

HARVARD JOURNAL *of* LAW & PUBLIC POLICY

VOLUME 32, NUMBER 3

SUMMER 2009

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PREFACE

President George W. Bush recently left office after eight often tumultuous years in the White House. His presidency was marked by tragedy and triumph, bipartisan unity and vicious discord. But what really happened during the Bush Administration? As the historians begin taking over from the newspapermen the long task of understanding the events of the last eight years, the *Harvard Journal of Law & Public Policy* is proud to present a Symposium that seeks to take a first turn at that project. We have assembled a collection of essays reflecting on President Bush's legacy, from perspectives both within and without the Administration.

One issue has, for better or for worse, come to define the Bush presidency: his Administration's response to the attacks of September 11. For the first time since World War II, a foreign enemy had successfully attacked American soil. Americans were harshly introduced to al Qaeda and the Taliban. The actions the President took in response—the invasion of Afghanistan, the USA PATRIOT Act, wiretapping, the invasion of Iraq, Guantanamo Bay, and so on—became incredibly divisive issues, even as they kept our soil free from attack for seven long years and liberated two countries from vicious rulers.

As the smoky haze of that terrible day faded, so did the political unity and patriotic fervor that had marked the days after the attacks. President Bush's national security and defense policies would spark strident political opposition and intense legal battles, with the Department of Justice often on the front lines. In this Issue, we are honored to have two Attorneys General share their reflections on their time at the Department. Attorney General John Ashcroft uses a compelling narrative to describe how the Department of Justice changed during the early years of the Bush Administration. Attorney General Michael Mukasey describes the rule-of-law legacy of the Bush Administration, with a special emphasis on national security. In addition, Professors Robert Delahunty and John Yoo defend the Bush Doctrine's justification of preventive war, placing it within its proper historical context of American diplomatic and military practice, and suggesting criteria under which it is an appropriate course of action.

On the home front, the most contentious debates were over social issues. Decisions made throughout the Bush Administration—from the creation of the Faith-Based Initiative to the President's refusal to fund new embryonic stem cell lines—spawned rancor and partisan bickering. Meanwhile, a national drama played out as most states witnessed political battles between

those who sought to protect traditional marriage and those who sought to redefine the institution. The President's opponents on the Left complained that he sought to institute a modern-day theocracy in order to impose his faith on the nation. His supporters countered that he was actually taking a middle road, acknowledging the importance of religion in our society. We are proud to present four authors who discuss the role of social issues in the Bush presidency. Professor O. Carter Snead examines bioethics, including stem cells and abortion, William Duncan tracks the marriage debate, Stanley Carlson-Thies writes about the Faith-Based and Community Initiative, and Professor Thomas Farr and William Saunders discuss international religious freedom.

It is hard to remember today, but President Bush entered office after a campaign focusing mainly on education and other domestic issues. His early days in office were filled with debate about grand domestic initiatives, perhaps most notably No Child Left Behind. These debates continued even beyond September 11—NCLB was not signed until 2002. Although national security and social issues have come to define the Bush presidency, it is possible that the policy pronouncements that will have the most lasting effect on American society—for good or bad—will be his domestic policy initiatives. The President successfully enacted several pieces of landmark legislation; other times, his Administration acted more incrementally, or found itself reacting to outside events, such as the Supreme Court's 2003 affirmative action cases. We are proud to present Roger Clegg, who discusses racial preferences, William Kilberg, Jason Schwartz, and Joshua Chadwick, who write about changes in labor and employment law, and Martha Derthick and Joshua Dunn, who critique Bush's approach to education policy.

We are also honored to publish an address by Senator Orrin Hatch, presented this spring to the Harvard Federalist Society and *Harvard Journal of Law & Public Policy*. Senator Hatch uses his personal experience on the Senate Judiciary Committee and a study of congressional history to illustrate how far the judicial confirmation process has deviated from historical norms. The last Congress was more hostile to the President's judicial nominees than any other in recent history, whereas President Obama's early nominations have hurtled forward in the Judiciary Committee with striking rapidity. Building on this background, Senator Hatch proposes a new strategy for judicial confirmations, one founded on constitutional values.

Professor Cass Sunstein has argued that judicial minimalism—the belief that the Supreme Court should decide cases as narrowly as possible—was the central disagreement of the Rehnquist Court. Based on Professor Sunstein’s review of prominent cases, this theory now receives its first empirical test. Professor Robert Anderson IV analyzes Professor Sunstein’s hypothesis by statistically analyzing all of the opinions of the final Rehnquist Court. Professor Anderson adds substantial texture and nuance to Professor Sunstein’s often anecdotal and superficial theory. The analysis largely confirms Professor Sunstein’s conjecture: Justices Scalia and Thomas are far less minimalist than the other Justices. But it adds much more, most notably a recognition that Chief Justice Rehnquist was perhaps the most minimalist member of the Court. By including in his study the Rehnquist Court’s entire corpus of work, rather than focusing on the most famous cases, Professor Anderson brings a measure of quantitative objectivity to a politically charged subject.

The edges of the First Amendment’s Press Clause have long been unclear. Even with its endless free speech cases, the Supreme Court has never enunciated a clear doctrine applicable specifically to the press. Professors Anthony Fargo and Laurence Alexander study the possible contours of such a doctrine with respect to the press’s tort liability for newsgathering activities, including surreptitious investigative reporting. After reviewing the jurisprudence relating to this potential liability, Professors Fargo and Alexander propose a possible solution to the problem, borrowing from the standing doctrine concept of “testers.” This new theory provides a way to balance the public’s interest in learning about newsworthy events with individuals’ interests in avoiding harm from tortious behavior.

The felony murder rule has long been the scourge of criminal law professors. *In Defense of the Felony Murder Rule*, published in Volume 8 of the *Journal*, challenged the conventional wisdom by presenting the arguments in favor of the rule. Professor David Crump now follows up on his 1985 article, responding to more recent critics of felony murder. The problem, Professor Crump argues, is that most academic criticism is targeted at ill-designed felony murder statutes. If one studies a bad statute, of course he will find flaws. But there are also properly constructed statutes that withstand most of the standard complaints. Professor Crump provides a clear explanation of what makes some felony murder statutes good and others bad.

As Volume 32 winds down, I would like to take one last opportunity to acknowledge and thank our entire *Journal* staff for the tireless dedication they have given this year. It is only through the labors of many individuals that we are able to continue to provide our subscribers with essays and articles of the highest quality. Operations Manager Ben Geslison was a one-man business team. He made sure that the bills were paid on time, that we had the supplies we needed, and that everything was taken care of so that the rest of the staff could focus on editing and reviewing articles. In an age of increasing technological dependence, Technology Manager Greg Dickinson ensured that the office computers and printers were working soon after the rest of us broke them. He also instituted several innovations, including a revamp of the *Journal* website. Managing Editors April Farris and Peter Schmidt devoted countless hours to reviewing every line of text and footnote in each issue, helping to ensure that the *Journal* maintains its high standards of excellence. Notes Editors Maximillian Amster and Will Adams reinvigorated our student writing program, providing invaluable support and guidance for our student authors. Deputy Managing Editors LeElle Krompass and Daniel Thies, with admirable cheer, made sure that everything got done. Whatever task needed doing, they happily took charge. They will be worthy leaders of the *Journal* for the year ahead. Articles Editors Jennie Bradley and Christopher Catizone provided the impressive slate of content that has made this year a success. From surveying incoming articles to assembling our Symposium contributions, they and their articles team ensured that Volume 32 is filled with the best material possible. Finally, Deputy Editor-in-Chief Lucas Walker was the perfect right-hand man; his tireless efforts and exacting focus made all of us better. One could not ask for truer friends and partners in advancing the *Journal's* founding mission: to provide the nation's leading forum for conservative and libertarian legal scholarship.

Christopher M. Thomas
Editor-in-Chief

REFLECTIONS ON EVENTS AND CHANGES AT THE DEPARTMENT OF JUSTICE

JOHN ASHCROFT*

Few have had the profound privilege to serve their country as I have during my career of public service. It has been an even higher honor to serve in a time of national crisis. Such was my tenure as the eightieth Attorney General of the United States.

The privilege of serving as Missouri's State Auditor, Attorney General, Governor, and Senator had been mine. I expected the end of my Senate career to mark the end of my career in public service. But when President George W. Bush asked me to continue my service to the nation as the United States Attorney General, I welcomed the opportunity to lead the only agency in government with a value as its title. "Justice" to me is a peerless value—a dedication to securing the rights and freedoms of America and each of its citizens.

Little did I know that during my time as Attorney General, we would experience the most devastating terrorist attack ever on American soil, and our country would be plunged into a war unlike any before. The war on terrorism became the overriding focus of the Department of Justice and my mission as Attorney General became clear: to transform a peacetime Justice Department ill-prepared for the challenges of 9/11, into a wartime Justice Department focused on the defense of life and liberty by ushering in a new culture of prevention. And despite these unprecedented challenges, I remained committed to protecting our constitutional liberties.

After being nominated by the President to serve as Attorney General, I did not have the luxury of being able to focus fully on preparing for the job. It became clear that the President's

* Attorney General of the United States, 2001–2005. Chairman of the Ashcroft Group, LLC and Distinguished Professor of Law and Government, Regent University School of Law. Co-written with David Israelite, President and Chief Executive Officer, National Music Publishers' Association; Deputy Chief of Staff and Counselor to Attorney General Ashcroft, 2001–2005.

recently-defeated political opponents, along with their liberal allies such as the American Civil Liberties Union, the People for the American Way, and the National Organization for Women, were preparing to oppose my confirmation with all their might.

A brutal confirmation process followed, with an all-out assault only previously seen during the confirmation battles of Judge Robert Bork and then-Judge Clarence Thomas. In many ways my confirmation became a proxy fight over the political divisions of the day. Ultimately, the Senate approved my nomination on February 1, 2001, on a 58-42 vote. With the confirmation battle over, I was eager to focus on the job at hand. I knew there was much work to be done at the Justice Department, and particularly at the Federal Bureau of Investigation.

In studying the tenure of my predecessor, Janet Reno, it became clear an Attorney General could easily be distracted from a planned agenda by the crises at hand. Attorney General Reno's term was best known for things on which I am sure she did not plan to focus. The shooting at Ruby Ridge, the disaster involving the Branch Davidian Compound at Waco, the deportation of Elian Gonzales, investigations of Clinton scandals—these were the issues with which the public identified the Justice Department.

We began our Administration with a clear goal to focus the Justice Department back on its mission:

[T]o enforce the law and defend the interests of the United States according to the law; to ensure public safety against threats foreign and domestic; to provide federal leadership in preventing and controlling crime; to seek just punishment for those guilty of unlawful behavior; to administer and enforce the Nation's immigration laws fairly and effectively; and to ensure fair and impartial administration of justice for all Americans.¹

The Department of Justice is a massive bureaucracy with roughly 110,000 employees spread out over thirty-nine separate component organizations. We entered the Department focused on a series of strategic goals including protecting America against the threat of terrorism, enforcing federal criminal laws, preventing and reducing crime—violent and gun crime

1. U.S. DEP'T OF JUSTICE, STRATEGIC PLAN: FISCAL YEARS 2001–2006, at ii (2006).

in particular—and protecting the liberties and interests of the American people.²

We learned first-hand on Day One how events can overtake the best-laid plans. After walking the entire building to meet and shake hands with as many employees as possible, I attended a small reception welcoming me to the Department. During the reception, then-FBI Director Louis Freeh pulled me aside and asked for a private word. It was then I learned of the spy Robert Hanssen. The next seventeen days were focused on building an airtight case against Hanssen until his arrest on February 18, 2001.

The distraction of the Hanssen matter was quickly followed by a series of brushfires threatening to burn broadly: a stand-off at the Indianapolis Baptist Temple which contained the seeds of the previous Justice Department's encounter with David Koresh and the Branch Davidian Compound in Waco, a national debate about my voluntary personal devotional sessions held prior to the workday in the Attorney General's office, and a botched prosecution of Oklahoma City bomber Timothy McVeigh. All of these matters would soon seem inconsequential when America was attacked and our nation was at war.

I. THE ATTACK OF SEPTEMBER 11, 2001

In the history of our nation, few days are as defining as September 11, 2001. On that day, a small number of my staff and I were flying on a small Citation jet to Milwaukee, Wisconsin to read with a group of schoolchildren as part of the President's initiative to focus on literacy. Many remember that the President himself was reading to schoolchildren in Sarasota, Florida when he learned about the attacks.

While flying over Michigan, we received an urgent message from the Justice Department Command Center with the news that two commercial airliners had struck the World Trade Center towers. I turned to my staff and said, "The world has changed forever. The country will never be the same." Because our plane did not have enough fuel to return to Washington, we landed in Milwaukee to refuel as quickly as possible. While on the ground we learned about the third plane that had hit the

2. *Id.* at i.

Pentagon and a fourth that was off course in Pennsylvania, potentially headed toward the Capitol. After refueling, I ordered our pilot to return to Washington despite a directive for all planes to remain grounded. Refusing advice from air traffic control to land in Detroit and then again in Richmond, Virginia, we finally had to wait just outside Washington, D.C. until an Air Force fighter jet could escort us in safely, because there was a shoot-down order for any planes entering Washington, D.C. airspace. We could see black smoke pouring toward the sky from the Pentagon while approaching the nation's capital and while landing. We would soon learn that our close friend Barbara Olson was on the plane that had crashed into the Pentagon. Barbara's husband, Ted Olson, was the Solicitor General of the United States and a key member of the Justice Department leadership.

After landing, we first joined the mass exodus of humanity leaving Washington. I had been directed to operate from a remote, undisclosed location. But traffic was so congested that I appealed that directive and headed to the Strategic Information Operations Center (SIOC) at the FBI, where I would spend most of my waking hours over the next several weeks. It was there that we launched the largest criminal investigation in the history of the world. And it was there that we quickly came to realize the need for a comprehensive overhaul of how the United States deals with the threat of terrorism.

The next day, the President assembled top officials to assess the damage and plan our response. It was there that the President turned to me and said, "Don't ever let this happen again." That statement became the guidepost for the remainder of my time as Attorney General: "Never again."

Soon after the meeting with the President I gathered the leadership of the Justice Department. Our mission was clear: Investigate the attack and those who carried it out, do everything within our power to prevent another attack (we lived under the daily expectation that a second wave was imminent), and evaluate the law and develop new, modern tools necessary for law enforcement to counter the twenty-first-century threat of terrorism. My framing instruction to the Department was that in all of our efforts we be prepared to think outside of the box, but never outside of the Constitution.

II. USHERING IN A CULTURE OF PREVENTION

Our immediate focus was the need to change the culture of the Department of Justice from a model prioritizing prosecution of terrorism to a model prioritizing the prevention of terrorism. During the National Security Council meeting the Wednesday after 9/11, we had already established we were likely dealing with an attack from al Qaeda. It is hard to imagine now, but at the time most Americans were unfamiliar with the terrorist group. In the discussions about our immediate response, questions were raised about possible complications to any future prosecutions. It was then I articulated our new priority:

We simply can't let this happen again. Prosecution cannot be our priority. If we lose the ability to prosecute, that's fine; but we have to prevent the next attack. Prevention has to be our top priority. . . . The chief mission of U.S. law enforcement is to stop another attack and apprehend any accomplices and terrorists before they hit us again. If we can't bring them to trial, so be it.³

Although this may seem like an obvious strategy, it was a radical departure from the mission of the Justice Department since its inception. Everything the Justice Department did was designed to bring prosecutable cases forward and to achieve convictions in a courtroom. Thus the law, tactics, and mindsets of the hardworking men and women of the Justice Department—the culture—was built around a model of prosecution.

The first step in moving from a peacetime Department of Justice to a wartime Department of Justice focused on prevention was to reorganize based on new priorities. Counterterrorism funding was tripled. Over 1000 new and redirected FBI agents were assigned to counterterrorism and counterintelligence. Hundreds of new Assistant United States Attorneys were hired. Joint Terrorism Task Forces, composed of federal, state, and local law enforcement officials focusing on the terrorist threat, were tripled in number and scope.⁴

Resources alone were not enough to combat this new threat. What was required was a change in the approach to terrorism. In

3. JOHN ASHCROFT, *NEVER AGAIN: SECURING AMERICA AND RESTORING JUSTICE* 133 (2006).

4. U.S. DEP'T OF JUSTICE, *PRESERVING LIFE AND LIBERTY: THE RECORD OF THE DEPARTMENT OF JUSTICE 2001–2005*, at 15–18 (2005).

a traditional criminal prosecution, a crime has been committed and the prosecutor's job is to prove the facts necessary to convict a person for committing that crime—or, alternatively, to catch that person in the act and both prevent the crime and gather enough evidence to prove the crime was about to be committed.

In myriad ways, however, the traditional approach to fighting crime is not relevant to preventing terrorism. What if the terrorist is not deterred by the threat of prosecution, because the terrorist is willing to sacrifice his life while committing the crime? Or what if the crime results in the deaths of hundreds or even thousands of innocent Americans? Waiting to prosecute a few terrorists after the fact is not a reliable or appropriate strategy.

On November 8, 2001, we announced our wartime reorganization strategy to enable the Justice Department to wage the war on terrorism. In announcing publicly that we had shifted our goal away from traditional prosecution to an orientation focused on prevention I stated:

When terrorism threatens our future, we cannot afford to live in the past. We must focus on our core mission and responsibilities, understanding that the department will not be all things to all people. We cannot do everything we once did, because lives now depend on us doing a few things very well. . . . The attacks of September 11 have redefined the mission of the Department of Justice. . . . Defending our nation and defending the citizens of America against terrorist attacks is now our first and overriding priority.⁵

In those first days after the attacks, one of the first things to crystallize as an immediate strategic necessity was the Department's push to remove potential threats at the earliest possible moment. That meant taking the "Spit on the Sidewalk" approach employed by Attorney General Robert F. Kennedy against organized crime in the 1960s and applying it to terrorism investigations. New York Mayor Rudy Giuliani had very effectively used a similar strategy. Giuliani's strategy toward crime prevention involved cracking down on relatively minor offenses with the goal of preventing more serious crimes. During Mayor Giuliani's tenure, crime dropped to record lows in New York City.

5. ASHCROFT, *supra* note 3, at 135–36.

For too long the Department's approach to terrorism investigations had been to let a situation develop until the latest possible moment so that terrorism charges could be brought. After 9/11, we realized our enemy was highly sophisticated, cunning, and technologically advanced. The risks of waiting for terrorists to get further along in the planning of an attack were too great in the face of the potential devastation to life and liberty. Wherever possible, we moved quickly to bring charges for immigration violations, credit card fraud, identification and document fraud, human smuggling, or any number of provable crimes that would remove the threat from our communities before suspected terrorists could bring more sinister plots to fruition.

For instance, the arrest of Jordanian national Rasmi Subhi Saleh Al Shannaq, a roommate of the 9/11 hijackers Nawaf Al Hazmi and Hani Hanjour, involved the discovery and dismantling of a large visa fraud scheme. Another example is Operation Tarmac, the Justice Department's security sweeps of more than fifty major airports across the United States. More than 1200 arrests were made for identification and document fraud and other crimes. At Dulles International and Reagan National Airports, federal law enforcement agents arrested ninety-four workers on charges of fraudulently obtaining airport security badges, falsifying Social Security applications, and immigration violations. The badges these individuals fraudulently obtained allowed them to enter secure areas where planes were loaded.

III. REORGANIZING THE FBI TO PREVENT ATTACKS

The most urgent priority in reorganizing the Justice Department to meet the wartime threat was the transformation of the FBI. The FBI was and still is the world's leading forensic investigative organization. No crime fighting organization could reconstruct the evidence of a crime to build a case and get a conviction in court better than the FBI. But that was no longer enough.

The FBI had to overhaul its counterterrorism activities to disrupt and prevent terrorist attacks. Under the leadership of Director Robert Mueller, the Bureau transformed its operations, expanded intelligence capacities, modernized its business practices and technology, and greatly improved its coordination with its partners at every level of government. It became crystal clear that the 700,000 state and local law enforcement officers with "feet on the street" were an essential asset to national se-

curity. With their help, the FBI cultivated detailed information on terrorism in America.

The FBI established a number of operational units that continue to provide new or improved capabilities to address the terrorist threat, including the 24/7 Counterterrorism Watch and the National Joint Terrorism Task Force to manage and share threat information. We established the Terrorism Financing Operation Section to centralize efforts to stop terrorist financing. "Fly Teams" were created to lend counterterrorism expertise wherever it was needed in real time. The FBI's Terrorist Screening Center and the Foreign Terrorist Tracking Task Force helped identify terrorists and keep them out of the United States.

Prior to September 11, 2001, the FBI produced few raw intelligence reports and lacked the capacity to provide a comprehensive daily terrorism threat briefing. In the three years following 9/11, the reformed counterterrorism and intelligence operations produced more than 3000 intelligence products including "raw" reports, intelligence memoranda, in-depth strategic analysis assessments, special-event threat assessments, and focused Presidential briefings. The FBI in coordination with other members of the U.S. intelligence community began producing daily briefings including the Director's Daily Report and the President's Terrorist Threat Report.

For too long, our law enforcement and intelligence bureaucracies resisted sharing information. But our post-9/11 defense required all of our government agencies to work together in a new way. Hoarding intelligence and evidence that could lead to the disruption of a threat if only the right eyes could see it was no longer an option. Anti-Terrorism Task Forces (ATTFs) were established in each of the ninety-four U.S. Attorneys' districts across America. Led by the U.S. Attorney, the ATTFs combined all of the federal, state, and local law enforcement assets in each district. By having the U.S. Attorney, Immigration and Customs Enforcement, the FBI, the Drug Enforcement Administration, the Bureau of Alcohol, Tobacco and Firearms, and state and local police all sitting at the same table sharing information gathered in various criminal investigations, they could quickly connect the dots, revealing plots that, if left undetected, could have devastating results.

The actions of the ATTFs led to the disruption of a Portland, Oregon terrorist cell. Six terrorist members of the Portland cell

plotted to travel to Afghanistan to wage Jihad against United States forces. Instead, they traveled to federal prison.

In northern Virginia, eleven individuals were charged with various crimes including conspiracy to levy war against the United States and conspiracy to contribute services to the Taliban. One was sentenced to life in prison, another to 85 years, and another to 97 months. Six pleaded guilty and accepted prison terms ranging from 46 to 240 months.

In Charlotte, North Carolina, the work of an ATTF produced the convictions of twenty individuals involved in a massive interstate cigarette smuggling operation with the purpose of funding Hizballah. The leader of that ring was sentenced to 155 years in prison.

IV. DISMANTLING THE TERRORIST FINANCIAL NETWORK

A critical tool in protecting the lives and liberties of American citizens and innocent people around the world is tracking terrorism funding and choking off the supply lines of the blood money that makes terrorism possible. The Justice Department aggressively pursued not only those who would carry out terrorist attacks, but also those who provide financing, equipment, personnel, or other support to terrorists and terrorist organizations.

At the request of the Justice Department, the State Department designated forty entities as terrorist organizations, enabling the freezing of their assets and funds. During my tenure, the Justice Department collaborated with the Treasury Department to freeze more than \$136 million in financial assets of organizations that support terrorism. In Chicago, Cleveland, Syracuse, Brooklyn, and other localities across the United States, the Justice Department took action against individuals and organizations involved in funding or supporting terrorism. For instance, we discovered that the Benevolence International Foundation, a charitable organization, was in reality a conduit for funding Islamic fighters in Chechnya, Bosnia, Sudan, and other places. The Department indicted Enaam Arnaout, the foundation's executive director, for conspiring to obtain charitable donations fraudulently to provide financial assistance to organizations engaged in violence. Arnaout pleaded guilty to a racketeering charge and is currently serving a ten-year prison sentence.

V. REFORMING IMMIGRATION ENFORCEMENT

Before the transfer of immigration enforcement to the Department of Homeland Security in March 2003, the Justice Department established and implemented several initiatives to strengthen immigration enforcement to protect better the American people from terrorists who may try to exploit our open borders and freedom of travel. The Department deployed the National Security Entry-Exit Registration System (NSEERS), which required visitors with a visa to register at the port of entry and again upon exit, with periodic status updates depending on the length of stay. Prior to NSEERS, once a person arrived here legally, there was no system in place to keep track of where he was going and if he departed on time. NSEERS provided the technological ability to scour our terrorist databases in real time and alert enforcement personnel to known terrorists or those affiliated with terrorists trying to gain entry into the United States. NSEERS quickly led to the apprehension of eleven suspected terrorists, including one known member of al Qaeda. NSEERS also stopped the entry of more than 700 aliens who had committed serious felonies or other violations that made them inadmissible to America. NSEERS identified over 100 felons in the United States, including individuals convicted of narcotics trafficking, child abduction, sexual abuse, assault with a deadly weapon, and murder.

There was an additional benefit from NSEERS as well. There is strong evidence that our enforcement efforts caused thousands of individuals who were in the United States illegally to "self-deport." Because it became clear we were actually enforcing the immigration laws, many chose to return to their home countries voluntarily before they could be deported.⁶

6. Kris W. Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. COMP. & INT'L L. 155, 159-60 (2008) ("The effectiveness of attrition through enforcement was first demonstrated in 2002 and 2003, with the implementation of the NSEERS by the U.S. Department of Justice. In the wake of the September 11th attacks on the World Trade Center, the Department of Justice launched NSEERS to screen and register aliens from Al-Qaeda-associated countries and aliens from anywhere in the world whose backgrounds or travel patterns suggested a higher risk of potential involvement in terrorism. . . . [T]he central fact was undeniable; the credible threat of enforcement had resulted in mass self-deportation. It was stunning proof that attrition through enforcement works. When the risks of being detained and/or prosecuted go up dramatically, illegal aliens make the rational decision to leave the United States on their own.").

The Department also implemented the Student and Exchange Visitor Information System (SEVIS) to keep track of student aliens in the United States and to make sure they were complying with the terms of their visas.

VI. OBTAINING THE MODERN TOOLS NEEDED BY LAW ENFORCEMENT

In addition to reorganizing the Department of Justice from within, it was clear law enforcement needed new tools to detect and prevent terrorism. Our enemy had cutting-edge technology, while law enforcement struggled to use decades-old legal tools that had not been updated to match the rapid advances in technology. The law often lags behind technology and changed circumstances, and legislation often does not pass until the enormity of a problem cries out for action. Such was the case with the laws relating to organized crime, drug trafficking, and terrorism. There is often an attitude about the law: If it's not broke, don't fix it. And by the time you know it is broke, it is long overdue.

Within hours of the attacks and the realization that we were at war, the Justice Department began analyzing what legal tools investigators and prosecutors needed to prevent terrorists from striking again. The September 11 attacks occurred on a Tuesday. By that Saturday, September 15, the Justice Department had a legislative proposal. We were able to move so quickly for three reasons. First, many of the provisions of the PATRIOT Act had been considered by Congress in 1996 and unwisely rejected. Second, many of the tools we were seeking were not new ideas. They were tools allowed in the fight against organized crime and drug trafficking, but not terrorism. And finally, while the normal legislative process can move sluggishly—sometimes for good reasons—here the country could ill afford the luxury of a slow process. We were focused on the imminent threat of another attack.

Congress introduced the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) after more than a month of careful and deliberate consideration. Despite what one might think after a great deal of revisionist history, the PATRIOT Act garnered overwhelming bipartisan support, passing easily in the House of Representatives (357-66) and passing nearly unanimously in the Senate (98-1). The President

signed the PATRIOT Act into law October 26, 2001—an amazing accomplishment given the attacks had happened just six short weeks earlier. The PATRIOT Act contained more than one thousand antiterrorism measures that have helped law enforcement investigate, prosecute, and most importantly, prevent acts of terror.

In the years leading up to 9/11, America's justice resources shaped a system that was designed to separate our law enforcement functions from those that involved gathering intelligence for national security purposes. That system became known as "the wall." The reasons for creating this wall were well intentioned. Law enforcement powers should be limited, and evidence gathered in intelligence operations potentially could taint evidence gathered for the purposes of criminal prosecution since the constitutional safeguards involved in criminal prosecutions are not always present during national security-related intelligence gathering. This well intentioned effort, however, far exceeded any constitutional requirement. And, when the United States Foreign Intelligence Surveillance Court of Review considered the wall and its limitations on electronic surveillance of an agent of a foreign power, it concluded that this wall was not constitutionally mandated and that the wall was dangerous to national security.⁷

7. *In re Sealed Case*, 310 F.3d 717, 743 (FISA Ct. Rev. 2002) ("The false premise was the assertion that once the government moves to criminal prosecution, its 'foreign policy concerns' recede. . . . [T]hat is simply not true as it relates to counterintelligence. In that field the government's primary purpose is to halt the espionage or terrorism efforts, and criminal prosecutions can be, and usually are, interrelated with other techniques used to frustrate a foreign power's efforts. Indeed, the Fourth Circuit itself, rejecting defendant's arguments that it should adopt a 'solely foreign intelligence purpose test,' acknowledged that 'almost all foreign intelligence investigations are in part criminal investigations.' . . . The method the court endorsed for determining when an investigation became primarily criminal was based on the organizational structure of the Justice Department. The court determined an investigation became primarily criminal when the Criminal Division played a lead role. . . . Putting aside the impropriety of an Article III court imposing such organizational strictures . . . the line the *Truong* court adopted—subsequently referred to as a "wall"—was unstable because it generates dangerous confusion and creates perverse organizational incentives. That is so because counterintelligence brings to bear both classic criminal investigation techniques as well as less focused intelligence gathering. Indeed, effective counterintelligence, we have learned, requires the wholehearted cooperation of all the government's personnel who can be brought to the task. A standard which punishes such cooperation could well be thought dangerous to national security." (quoting *United States v. Truong Dinh Hung*, 629 F.2d 908, 915 (4th Cir. 1980)) (footnote omitted) (citations omitted)).

In 1995, the Justice Department had both reinforced and enhanced this wall between prosecutors and intelligence officials. Not only could different agencies, such as the CIA and FBI, not communicate freely, but the intelligence division of the FBI was even prohibited from certain kinds of information sharing with the criminal division.

The concern about this wall had our attention well before 9/11. In May 2001, soon after arriving at the Justice Department, Deputy Attorney General Larry Thompson issued a directive to the FBI not to underestimate the potentially harmful effects of the wall. The most important tool provided by the PATRIOT Act was the tearing down of the wall between intelligence officials and law enforcement so they could finally share information and connect the dots.

The information sharing authorized by the PATRIOT Act rebalanced the scales, putting the good guys on an equal footing with the bad guys who had been able to evade law enforcement for too long. It now seems unthinkable that there ever was such a prohibition that endangered the lives and liberties of our citizens. But the prohibition existed across administrations through the last quarter of the twentieth century. It frustrated the people to whom we entrust our safety and our freedom. This is what U.S. Attorney Patrick Fitzgerald had to say about the wall:

I was on a prosecution team in New York that began a criminal investigation of Usama Bin Laden in early 1996. The team . . . had access to a number of sources. We could talk to citizens. We could talk to local police officers. We could talk to other U.S. Government agencies. We could talk to foreign police officers. Even foreign intelligence personnel. And foreign citizens. And we did all those things as often as we could. We could even talk to al Qaeda members—and we did. . . . But there was one group of people we were not permitted to talk to. Who? The FBI agents across the street from us . . . assigned to a parallel intelligence investigation of Usama Bin Laden and al Qaeda. We could not learn what information they had gathered. That was “the wall.”⁸

8. *Protecting Our National Security From Terrorist Attacks: A Review of Criminal Terrorism Investigations and Prosecutions Before the S. Comm. on the Judiciary*, 108th Cong. 124–25 (2003) (statement of Patrick J. Fitzgerald, U.S. Attorney for the Northern District of Illinois).

The USA PATRIOT Act brought down this “wall” separating intelligence officers from law enforcement agents.

The PATRIOT Act was vital to the success of the investigation into Hemant Lakhani in Newark, New Jersey. Lakhani was attempting to sell shoulder-fired missiles to terrorists for use against American targets. The indictment against Lakhani alleged that he brokered the initial purchase of one shoulder-fired missile and was arranging for the purchase of fifty more. Lakhani was caught in recorded conversations saying he supported the use of the missiles for shooting down American commercial airlines and that bin Laden “straightened them all out,” and “did a good thing.”⁹ The investigation would not have been possible had American intelligence and foreign intelligence officials not been able to share intelligence and coordinate with law enforcement.

The PATRIOT Act also stiffened the penalties for terrorism, giving prosecutors enhanced tools to take terrorists off the streets for a long time. The Act enhanced the penalties for crimes likely to be committed by terrorists, such as arson, destruction of energy facilities, material support to terrorists, and the destruction of national defense materials. The PATRIOT Act also helped stem the flow of money to terrorists, improved laws protecting against cyber-terrorism, and filled gaps in criminal law by creating a new crime of attacking a mass transportation system. Prosecutors used the new material-support provisions to prosecute more than 110 individuals and cut off terrorism funding.

The PATRIOT Act also removed a number of significant obstacles that had prevented law enforcement from effectively investigating terrorism and the criminal activity that often accompanies and supports terrorist operations. For instance, terrorism investigations often span several federal districts. With time being of the essence and with law enforcement frequently having only a brief window of opportunity to prevent a terrorist attack, it was no longer feasible to waste time petitioning several judges in multiple districts for search warrants related to the same investigation. To address this problem, the Act al-

9. Attachment A to Complaint at 1, *United States v. Lakhani*, Mag. No. 03-7106 (D.N.J. Aug. 11, 2003), available at <http://f11.findlaw.com/news.findlaw.com/hdocs/docs/terrorism/uslakhani81103cmp.pdf>.

lowed out-of-district warrants in certain terrorism cases. This tool was essential to the Department's success in stopping the northern Virginia Jihad operation.

The Act also allowed law enforcement to conduct investigations without tipping off terrorists. In some cases, if criminals learn of an investigation too early, they may flee, destroy evidence, intimidate or kill witnesses, stop contacting associates, or take other evasive actions. Federal courts, in narrow circumstances, have allowed law enforcement to delay for a limited time telling the subject of the investigation that a search has been executed. The delay gives law enforcement the ability to identify the criminal's associates, coordinate the arrest of multiple subjects without tipping them off beforehand, and eliminate threats to our communities. The PATRIOT Act extended to terrorism investigations that decades-old provision of criminal law which had been crucial in drug and organized crime cases and provided a uniform national standard for the use of delayed-notification search warrants.

Finally, the PATRIOT Act brought the law up to date with current technology so that our investigators would no longer have to fight a digital-age battle with rotary phone legal authorities. The Act allows federal agents to track terrorists using a multi-point wiretap, a tool that had been in use for decades in tracking drug traffickers and mobsters. Instead of requiring law enforcement officers to apply for a separate warrant for every phone, fax, and communication device used by a single terrorist, the warrant applies to all of the communications devices used by the subject, making it harder for terrorists to evade detection.

In addition to working with Congress to provide much-needed legal tools to law enforcement, I ordered a review of our investigative guidelines concerning national security and criminal investigations. In May 2002, I issued revised guidelines concerning FBI criminal investigations, undercover operations, the use of confidential informants, and the consensual monitoring of communications. These guidelines explicitly established the protection of the American people as the central mission and number-one priority of the FBI. The guidelines emphasized early intervention and aggressive investigation to prevent terrorist acts and eliminated unnecessary red tape that could prevent FBI field offices from effectively detecting, investigating, and preventing terrorist activities. It came as a shock

to many that under the old guidelines the FBI was not even allowed the same freedom as ordinary schoolchildren to surf the Internet without a predicate investigation. The revised guidelines changed that.

In October 2003, I issued revised guidelines for FBI investigations of international terrorism, espionage, and other national security threats. These classified guidelines included provisions for sharing information related to national security with other federal agencies and with knowledgeable and necessary state, local, and foreign authorities.

The 9/11 attacks were trained for and planned in Afghanistan and Pakistan, researched in Germany, and staged and carried out in New York, Virginia, Massachusetts, and Pennsylvania. They were financed from sources around the world. It was thus imperative that we share information as consistently and fully as possible among all agencies around the globe to counter the global dimensions of terrorist activities.

These are just some of the many legal tools that we sought and obtained from Congress as we attempted to increase our capacity to counter the threat of terrorism.

VII. SUCCESSES IN THE WAR ON TERROR

Since 2001, the Justice Department has been successful at identifying, prosecuting, and incarcerating terrorists as well as those who provide them with financial assistance and other support. America is safer today than it was before 9/11 because our law enforcement system has been refocused to put terrorist prevention first.

Because our strategy was not to wait until terrorists killed Americans to bring criminal charges but rather to make arrests early to get them off our streets or to use immigration tools to deport them, it is difficult to say how many plots we disrupted—and how many American lives we saved. We know, however, that British national Richard Reid is currently serving a life sentence in prison after pleading guilty to attempting to ignite a shoe bomb while on a flight from Paris to Miami. We know 184 passengers and 14 crewmembers lived because Reid did not succeed in blowing up the plane. Americans and other citizens of good will endorsed and implemented the prevention strategy in that case, saving hundreds of lives. Reid's prosecution makes us all safer.

We know that six men from the Lackawanna, New York area pleaded guilty to charges of providing material support to al Qaeda, based on their attendance at an al Qaeda terrorist training camp overseas. We may never be able to say with certainty what they were planning to do when they returned to New York. Instead of living in one of our communities, however, they currently are serving terms ranging from seven to ten years in prison.

Iyman Faris currently is serving twenty years in prison for terrorism violations stemming from his efforts to "case" a New York City bridge for al Qaeda and to provide information to al Qaeda on the tools necessary for possible attacks on U.S. targets.

Ahmed Omar Abu Ali is serving thirty years in prison for terrorism violations in connection with his membership in an al Qaeda cell and his efforts to plot the assassination of the U.S. President as well as conspiring to attack and destroy civilian airliners.

And Zacarias Moussaoui is serving six consecutive life terms after pleading guilty to various terrorism violations, admitting that he conspired with al Qaeda to hijack planes and crash them into prominent U.S. buildings as part of the 9/11 attacks.

These prosecutions—and the many other individuals that we prosecuted on lesser charges or deported pursuant to their violation of immigration laws—made our country safer by taking players in the terrorist network out of the picture as soon as possible.

CONCLUSION

Some people assert that the war on terrorism involves a balance between national security and individual civil liberties. I reject that notion. In my view, there is no value as high as our liberty or freedom. Security does not merit our profound respect as an independent value. It is a most important means to achieve and enhance the values of liberty and freedom. It is the purpose of security to enrich freedom, not counterbalance it. Security is not pursued to constrain liberty; rather, it is employed to protect it.

I do not believe that fighting terrorism aggressively and protecting civil liberties are mutually exclusive goals. We must not underestimate the threat of our enemies, but must never go beyond the limits of the Constitution in countering it. Those were the instructions that I gave those with whom I worked at the

Justice Department, and I believe that our work was done in a good faith effort fully consistent with our American traditions and the Constitution.

To this day we have not had another attack on American soil. For America's safety, I thank God, as well as the men and women of law enforcement who worked hard to rebuild our justice system to focus on prevention. In some ways, I consider our success a validation of the strategy of prevention that we embraced sitting in the FBI's Strategic Information Operations Center while New York City and the Pentagon were still burning.

Political battles are nothing new to Washington, D.C., and will continue for some time over a few of the strategic aspects of the war on terror. I know, however, that we left the Justice Department better prepared to keep America safe, and I remain grateful for the honor to be a part of the important work of ensuring American life and liberty.

NATIONAL SECURITY AND THE RULE OF LAW

MICHAEL B. MUKASEY*

I have long had a deep respect for the Federalist Society and for its principles, and so I feel particularly privileged to be at this podium tonight. For over twenty-five years, the members of this Society have committed themselves to vigorous and open debate about the pressing legal issues of our day and how they ought to be resolved under the constant and durable provisions of our Constitution. The Federalist Society is committed to taking the Constitution seriously and understanding it to be a legal document, rather than an empty vessel to be filled by the policy preferences of those who happen to be wielding the pen at any given moment. On this evening, I want to applaud your contributions to the nation's legal culture and your efforts particularly over the past eight years to elevate the discourse surrounding the most important legal and policy issues facing our nation.

It is my privilege to be here tonight with such distinguished guests, including members of the Supreme Court and the rest of the judiciary. There are also dozens of lawyers here who have served their country during this Administration, some of whom have now returned to the private sector and some of whom I have had the pleasure of working with during my tenure at the Justice Department. There are likely others in attendance who will have the opportunity to serve in the new Administration, all of which is a testament to those who founded this Society and who have a great deal to be proud of. The principles of the Society you founded have inspired a generation of lawyers and are now inspiring the next generation.

As we near the end of this Administration and as we approach the first transition that our government has seen since the attacks of September 11, 2001, I would like to focus on the successes of this Administration that relate to matters that con-

* United States Attorney General, 2007–2009. This Essay was delivered as a speech to the Federalist Society National Lawyer's Convention in Washington, D.C., on November 20, 2008.

cern this Society, the legacy that will remain when this Administration leaves office, and on a matter relating to our national security that I think should continue to receive the attention of this Society.

Perhaps of most obvious interest to the members of the Federalist Society are the judges and Justices whom the President has appointed to the federal bench. As the President recently explained to the Cincinnati chapter of this Society, he has sought out “judges who would faithfully interpret the Constitution—not use the courts to invent laws or dictate social policy.”¹ With the help of many in this room, the President has succeeded in this effort and appointed many well-qualified and accomplished judges who have understood their role in interpreting—not writing—the laws.

Most notably, the President has appointed two members of the Supreme Court, Chief Justice John Roberts and Justice Samuel Alito. These men are no strangers to the people in this room—indeed, they both spoke to this Society last year. Both of these remarkably accomplished Justices will continue to serve the Nation for many years to come, and we are grateful not only for their service but also for their approach to the difficult questions of constitutional law and statutory interpretation that the Court faces each Term. The President is rightfully proud of his selection of both of these men, and the Federalist Society should be proud of the role it played in supporting their nominations.

The President also has nominated, and the Senate has confirmed, many other well-qualified judges throughout the federal courts. Unfortunately, still other good and well-qualified people were denied the same opportunity. We have seen the nominations of skilled, experienced, and well-respected candidates delayed or frustrated through procedural tactics. Quite frequently, it has been hard for these nominees to receive a vote in the Senate or even a hearing before the Judiciary Committee. For those who never received a vote or even a hearing, I offer my profound regret. You deserved better.

Tonight, however, we should take note of our successes. Indeed, this Administration’s judicial legacy includes sixty-one judges appointed to the courts of appeals and 261 judges ap-

1. Sheryl Gay Stolberg, *Bush, Though Not Campaigning, Delivers a Message to Voters: ‘Judges Matter,’* N.Y. TIMES, Oct. 7, 2008, at A20.

pointed to the district courts. The President and the members of his Administration leave office in January, but these good judges will remain in place, many for decades to come.

The Federalist Society should be proud of the role it played in supporting these judges, but it also should be proud of the basis on which it did so. As the members of this Society recognize, the core meaning of judicial independence is independence from the political pressures and fashions of the moment. Otherwise, judges become simply politicians who are independent only in the sense that they have life tenure and so are not subject to the discipline of the political process—namely, elections. Although judges are appointed through a political process, once they take the oath they are confined to exercising a power that is, under Article III, judicial only. Which is to say, one that should involve a faithful, not a fanciful, reading of the laws and the Constitution.

I want to turn to another subject which I have taken from Day One to be my most solemn responsibility as Attorney General. That is ensuring that we put into place the institutions we need to keep our country safe from the continuing threat posed by al Qaeda and other international terrorists.

On September 11, 2001, nineteen terrorists inflicted the most catastrophic attack on our homeland since Pearl Harbor. What made that attack so devastating was not simply the toll inflicted on our country, but the idea that nineteen lightly armed terrorists could murder nearly 3000 Americans. The reality of such asymmetric warfare required us to dramatically reconsider how we should confront the threat of international terrorism.

When the terrorists attacked the World Trade Center in 1993, and when al Qaeda attacked the U.S.S. *Cole* in Yemen and our embassies in Kenya and Tanzania, the United States deployed the FBI to the scenes of these crimes to collect evidence, pursue leads, and ultimately indict and prosecute at least some of those responsible.

Following the September 11 attacks, however, it no longer seemed prudent to treat international terrorism solely as a criminal matter, where suspects are pursued and prosecuted only after they have perpetrated a crime. Indeed, at the time of the September 11 attacks, Osama bin Laden was already under criminal indictment for his role in the embassy bombings. Apparently, he was undeterred. Instead, the United States recognized the attacks of September 11 to be what they were: an act

of war—a war that had been declared years earlier by enemies of the United States, and indeed of civilized people everywhere. In response, this Nation, under our President, committed to a comprehensive offensive strategy against the terrorists abroad, using every resource at our disposal—military, intelligence, financial, and law enforcement.

The U.S. military deployed to Afghanistan, where al Qaeda had found a safe haven within the confines of the brutal and inhumane regime of the Taliban. When our forces or those of our allies captured members of the enemy, we detained them so that they could not simply return to the battlefield and, where we thought it appropriate, transferred them for detention to the U.S. Naval Station at Guantánamo Bay.

At home, the Administration sought to reorganize and modernize our government to reflect the new priorities of the War on Terror. We brought domestic security agencies, which historically had been scattered throughout the Executive Branch, under the umbrella of the Department of Homeland Security, and we established a Director of National Intelligence to ensure that our intelligence agencies would work together in tracking terrorist threats and preventing new attacks.

Within the Department of Justice, the FBI made preventing terrorism its top priority and restructured its resources accordingly. Since September 11, the FBI has transformed itself into a world-class intelligence agency designed to detect and prevent attacks before they occur, rather than simply investigating them afterwards. The FBI has doubled the number of intelligence analysts and translators in its ranks and opened sixteen new offices overseas, including in Kabul and Baghdad. We created the FBI's new National Security Branch to bring together divisions responsible for counterterrorism and intelligence and counterespionage, and we made similar institutional reforms in establishing the National Security Division at the Department of Justice.

The Administration worked with Congress in reorganizing our government and with passing new laws to promote the collection and dissemination of critically important intelligence. Shortly after September 11, Congress passed the PATRIOT Act²

2. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

to ensure that analysts and investigators could access the information they needed to protect our Nation, work together to “connect the dots,” and pursue a strategy of prevention. And this year, Congress did the same for our intelligence professionals, passing bipartisan legislation that modernizes the Foreign Intelligence Surveillance Act³ to allow the intelligence community to quickly and effectively monitor terrorist communications while ensuring respect for our civil liberties.

Taken together, the Administration’s policies in the War on Terror represent nothing less than a fundamental reorganization of our government and will ensure that the next President has the tools he needs to continue to defend the country. The Administration’s strategy in defending the Nation from terrorist threats has not only been comprehensive, but has also been successful based on what matters most: Since September 11, 2001, al Qaeda has not managed to launch a single act of terrorism in the United States. This is a remarkable achievement that no one could have or would have predicted in the days following the September 11 attacks. The credit for that goes to many people, including many brave men and women in our armed forces, and many brave men and women in law enforcement and intelligence services, who put their lives at risk routinely in parts of the world that most Americans, to their great comfort, will never encounter. Much of the credit also goes to the President. In this area, as in many others, leadership and resolve matter.

As the end of this Administration draws near, you would expect to hear broad praise for this success at keeping our Nation safe. Instead, I’m afraid what we hear is a chorus with a rather more dissonant refrain. Instead of appreciation or even a fair appraisal of the Administration’s accomplishments, we have heard relentless criticism of the very policies that have helped keep us safe. We have seen this in the media, we have seen this in the Congress, and we have heard it from the legal academy as well.

In some measure, these criticisms rest on a very dangerous form of amnesia that views the success of our counterterrorism efforts as something that undermines the justification for continuing them. In an odd way, we have become victims of our own

3. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub. L. No. 110-261, 122 Stat. 2436.

success. In the eyes of these critics, if al Qaeda has not struck our homeland for seven years, then perhaps it never posed a threat after all, and we didn't need these counterterrorism policies.

Other critics question the premise—almost universally accepted following the September 11 attacks—that the United States is engaged in a war against al Qaeda and other groups. Even more common is the casual assumption among many in the media, political, and legal circles that the Administration's counterterrorism policies have come at the expense of the rule of law. I am quite familiar with these criticisms, having heard many of them myself during my tenure as Attorney General.

Now it is hardly surprising that the questions of how we confront the terrorism threat could generate vigorous debate. These questions are among the most complex and consequential that a democratic government can face. There is, understandably, passionate debate about where the legal lines are drawn in this new and very difficult conflict and, as a matter of policy, how close to those legal lines we should go.

As the members of the Federalist Society know, however, answering legal questions often involves a close reading and a critical analysis of a text—the Constitution, statutes, judicial decisions, and the like. Regrettably, this point is much too often lost in the public discourse on the subject. Newspapers, commentators, and even prominent lawyers often discuss critical questions about national security policies with barely any acknowledgement that the answers may depend on the language of, say, the Constitution or a statute. And critics of this Administration's policies rarely draw distinctions between whether a course of action is permitted as a matter of law and whether that course of action is prudent as a matter of policy.

For example, earlier this year, the head of a legal organization that prides itself on what it calls its "nonpartisan approach to the law" gave a speech condemning what he called "the oppressive, relentless, and lawless attack by our own government on the rule of law and our liberty."⁴ According to this person, we live now in a "time of repression," where the word "'Patriot' names a statute that stifles liberty," and where we face

4. Michael Traynor, President, Am. Law Inst., Address at the American Law Institute Annual Dinner: Remarks on Liberty, Equality, and the Rule of Law 8–9 (May 20, 2008), available at <http://www.ali.org/doc/Traynorspeech-5-20-08annotated.pdf>.

“assaults by our government on constitutional rights, the Separation of Power[s] and the Geneva Conventions.”⁵ We can practically hear the rumble of tanks in the background.

It is interesting and telling that even in the published written version of these remarks—by a lawyer—the references and footnotes largely ignore statutory text, the Constitution, treaties, or laws. Instead, the author relied on such authorities as the *New York Times*, *Washington Post*, and *New York Review of Books*. This style of criticism can be called many things—provocative, perhaps, or evidence that the author could be regarded by some as well-read—but what it cannot be called is a reasoned legal critique.

Also completely absent from these remarks, and from many remarks like it, is any fair appraisal of the legal issues actually involved or an acknowledgement of the difficulty or novelty of the legal questions confronted by the Administration lawyers who made these decisions. Nor was there any discussion of the atmosphere in which these decisions were made. I was in New York City when the two planes hit the Twin Towers, and I know what it was like to be in the city at that time. But I cannot speak from any experience of my own of what it was like to be a lawyer in the Justice Department at that time. There must have been almost unimaginable pressure, without the academic luxury of endless time for debate. The lawyers called on to make critical legal judgments at that time, and in real time, certainly had no time to consult the *New York Review of Books* when looking for answers to these difficult and pressing questions.

If you listen only to the critics, you might assume, for example, that this Administration, by asserting that habeas corpus did not apply to enemy combatants, had tried to deprive the judiciary of a time-honored role in second-guessing our military commanders’ decisions concerning whom to detain on foreign battlefields. Of course, before this armed conflict, federal judges had never asserted the authority to afford habeas corpus to alien enemy combatants captured and detained abroad.

As even the majority in *Boumediene* acknowledged, the Supreme Court had, in its words, “never held that non-citizens detained by our Government” outside the United States had

5. *Id.* at 9, 11.

“any rights under our Constitution.”⁶ Indeed, following World War II, the Court had specifically rejected that habeas corpus would apply in that context.⁷ The Administration’s position in *Boumediene* thus was at least arguably justified by text, history, and precedent. A majority of the Supreme Court may have disagreed, but the Administration’s position hardly constitutes the attack on habeas corpus asserted, but not explained, by critics like the author I quoted.

And when people denounce a purported assault on the “Geneva Conventions,” you might expect some level of specificity in the charges. One cannot “assault” a treaty as an abstract concept; one can only violate a treaty by acting contrary to its words. The Geneva Conventions contain 319 articles, of which 315 are plainly addressed to armed conflicts among the nations that signed the Conventions.⁸ It is hardly surprising that the United States concluded that those provisions would not apply to the armed conflict against al Qaeda, an international terrorist group and not, the last time I checked, a signatory to the Conventions.

One common article appearing in each of the four conventions, Article 3, provides rules that govern “conflict[s] not of an international character,” such as civil wars.⁹ The President concluded early on that the global war against al Qaeda had a decidedly “international character.” In *Hamdan v. Rumsfeld*, a majority of the Supreme Court disagreed.¹⁰ This narrow legal dispute—again turning on an Administration interpretation that was both reasonable and indeed consistent with text, history, and precedent—hardly warrants the sweeping, dismissive, and entirely conclusory criticisms so frequently heard.

I focus on these types of criticism not because they are so extraordinary, but because they are, unfortunately, so typical of

6. *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008).

7. *Johnson v. Eisentrager*, 339 U.S. 763, 781 (1950).

8. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

9. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 8, 6 U.S.T. at 3318.

10. 548 U.S. 557, 630–31 (2006).

people who substitute their policy views for any serious legal analysis and would turn a good-faith legal disagreement into a battle over the purported existence or nonexistence of the rule of law. The irony, of course, is that the law requires a serious analysis of text, precedent, and history, and it does not serve the rule of law to substitute a smug sense of outrage for that kind of analysis. In fact, this Administration has displayed a strong commitment to the rule of law with all that it entails, and I suspect—and I admit that it is a suspicion tinged with hope—that the next Administration will maintain far more of this Administration's legal architecture than the intemperate rhetoric in some quarters would seem to suggest.

I remain concerned, however, that when relentless criticism of this Administration's policies moves beyond simply disagreement into a realm where critics and even public officials seek to invoke the criminal justice system to vindicate their policy views, we are in a difficult time. For instance, in June of this year, fifty-six members of Congress sent me a letter requesting that I appoint a special counsel to conduct a criminal investigation of the actions of the President, members of his cabinet, and other national security lawyers and intelligence professionals, into the CIA's interrogation of captured members of al Qaeda.

The members who signed this letter offered no evidence that these government officials acted based on any motive other than a good-faith desire to protect the citizens of our nation from a future terrorist attack, nor did they provide any evidence or indication that these government officials sought to authorize any policies that violated our laws. Quite the contrary: it has become well-known that before conducting interrogations, CIA officials sought the advice of the Department of Justice, and I am aware of no evidence that these DOJ attorneys provided anything other than their best judgment of what the law required.

Casual requests for criminal investigations, as well as the even more prolific conflation of legal disagreements with policy disagreements, reflect a broad trend whose institutional effects may outlast the current Administration and could well endanger our future national security. I have spoken in more detail about these concerns in several recent speeches in which

I drew substantially on former Assistant Attorney General Jack Goldsmith's book, *The Terror Presidency*.¹¹

Let's all remember what Professor Goldsmith has said about what he saw during his time in the Administration. Although he may have disagreed with some of the legal reasoning employed in making these decisions, he made it perfectly clear that despite his disagreement he saw no evidence that those who provided that advice did so in bad faith, for any reason other than to protect the country during a time of war, or with the belief that what they were doing was in any way contrary to the law.¹² It is important for those who are so quick to condemn the attorneys who were working nearly around the clock for months on end in the wake of September 11 to keep that in mind.

In his book, Professor Goldsmith describes what he calls "cycles of timidity and aggression" among political leaders in their attitudes toward the intelligence community.¹³ These cycles have played out before, from the 1960s through the 1990s, but those past cycles are now mainly of historic interest.¹⁴ The most recent cycle is of much more than historic interest. As Professor Goldsmith explains, following the September 11 attacks, "The consistent refrain from the [9/11] Commission, Congress, and pundits of all stripes was that the government must be more forward-leaning against the terrorist threat: more imaginative, more aggressive, less risk-averse."¹⁵

After going seven years without another terrorist attack, our intelligence professionals and national security lawyers now hear a quite different message. When fifty-six members of Congress request a criminal investigation of the professionals and lawyers, they should have no doubt that those lawyers, and certainly their successors, will get the message: If they support an aggressive counterterrorism policy based on their good-faith belief that such a policy is lawful, they may one day be prosecuted for it.

The competing imperatives to protect the Nation and to safeguard our civil liberties are worthy of public debate and discussion, and congressional oversight and review of our intelli-

11. JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007).

12. *Id.* at 10, 34, 38.

13. *Id.* at 163.

14. *Id.*

15. *Id.* at 74.

gence activities is vitally important. But it is equally important that such scrutiny be conducted responsibly, with appreciation of its institutional implications. We want lawyers to give their best advice to those who must act, and we want those who must act to know that they can rely on that advice.

As this Society knows, the rule of law is not undermined by stating with clarity and precision exactly what the law requires. To the contrary, both our law and our democracy gain strength when we separate legal disputes from policy disputes and when we permit our policy disputes to be aired in good faith.

In a democracy, of course, the appropriate way to resolve policy disputes is through the ballot box. We just had an election, and a new Administration will soon take the reins in Washington. What I have done as Attorney General has been to try, along with others in our government, to make sure that our counterterrorism efforts stand on sound institutional and legal footing so that the next Attorney General and the new Administration have what they need to assure the safety of the Nation.

The next Administration will have the opportunity to review the institutions and legal structures that this Administration has relied upon in keeping the Nation safe over the past seven years. I am neither so proud as to think that the next Administration will be unable to make improvements, nor so naïve as to think that the policy choices or even the legal judgments that they make will be identical to ours.

What I do hope, however, is that the next Administration understands the threat that we continue to face and that it shares the priority we have placed on remaining on the offense to prevent future terrorist attacks. Remaining on the offense includes not simply relying on the tools that we have established, but also encouraging a climate in which both legal and policy issues are debated responsibly, in a way that does not chill the intelligence community and deter national security lawyers from making the decisions necessary to protect us.

And I am hopeful that some time from now, after the next Administration has had the chance to review the decisions made and the legal advice provided, it will acknowledge that, despite any policy differences, the national security lawyers in this Administration acted professionally and in good faith and that the country was safer as a result.

The loyal opposition, of course, remains as important a part of democracy as the majority in power. In that regard, I take

comfort in the fact that whether in office or not, many members of this Society will remain a part of the public debate and will help ensure that the next Administration acts responsibly and effectively to protect our country and to protect the ideals on which it is based. For that, and for your support based on the principles that support this Society, I am grateful, and I can say with certainty that the Nation is grateful.

THE "BUSH DOCTRINE": CAN PREVENTIVE WAR BE JUSTIFIED?

ROBERT J. DELAHUNTY* & JOHN YOO**

Despite the Bush Administration's successes against al Qaeda,¹ we continue to live in a dangerous world. We are exposed to the risk that hostile states or terrorist groups with global reach might attack our civilian population or those of our allies using weapons of mass destruction.² In such circumstances, it might seem natural for U.S. policymakers to consider preventive war as a possible tool for countering such threats.³ In the past lead-

* Associate Professor of Law, University of St. Thomas School of Law, Minneapolis, Minnesota.

** Fletcher Jones Distinguished Visiting Professor of Law, Chapman University School of Law (2008–09); Professor of Law, Berkeley Law School, University of California, Berkeley; Visiting Scholar, American Enterprise Institute.

1. See *The growing, and mysterious, irrelevance of al-Qaeda*, ECONOMIST, Jan. 24, 2009, at 65, available at http://www.economist.com/world/international/displaystory.cfm?story_id=12972613. One strategic analyst has recently opined that "Al Qaeda has failed in its goals. The United States has succeeded, not so much in winning the war as in preventing the Islamists from winning, and, from a geopolitical perspective, that is good enough." GEORGE FRIEDMAN, THE NEXT 100 YEARS: A FORECAST FOR THE 21ST CENTURY 31 (2009).

2. See COMM'N ON THE PREVENTION OF WMD PROLIFERATION & TERRORISM, WORLD AT RISK (2008). One of the Commission's "top priority" recommendations was that the successor to the Bush Administration "must stop the Iranian and North Korean nuclear weapons programs." *Id.* at xxii. Because of "the dynamic international environment," the Commission declined to specify exactly how that objective should be accomplished. *Id.* It did insist, however, that the United States should pursue diplomacy with Iran and North Korea "from a position of strength, emphasizing both the benefits to them of abandoning their nuclear weapons programs and the enormous costs of failing to do so. Such engagement must be backed by the credible threat of direct action in the event that diplomacy fails." *Id.* at xxii–xxiii.

3. As the Bush Administration neared its end, there appeared to be a growing recognition that preventive military action was needed to counter the threats posed by the conjunction of transnational terrorism, the greater availability of weapons of mass destruction (WMD), and the existence of "rogue" states that may be unresponsive to deterrence or other means of dissuasion. Taken together, these factors pose an unusual risk of mass killings among innocent civilian populations. See, e.g., MICHAEL W. DOYLE, STRIKING FIRST: PREEMPTION AND PREVENTION IN INTERNATIONAL CONFLICT 20–23 (2008) ("[T]oday's more salient threats do not appear to be fully amenable to such traditional counter-strategies. Preven-

ers of democracies have not shied away from the prospect of preventive war. Winston Churchill, in his memoirs of the Second World War, found “no merit in [statesmen] putting off a war” when “the safety of the State, the lives and freedom of their own fellow countrymen, to whom they owe their position, make it right and imperative in the last resort.”⁴ Yet in the current climate of opinion, such thinking would be controversial—in large part, no doubt, because of the continuing disputes over the normative, strategic, and legal wisdom of what has been called the “Bush Doctrine.”

The “Bush Doctrine” refers to the position set forth in the National Security Strategy for 2002:

We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends.

....

Given the goals of rogue states and terrorists, the United States can no longer solely rely on a reactive posture as we have in the past. The inability to deter a potential attacker, the immediacy of today’s threats, and the magnitude of potential harm that could be caused by our adversaries’

tive responses that involve unilateral armed attack or multilateral enforcement measures may be necessary. These contravene peaceful foreign relations and range from multilateral economic sanctions through blockade to intervention and all-out armed invasion. . . . Deterrence may . . . fail to forestall some of today’s threats. It is generally understood that terrorists are difficult to deter. . . . [W]hile so called *rogue states* may be deterrable, many are only partially deterrable, or deterrable at too high a moral cost.”).

Similarly, Philip Bobbitt recently argued that

anticipatory warfare is [no longer] the result of the development of WMD or delivery systems that allow no time for diplomacy in the face of an imminent reversal of the status quo. . . . Rather it is the potential threat to civilians . . . posed by arming, with whatever weapons, groups and states openly dedicated to mass killing that has collapsed the distinction between preemption and prevention, giving rise to anticipatory war.

PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* 137 (2008).

4. WINSTON S. CHURCHILL, *THE SECOND WORLD WAR: THE GATHERING STORM* 320 (1948).

choice of weapons, do not permit that option. We cannot let our enemies strike first.⁵

Even critics of the Iraq War should acknowledge that preventive war ought to remain among the strategic options available to the new Obama Administration.⁶ Reliance on the United Nations Security Council alone to combat terrorism, halt the proliferation of nuclear weapons, or intervene to prevent genocide and "ethnic cleansing" would be obvious folly.⁷ The Council has proven to be all but hapless in confronting such challenges, and, despite persistent, but unavailing, calls for reform, will remain so.⁸ The lesson of experience is that "when . . . the Great Powers and relevant local powers are in agreement . . . the elaborate charades of the Security Council . . . are unnecessary. When those powers do not agree, the U.N. is impotent."⁹ Hence, although Security Council authorization for the preventive use of force might well be desirable for policy reasons,¹⁰ dozens or even hundreds of wars have been fought during the Council's existence without its permission and in apparent contravention of U.N. Charter use-of-force rules.¹¹ To take but one conspicuous post-Cold War example: The United States and its

5. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 14–15 (2002), available at <http://www.state.gov/documents/organization/15538.pdf>. For representative criticisms of the Bush Doctrine, see BOBBITT, *supra* note 3, at 433–37; DOYLE, *supra* note 3, at 25–29; JEFFREY RECORD, CATO INSTITUTE POLICY ANALYSIS NO. 519, NUCLEAR DETERRENCE, PREVENTIVE WAR, AND COUNTERPROLIFERATION 11–13, 15–21 (2004), available at <http://www.cato.org/pubs/pas/pa519.pdf>; DAN REITER, PREVENTIVE WAR AND ITS ALTERNATIVES: THE LESSONS OF HISTORY 2 (2006) ("The central conclusion of this monograph is that preventive attacks are generally ineffective, costly, unnecessary, and potentially even counterproductive tools for use in behalf of nonproliferation and counterterrorism."); and Robert Jervis, *Why the Bush Doctrine Cannot Be Sustained*, 120 POL. SCI. Q. 351 (2005).

6. See Ivo Daalder & James Steinberg, *Preventive war, a useful tool*, L.A. TIMES, Dec. 4, 2005, at M3 (Magazine), available at http://www.brookings.edu/opinions/2005/1204iraq_daalder.aspx.

7. We have recently examined the failings of the U.N. Charter system, both normatively and in terms of institutional design, in Robert J. Delahunty & John C. Yoo, *Great Power Security*, 10 CHI. J. INT'L L. (forthcoming 2009).

8. See, e.g., DOYLE, *supra* note 3, at 33–34; John C. Yoo & Will Trachman, *Less than Bargained for: The Use of Force and the Declining Relevance of the United Nations*, 5 CHI. J. INT'L L. 379 (2005).

9. WALTER A. MCDUGALL, PROMISED LAND, CRUSADER STATE: THE AMERICAN ENCOUNTER WITH THE WORLD SINCE 1776, at 213 (1997); Delahunty & Yoo, *supra* note 7.

10. See DOYLE, *supra* note 3, at 61.

11. See generally A. MARK WEISBURD, USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II (1997).

NATO allies fought a major war in the center of Europe in 1999 against Serbia, a Member State of the United Nations, yet they acted neither pursuant to Security Council authorization nor in individual or collective self-defense, as set forth in Article 51 of the U.N. Charter.¹²

The actual conduct of states thus calls into doubt whether Charter use-of-force rules remain legally binding,¹³ or, even assuming that they are, whether compliance with the Charter's ineffective legal norms must trump all other considerations bearing on the use of preventive force. Walter Slocombe, Deputy Secretary of Defense in the Clinton Administration, pointed out the consequences of such legal absolutism:

12. Critiques of the legality of NATO's intervention include DAVID CHANDLER, FROM KOSOVO TO KABUL AND BEYOND: HUMAN RIGHTS AND INTERNATIONAL INTERVENTION 127–39, 158–66 (2006); MICHAEL GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO ch. 1 (2001); Jules Lobel, *Benign Hegemony? Kosovo and Article 2(4) of the U.N. Charter*, 1 CHI. J. INT'L L. 19 (2000); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT'L L. 1 (1999); and John C. Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 735 (2004). For a legal defense of NATO's intervention on the grounds of a limited form of a "humanitarian intervention" doctrine, see CHRISTOPHER GREENWOOD, ESSAYS ON WAR IN INTERNATIONAL LAW 593–630 (2006). See also Louis Henkin, Editorial Comments: NATO's Kosovo Intervention, *Kosovo and the Law of "Humanitarian Intervention"*, 93 AM. J. INT'L L. 824 (1999); Michael J. Matheson, *Justification for the NATO Air Campaign in Kosovo*, 94 AM. SOC'Y INT'L L. PROC. 301 (2000).

Despite the vociferousness of the Bush Administration's critics, the United States's defense of the Iraq War under the U.N. Charter was more persuasive than its (virtually non-existent) legal defense of the War in Kosovo and had merit even in the eyes of outsiders to the Administration. See, e.g., Walter B. Slocombe, *Force, Pre-emption and Legitimacy*, SURVIVAL, Spring 2003, at 117, 124 ("[F]ar from ignoring international law, the United States government has advanced a sophisticated legal argument for the legitimacy of its position regarding pre-emption against rogue state WMD that is squarely based on international law principles."); see also ALAN M. DERSHOWITZ, PREEMPTION: A KNIFE THAT CUTS BOTH WAYS 153–89 (2006) (evaluating the position of the United States); Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AM. J. INT'L L. 576, 582–85 (2003) (same); John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563 (2003).

13. See GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER 194–223 (2004). Simpson poses the question whether NATO's 1999 intervention in Kosovo was the "foundational moment" of a project of international "regime building" in which the West sought to overthrow the U.N. Charter as the "constitution" of the world legal order and to install a regime of regional hegemonism instead. *Id.* at 194–95. For a different view, see JOHN F. MURPHY, THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS 177–81 (2004).

[T]o require United Nations approval as an absolute condition of the legitimate use of military force is to say that no military action of which Russia or China (or, in principle, France, Britain, or, indeed, the US) strongly disapproves is legitimate, no matter how broadly the action is otherwise supported, or how well justified in other international legal or political terms.¹⁴

We argue that there are deep and pervasive similarities between, on the one hand, a preventive war undertaken to protect American or allied civilian populations from an emerging threat that weapons of mass destruction might be used against them and, on the other hand, a humanitarian intervention—like that in Kosovo—to protect another population from genocide, forcible deportations, or other grave human rights abuses. In both circumstances, the intervening powers would have a *protective* purpose in view. In the first case, the objective of the intervening powers would be the protection of their own people; in the second case, the objective would be the protection of another people or at-risk group. In both cases, the intervening powers would also be employing force to counteract a threat of violence—a threat that would be large in scale and gross in illegality in either context. In the first case, the threat would involve intentional mass attacks on non-combatants. In the second case, the threat would involve severe and widespread danger to basic human rights. The targeted states in both cases would have wrongfully subjected others to unacceptable harm or risk of harm—either internally, by failing to protect their citizens from genocide and other gross human rights violations, or externally, by posing security threats to the citizens of other states, whether by acquiring weapons of mass destruction themselves for aggressive purposes, or by sheltering (or failing to control) terrorists willing to use such weapons. Fundamentally, the aims of both the preventive and humanitarian interventions

14. Slocombe, *supra* note 12, at 122. Slocombe further noted that NATO's intervention in 1999 to prevent Serbia's attempted ethnic cleansing of the Albanian population of Kosovo, despite being contrary to Charter rules, "was, nonetheless, broadly regarded as legitimate, whether as a 'humanitarian intervention' or as a means of forestalling a spreading conflict in a region of Europe that has bred a host of wars in living memory." *Id.*

in question are to uphold the "strong global ethic" against the mass killing of civilians and other equally catastrophic events.¹⁵

The characteristic objections to both preventive war and humanitarian intervention are also essentially the same. According to critics, engaging in either activity will destabilize the international order by creating a dangerous precedent that will lead to further conflict, violence, and disregard for positive international law. Moreover, critics argue that the professed justifications for such activity serve all too easily to conceal some other motive. Nations bent on imperialism or hegemony will use humanitarian intervention or preventive war as a pretext for conquest or control.¹⁶ But even when these concerns are reasonable, the options provided by the U.N. Charter system to resolve them are unsatisfactory. The Charter attempts to drive the level of international violence to zero, despite the possibility that the use of force will improve global welfare by stopping human rights catastrophes or heading off rogue states that are likely to cause greater harms in the future.

Viewed in this light, preventive war, in appropriate circumstances, can be justified for reasons that are closely analogous to those usually offered to justify humanitarian intervention. The key difference is that in preventive war the intervenors protect *their own* populations, whereas in humanitarian intervention the intervenors protect *the target state's* population. Although critics of preventive war tend to be sympathetic to humanitarian intervention, the underlying logic for both uses of force is substantially the same. To be sure, even in the contemporary world, preventive war remains rooted in *self-defense*, whereas humanitarian intervention is rooted in the defense of *others*. This difference helps explain why nations, which characteristically pursue their own interests, are more inclined to wage preventive war and insufficiently inclined to engage in humanitarian intervention. Nonetheless, it cannot be an *objection* to a U.S.-led preventive war that it would aim chiefly at protecting the lives and safety of the *American* people.

15. See HUGO SLIM, *KILLING CIVILIANS: METHOD, MADNESS, AND MORALITY IN WAR* 20 (2008).

16. Concerns such as these appear to underlie the General Assembly's 2005 call for rigid adherence to the Charter's use-of-force rules. See G.A. Res. 60/1, ¶¶ 77–80, 138–139, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

In this Essay, we first explain what we mean by "preventive" war, and how it is distinguishable from "preemptive" war. Then we briefly consider whether, as critics of the Bush Doctrine allege, the War in Iraq was virtually unprecedented in the nation's history or was, instead, one of several major conflicts fought by the United States that could fairly be described as preventive wars. Finally, we shall recommend certain normative guidelines and criteria for policymakers to follow in deciding whether to initiate a "preventive" war. As previously indicated, these criteria will resemble those that are often suggested for justifiable humanitarian interventions.

I. PREVENTIVE WAR AND AMERICAN DIPLOMATIC DOCTRINE

Article 51 of the United Nations Charter makes an exception to the prohibition against the use of force not compelled or authorized by the Security Council acting under Chapter VII. It permits Member States to exercise "the inherent right of individual or collective self-defense if an armed attack occurs against" them, "until the Security Council has taken the measures necessary to maintain international peace and security."¹⁷ Although the question is still disputed, this provision is widely understood to permit Member States to engage in armed self-defense, not only after they have been attacked, but also to preempt an armed attack that is "imminent." For example, most view Israel's attack on Egypt in 1967 as a legitimate act of preemptive self-defense under Article 51. On the other hand, many believe that a Member State may not lawfully act in self-defense to *prevent* an armed attack that is more remote in time. Thus, Israel's 1981 attack on the Iraqi nuclear facility at Osirak faced condemnation by the Security Council as an unlawful preventive strike.¹⁸

International lawyers commonly distinguish between "legitimate" preemptive self-defense and allegedly "illegitimate" preventive self-defense by reference to the famous nineteenth-century exchange of letters between U.S. Secretary of State Daniel Webster and British Special Minister Lord Ashburton.

17. U.N. Charter art. 51; 59 Stat. 1031, 1044-45 (1945).

18. BOBBITT, *supra* note 3, at 137; see Robert J. Delahunty, *Paper Charter: Self-Defense and the Failure of the United Nations Collective Security System*, 56 CATH. U. L. REV. 871, 872-74, 916-20 (2007).

The Webster-Ashburton correspondence concerned a British military foray into American territory during the Canadian Rebellion of 1837, the so-called "*Caroline* incident."¹⁹ In a letter dated July 27, 1842, Webster stated that it was for the British government to justify the incursion of its forces by "show[ing] a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation."²⁰ Webster's description, many contend, identifies the conditions for legitimate "preemptive" self-defense; by contrast, other allegedly defensive uses of force in anticipation of armed attacks would constitute illegitimate "preventive" strikes or wars.²¹

No doubt there is a valid and useful distinction to be made, analytically and strategically, between preemptive and preventive self-defense.²² But other recent commentators are correct in

19. The classic account of this episode is found in R. Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938). A superb study of the incident, the diplomatic exchange to which it gave rise, and the prevailing, but mistaken, interpretation of the legal precedent it set is given by Timothy Kearley, *Raising the Caroline*, 17 WIS. INT'L L.J. 325 (1999).

20. Letter from Daniel Webster, U.S. Sec'y of State, to Lord Ashburton, British Special Minister (July 27, 1842), in 4 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA: 1836-46, at 449 (Hunter Miller ed., 1934), available at http://avalon.law.yale.edu/19th_century/br-1842d.asp.

21. For a statement of the prevailing view, see, for example, Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 EUR. J. INT'L L. 227, 231 (2003). For a powerful argument that the prevailing view embodies a serious misunderstanding of the *Caroline* doctrine, see Kearley, *supra* note 19.

22. British military strategist Colin S. Gray explains that "[t]o preempt is to launch an attack against an attack that one has incontrovertible evidence is either actually underway or has been ordered." COLIN S. GRAY, THE IMPLICATIONS OF PREEMPTIVE AND PREVENTIVE WAR DOCTRINES: A RECONSIDERATION 9 (2007), available at <http://www.strategicstudiesinstitute.army.mil/pubs/display.cfm?pubID=789>; see also *id.* at 13 ("The most essential distinction between preemption and prevention is that the former option, uniquely, is exercised in or for a war that is certain, the timing of which has not been chosen by the preemptor. In every case, by definition, the option of preventive war, or of a preventive strike, must express a guess that war, or at least a major negative power shift, is probable in the future. The preventor has a choice."); Jack S. Levy, *Preventive War and Democratic Politics*, 52 INT'L STUD. Q. 1, 4 (2008) ("Prevention and preemption are each forms of better-now-than-latter logic, but they are responses to different threats involving different time horizons and calling for different strategic responses. Preemption involves striking now in the anticipation of an imminent adversary attack, with the aim of securing first-mover advantages. Prevention is a response to a future threat rather than an immediate threat. It is driven by the anticipation of an adverse power shift and the fear of the consequences . . ."). Legal scholars also draw a similar distinction between preemptive and preventive self-defense. See W. Mi-

questioning whether criteria imported from the *Caroline* incident still should be considered dispositive in judging the legality or legitimacy of preventive war.²³ Demanding a standard for lawful anticipatory self-defense that is all but impossible to meet makes little sense now, at least in cases when preventive action may be necessary to forestall a foreseeable, albeit not imminent, threat from a state or group that is openly committed to the mass killing of civilians.

Moreover, the standards for anticipatory action set out in Webster's 1842 letter were far more stringent than those that regularly appeared in American diplomatic doctrine and practice both before and after Webster's time. Consider, for example, Secretary of State John Quincy Adams's communication to the Spanish government on November 28, 1818. Adams's distinguished biographer, Samuel Flagg Bemis, described this as "[t]he greatest state paper of John Quincy Adams's diplomatic career."²⁴ The episode that Adams addressed arose when General Andrew Jackson, without proper authorization, invaded Spanish Florida in response to a series of attacks across the U.S. border by Creeks, Seminoles, and escaped slaves, whose activities the Spanish authorities in Florida were unable or unwilling to control.²⁵ Rather than apologize for Jackson's intervention, Adams warned the Spanish in unequivocal terms that they must take steps to suppress further cross-border incursions or face the invasion and loss of Florida to the United States.²⁶ The

chael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525, 526 (2006).

23. See, e.g., DOYLE, *supra* note 3, at 15 ("The *Caroline* standard is too extreme . . . [T]he principles themselves are deeply flawed. They justify reflex defensive reactions to imminent threats and nothing more. For instance, they do not leave enough time for states to protect their legitimate interests in self-defense when they still do have some 'choice of means,' albeit no peaceful ones, and some 'time to deliberate' among the dangerous choices left. Extreme *Caroline* conditions are rarely found in reality.")

24. SAMUEL FLAGG BEMIS, JOHN QUINCY ADAMS AND THE FOUNDATIONS OF AMERICAN FOREIGN POLICY 326 (1949). The importance of Adams's letter for understanding the American grand strategy of the period has been emphasized in JOHN LEWIS GADDIS, SURPRISE, SECURITY, AND THE AMERICAN EXPERIENCE 16–17 (2004).

25. See John Yoo, *Andrew Jackson and Presidential Power*, 2 CHARLESTON L. REV. 521, 521, 527–28 (2008).

26. Adams wrote:

If, as the [Spanish] commanders both at Pensacola and St. Marks have alleged, this has been the result of their weakness rather than of their will; if they have assisted the Indians against the United States to avert their

application of Adams's doctrine to contemporary circumstances would unquestionably warrant the United States using force preventively against a failed or failing state that was unable or unwilling to take the actions necessary to suppress a terrorist group within its boundaries that was engaging in attacks upon the United States.

John Quincy Adams was by no means the only American Secretary of State to maintain that preventive war would be justifiable in some circumstances. In a 1914 address to the American Society of International Law titled *The Real Monroe Doctrine*, former Secretary of State and then-Senator Elihu Root described instances in which earlier Secretaries of State had made plain that the United States would fight a war to prevent the occupation of a part of Latin America by a European power not previously in possession of it.²⁷ Speaking for himself, Root declared,

It is well understood that the exercise of the right of self-protection may and frequently does extend beyond the limits of the territorial jurisdiction of the state exercising it. The strongest example probably would be the mobilization of an army by another Power immediately across the frontier. Every act done by the other Power may be within its own territory. Yet the country threatened by the state of facts is justified in protecting itself by immediate war. . . . [E]very sovereign state

hostilities from the province which they had not sufficient force to defend against them, it may serve in some measure to exculpate, individually, those officers; but it must carry demonstration irresistible to the Spanish government that *the right of the United States can as little compound with impotence as with perfidy*, and that Spain must immediately make her election, either to place a force in Florida adequate at once to the protection of her territory and to the fulfillment of her engagements, or cede to the United States a province, of which she retains nothing but the nominal possession, but which is, in fact, a derelict, open to the occupancy of every enemy, civilized or savage, of the United States, and serving no other earthly purpose than as a post of annoyance to them.

BEMIS, *supra* note 24, at 327.

27. See Elihu Root, *The Real Monroe Doctrine*, 8 AM. J. INT'L L. 427 (1914). Secretary James Buchanan stated in 1848 that "[t]he highest and first duty of every independent nation is to provide for its own safety; and acting upon this principle, we should be compelled to resist the acquisition of Cuba by any powerful maritime state, with all means which Providence has placed at our command." *Id.* at 431-32. Likewise, Secretary John Clayton said in 1849 that "[t]he news of the cession of Cuba to any foreign Power would in the United States be the instant signal for war." *Id.* at 432.

[has the right] to protect itself by preventing a condition of affairs in which it will be too late to protect itself.²⁸

A succession of twentieth-century American Presidents also announced "doctrines" of preventive intervention. These included Theodore Roosevelt, Franklin Roosevelt (through Secretary of State Henry Stimson), Harry Truman, Dwight Eisenhower, Lyndon Johnson, Richard Nixon, Jimmy Carter, and Ronald Reagan. According to Philip Bobbitt, these Presidential doctrines "do not say when the U.S. will actually intervene, but rather when it will regard itself as rightfully contemplating intervention."²⁹ For example, President Theodore Roosevelt's so-called "Corollary to the Monroe Doctrine" made plain that the United States would intervene in the affairs of a Latin American nation in the event that any such nation experienced "[c]hronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society," especially if that disorder "had invited foreign aggression to the detriment of the entire body of American nations."³⁰ President John Kennedy used force in the Cuban Missile Crisis—a naval blockade of Cuba—to prevent a dramatic change in the balance of power from the presence of Soviet nuclear missiles in the Caribbean. President Lyndon Johnson announced in 1965 that "the United States would henceforth prevent by force 'a communist dictatorship' from coming to power in the Americas"; he subsequently sent 24,000 troops "to the Dominican Republic to accomplish this task in the political chaos that followed the assassination of the dictator Rafael Trujillo."³¹ President Jimmy Carter also announced a preventive doctrine by declaring that the United States "would regard any attempt by any outside force to gain control of the Persian Gulf region as an assault on the vital interests of the U.S. [to be] repelled 'by use of any means necessary'—which implied a possible resort to nuclear weapons."³²

An excessively narrow interpretation of the *Caroline* doctrine regards preemptive and preventive uses of armed force in self-

28. *Id.* at 432.

29. BOBBITT, *supra* note 3, at 431–32.

30. President Theodore Roosevelt, Message to Congress on Foreign Affairs (Dec. 6, 1904), in JOHN E. POMFRET, 12 AMERICANS SPEAK: FACSIMILES OF ORIGINAL EDITIONS SELECTED AND ANNOTATED 119–20 (1954).

31. BOBBITT, *supra* note 3, at 432.

32. *Id.*

defense quite differently. But both policymakers and legal scholars have begun to question whether the distinction should continue to carry its current normative significance. Insofar as it hinges on the criteria derived from the *Caroline* incident, the current international legal doctrine rules out forms of self-defense that are reasonable and legitimate in contemporary circumstances. Finally, the *Caroline* doctrine is inconsistent with the view, repeatedly advanced over two centuries of American diplomacy, that preventive wars or other armed interventions are legitimate in appropriate instances. In the following section, we endeavor to show that longstanding American practice supports the view that preventive war may be a legitimate strategic option.

II. PREVENTIVE WAR AND AMERICAN MILITARY PRACTICE

How common is preventive war? How often has the United States engaged in it? As a general matter, it is widely agreed that preventive wars, not just preemptive wars, have been common in world history. Professor Paul Schroeder writes that “[p]reventive wars, even risky preventive wars, are not extreme anomalies in politics They are a normal, even common, tool of statecraft, right down to our own day.”³³ Political scientist Richard Betts concurs: “[P]reventive wars . . . are common, if one looks at the rationales of those who start wars, since most countries that launch an attack without immediate provocation believe their actions are preventive.”³⁴ And military strategist Colin Gray writes that “far from being a rare and awful crime against an historical norm, preventive war is, and

33. Paul W. Schroeder, *World War I as Galloping Gertie: A Reply to Joachim Remak*, 44 J. MOD. HIST. 319, 322 (1972). This is not to say that *preemptive* wars are also common. According to Dan Reiter, “preemptive wars almost never happen. Of all the interstate wars since 1816, only three are preemptive: World War I, Chinese intervention in the Korean War, and the 1967 Arab-Israeli War.” Dan Reiter, *Exploding the Powder Keg Myth: Preemptive Wars Almost Never Happen*, INT’L SECURITY, Autumn 1995, at 5, 6. Reiter distinguishes preemptive from preventive war. *See id.* at 6–7. Political scientists have observed that preventive and preemptive wars differ in several dimensions, including characteristic differences in the threat’s nearness or remoteness, its source, and the incentives for a first strike, thus rendering a theory of preemption unable to explain prevention. *See* Jack S. Levy, *Declining Power and the Preventive Motivation for War*, 40 WORLD POL. 82, 90–92 (1987).

34. Richard K. Betts, *Striking First: A History of Thankfully Lost Opportunities*, 17 ETHICS & INT’L AFF. 17, 19 (2003), available at http://www.cceia.org/resources/journal/17_1/roundtable/866.html.

has always been, so common, that its occurrence seems remarkable only to those who do not know their history."³⁵ Indeed, preventive war was widely considered to be acceptable in some circumstances, at least from the time of King Frederick the Great's 1756 invasion of Saxony³⁶ to the start of the First World War in 1914, and perhaps even up to 1941.³⁷ During the eighteenth and nineteenth centuries, leading European writers on international law acknowledged the existence of a right of preventive intervention.³⁸

Although it is widely agreed that preventive wars are common, there is far less agreement that the United States has fought such wars. One recent study describes the 2003 War in Iraq as the United States's "first preemptive [i.e., preventive] war."³⁹ A diplomatic historian asserts that the Bush Doctrine has been "widely criticized" because Iraq "did not pose a direct and imminent threat to the United States. Bush chose to overturn more than 200 years of American foreign policy."⁴⁰ The late Arthur Schlesinger, Jr., claimed nearly as much when he condemned the Iraq War as "illegitimate and immoral. For more than 200 years we have not been that kind of country."⁴¹

Other scholars, however, sharply disagree. The historian John Lewis Gaddis argues that what he broadly calls "preemption" has been a constant facet of U.S. foreign policy, leading to a long series of interventions throughout the nineteenth and twentieth

35. GRAY, *supra* note 22, at 27.

36. This invasion has been described as "the most famous preventive war in European history." M.S. ANDERSON, *EIGHTEENTH-CENTURY EUROPE: 1713-1789*, at 34 (1966).

37. See Hew Strachan, *Preemption and Prevention in Historical Perspective*, in *PRE-EMPTION: MILITARY ACTION AND MORAL JUSTIFICATION* 23, 23 (Henry Shue & David Rodin eds., 2007) (stating that Frederick's decision "was deemed to be adroit more than unethical: confronted with the possibility of a war in which the very survival of his kingdom would be at stake, Frederick had behaved prudently and wisely. The 1756 example shaped the understanding of preventive war in Europe until 1914, and probably until 1941.").

38. See EDWARD VOSE GULICK, *EUROPE'S CLASSICAL BALANCE OF POWER: A CASE HISTORY OF THE THEORY AND PRACTICE OF ONE OF THE GREAT CONCEPTS OF EUROPEAN STATECRAFT* 62-64 (1955) (citing the writings of Brougham, Vattel, and Gentz).

39. GEORGE C. HERRING, *FROM COLONY TO SUPERPOWER: U.S. FOREIGN RELATIONS SINCE 1776*, at 948 (2008).

40. JOHN G. STOESSINGER, *WHY NATIONS GO TO WAR* 311 (2005).

41. Arthur Schlesinger, Jr., *Commentary, The Immorality of Preventive War*, *L.A. TIMES*, Aug. 15, 2002, at B15.

centuries against the Spanish Empire's possessions in the Americas and in the Latin American republics that succeeded them, including Mexico, Cuba, and Venezuela.⁴² In a fascinating study, historian Marc Trachtenberg concluded that "the sort of thinking one finds in the Bush policy documents is not to be viewed as anomalous. Under [Franklin] Roosevelt and Truman, under Eisenhower and Kennedy, and even under Clinton in the 1990s, this kind of thinking came into play in a major way."⁴³ Even more starkly, historian Hew Strachan argues that "[t]he United States has used preventive war regularly since 1945 to forestall revolutionary change. In the 1950s and 1960s, it employed military power once every eighteen months on average to overthrow a government inimical to its interests."⁴⁴ Colin Gray contends that even the Second World War—despite the Japanese first strike at Pearl Harbor—should be considered a preventive war.⁴⁵ Gray further characterizes several other major American wars as preventive, including the War in Afghanistan (2001); the Persian Gulf War (1991); the Korean War (1950); the First World War (1917); the Spanish-American War (1898); the Civil War (1861); and the many frontier wars the United States fought with Native Americans, Mexicans, Frenchmen, and Spaniards.⁴⁶

This second group of scholars has the better of the argument. Consider the Second World War. Even after the outbreak of war in Europe in 1939, President Franklin Roosevelt followed a policy that was designed to favor the anti-Axis powers in Europe and Asia and eventually bring the United States into the war on their behalf. Roosevelt urged Congress to revise or repeal the Neutrality Act, provided Great Britain with desperately needed war materiel, waged a covert war against German submarines in the North Atlantic, occupied Iceland to prevent it from falling into German hands, and tightened the economic noose on Japan, seeking to strangle its efforts to continue its

42. See GADDIS, *supra* note 24, at 16–22.

43. Marc Trachtenberg, *Preventive War and US Foreign Policy*, in PREEMPTION, *supra* note 37, at 40, 66.

44. Strachan, *supra* note 37, at 38.

45. GRAY, *supra* note 22, at 23–25.

46. *Id.* at 25–27. In light of this record, Gray correctly concludes that "the so-called Bush Doctrine is historically unremarkable, notwithstanding all the excitement that it occasioned in 2002–03." *Id.* at 27.

long war in China.⁴⁷ Almost a year before the attack on Pearl Harbor, Roosevelt warned the nation on December 29, 1940:

Never before . . . has our American civilization been in such danger as now. . . . If Great Britain goes down, the Axis powers will control the continents of Europe, Asia, Africa, Australia, and the high seas—and they will be in a position to bring enormous military and naval resources against this hemisphere. It is no exaggeration to say that all of us, in all the Americas, would be living at the point of a gun.⁴⁸

Consistent with his vision of the threat, for more than a year and a half before Pearl Harbor Roosevelt deliberately pursued a policy of economic warfare with Japan that left the Japanese with no alternative to war.⁴⁹ In short, the United States deliberately provoked and fought a war that it could have avoided with Japan, for the sake of preventing the emergence of a grave strategic threat in the Pacific.

The United States's decision to enter the First World War was also preventive in character:

Germany's announcement of its third campaign of unrestricted U-boat warfare provided the occasion, the excuse, for the

47. Marc Trachtenberg writes that the study of the United States's actions in the period before Pearl Harbor, both in Europe and in the Pacific, shows that the United States "was not a country that 'asked only to be left alone.'" Rather,

[b]y late 1941, the United States was fighting an undeclared naval war against Germany in the North Atlantic. America had in fact gone on the offensive President Roosevelt's policy by that time, as he said, was to 'wage war, but not declare it.' He would become 'more and more provocative,' he told Churchill in early August, and 'if the Germans did not like it, they could attack American forces.' He also pursued a very active policy in the Pacific at this time. . . . [that in the end left Japan] cornered. She was forced to choose between war and capitulation on the China issue, and the Pearl Harbor attack has to be understood in that context. It is thus quite clear that US policy played a major role in bringing on the war.

Trachtenberg, *supra* note 43, at 60–61; see also Delahunty, *supra* note 18, at 912–13.

48. MCDUGALL, *supra* note 9, at 150 (quoting President Franklin Roosevelt).

49. GRAY, *supra* note 22, at 23 ("[T]he United States had been waging preventive economic warfare against Imperial Japan for at least 18 months prior to Pearl Harbor. . . . U.S. measures of economic blockade left Japan with no alternative to war consistent with its sense of national honor. The oil embargo eventually would literally immobilize the Japanese Navy. So Washington confronted Tokyo with the unenviable choice between de facto complete political surrender of its ambitions in China, or war."); see also Strachan, *supra* note 37, at 23 ("For Japan itself the choices by 1941 seemed to be economic strangulation and geopolitical imprisonment on the one hand, or war on the other.").

public moral outrage that permitted President Wilson to ask for a declaration of war. However, Germany was not threatening U.S. security in any meaningful sense in 1916 or 1917 [T]he United States chose to wage a preventive war as an Associated Power of the Allies. Wilson recognized that a German-dominated Europe must constitute a serious threat to U.S. national security.⁵⁰

Two preventive wars of the nineteenth century also deserve mention: the Mexican-American War of 1848 and the Spanish-American War of 1898. Claims that the United States needed to use force in 1848 seem far-fetched. President James K. Polk deliberately forced an armed incident over the location of the border between Mexico and the United States—he ordered American troops to deploy in between a Mexican unit in disputed border territory and Mexican territory. After fighting broke out, the United States invaded Mexico, captured and occupied Mexico City, and took what is today California and the American Southwest. Today, if not at the time, it seems clear that the American use of force was designed to eliminate a competitor for influence on the continent rather than to defend the United States from Mexican attack.⁵¹ Similarly, the Spanish-American War was triggered by an explosion aboard the U.S.S. *Maine* while in Havana harbor. There was no threat of a Spanish attack upon the United States. In response, the United States took control over the Philippines and Cuba. American intentions again were preventive, in the sense that they took action to remove Spain as an obstacle to American expansion.⁵²

The practice of threatening, and occasionally waging, preventive war has very early roots in the history of the Republic. After learning in 1802 of the planned acquisition of Louisiana from Spain by Napoleonic France, President Thomas Jefferson threatened France with war—although the United States had no claim to Louisiana, and Spain's intended conveyance of the territory was unquestionably legal. Jefferson warned Napoleon that if France took position of the vital port of New Orleans, the

50. GRAY, *supra* note 22, at 25.

51. See DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 731–91 (2007).

52. See GRAY, *supra* note 22, at 26 (“The Spanish-American War was contrived, among other reasons, in order to prevent European colonial powers picking up the remnants of the erstwhile Spanish Empire.”).

United States would "marry" itself to the "British fleet and nation" and would use the expected return of war in Europe as the occasion to seize Louisiana by force.⁵³ Jefferson dispatched James Monroe as a special envoy to France in 1803, instructing him to purchase Louisiana from France if that were possible and to proceed to London to discuss an alliance against France if it were not.⁵⁴ Although Napoleon eventually agreed to sell Louisiana, Jefferson had plainly threatened war to prevent a dangerous strategic setback for the United States.

Jefferson also attempted to procure East and West Florida from Spain, threatening Spain with force if it refused to sell those possessions, because of his fear that those lands might be seized by Great Britain.⁵⁵ President James Madison, Jefferson's successor, carried Jefferson's policy further, ordering the military to occupy much of West Florida in 1811, incorporating that territory into the state of Louisiana in 1812, and completing the conquest of West Florida by annexing Mobile in 1813.⁵⁶ Madison also connived with the adventurer George Matthews to induce the residents of East Florida to rebel against Spain, and, in 1811, Madison obtained authorization from Congress to use force to prevent Britain or France from taking over that territory.⁵⁷ For both Jefferson and Madison, then, preventive war was plainly available—and used—as a strategic option.

The United States's "quarantine" or naval blockade of Cuba in 1962, during the presidency of John F. Kennedy, provides a particularly noteworthy example of the use of preventive action as a policy tool. Plainly, this form of armed intervention fell short of an actual invasion, capture, or occupation of Cuban territory, and it failed to yield either an air strike on the nuclear weapon sites the Soviet Union was installing in Cuba or any nuclear exchange with the Soviet Union. Nonetheless, it was an armed interference both with the Soviet navy's right to traverse international waters and with Cuba's right to allow the Soviets to build military facilities on its territory.⁵⁸

53. See HERRING, *supra* note 39, at 104.

54. *Id.* at 104–05.

55. *Id.* at 109.

56. *Id.* at 111.

57. *Id.*

58. The legality of the U.S. naval blockade, which was limited to missile-bearing Soviet ships, has been much debated. One authority opines that a so-called "pacific"

The Kennedy Administration's advisers differed over how best to defend the legality of this preventive action. The Justice Department provided the opinion that although "preventive action would not ordinarily be lawful to prevent the maintenance of a missile base, or other armaments in the absence of evidence that their actual use for an aggressive attack was imminent," the Monroe Doctrine of 1823 created a *lex specialis* for the Western Hemisphere that established "less restrictive conditions" for the United States's use of preventive force.⁵⁹ Later legal scholars have viewed the Cuban blockade as an act of anticipatory self-defense, although neither the Soviet Union nor Cuba had attacked the United States, was on the verge of attacking it, or had even publicly threatened to attack it.⁶⁰ Thus, although not triggering an actual war, Kennedy's naval blockade is rightly seen as a precedent that lends support to the Bush Doctrine.

This brief account reveals that preventive war has not been uncommon in American history—at least if a preventive war is defined as a war that stems in large part from a desire to prevent a foreseen, but not imminent, threat of particular gravity to the nation's security. Consequently, the War in Iraq was not a unique and unprecedented event in the nation's history. The American

blockade, such as the one President Kennedy ordered against Cuba, "would seem to be inconsistent with the obligations in Article 2(3) and (4) of the United Nations Charter." L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 179 (2d ed. 2000). A careful and detailed legal analysis of the episode by Quincy Wright supports that conclusion. Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 548–63 (1963). For an account that weaves together legal and strategic considerations, see D.P. O'CONNELL, *THE INFLUENCE OF LAW ON SEA POWER* 61–63 (1975). For the State Department Legal Adviser's perspective, see ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISES AND THE ROLE OF LAW* (1974).

59. Opinion of Norbert Schlei, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, *quoted in* SCOTT A. SILVERSTONE, *PREVENTIVE WAR AND AMERICAN DIPLOMACY* 121 (2007). President Kennedy apparently disapproved of the Justice Department's rationale. *Id.*

60. See Thomas M. Franck, *When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization?*, 5 WASH. U. J.L. & POL'Y 51, 59 (2001) (characterizing a claim to impose a naval quarantine as anticipatory self-defense); Eugene V. Rostow, *Until What? Enforcement Action or Collective Self-Defense?*, 85 AM. J. INT'L L. 506, 515 (1991) ("Although President Kennedy spoke of the United States action as one of self-defense, his State Department, in presenting the case to the Security Council, the OAS, and the public, sought to justify the American use of force in Cuba primarily under the Rio Treaty and the action of the Organization of American States pursuant to that Treaty. This legal argument is untenable. . . . The only possible legal basis for the action taken by the United States in the Cuban missile crisis was therefore its 'inherent' right of self-defense, reaffirmed by Article 51 of the Charter.").

diplomatic doctrine surveyed in Part I and the American practice canvassed here in Part II are, unsurprisingly, convergent.⁶¹

III. JUSTIFYING PREVENTIVE WAR

When, if ever, can preventive war, or other armed preventive interventions short of full-scale war, be justified? Obviously, we are not contending that preventive war is always justifiable; often it is not. Few defenders would be found today for all of the United States's preventive interventions of the past, including some of our interventions during the Cold War. Likewise, preventive wars undertaken by other great powers—China's intervention in the Korean War, for example—may also make sense strategically but hardly seem justified in other respects. Nonetheless, the Bush Doctrine, in its preventive war dimension, has strong foundations in American political and diplomatic history, as well as in international practice. The chief normative claim defended

61. We also briefly note here that two other common criticisms of the Bush Doctrine are misplaced. One of them is that democracies, or at least the United States, do not fight preventive wars. See Schlesinger, *supra* note 41. The political scientist Jack Levy has argued that this assumption, though once widely accepted, is without empirical support. Indeed, Levy shows that democratic Israel fought a preventive war against Egypt in 1956, that the United States fought a war in Iraq in 1990–91 for preventive reasons broadly accepted by the American public, and that "[t]here is no evidence that normative beliefs that a preventive strike was immoral or contrary to American democratic identity played any role" in the Clinton Administration's planning in 1994 for a possible air strike against North Korea's nuclear program. See Levy, *supra* note 22, at 18. Levy's findings plainly accord with our own.

The second criticism is that the preventive war against Iraq in 2003 is symptomatic of the policies of a "declining" hegemon, which the United States is taken to be. See, e.g., Robert A. Pape, *Empire Falls*, NAT'L INTEREST ONLINE, Jan. 22, 2009, <http://www.nationalinterest.org/Article.aspx?id=20484>. Although this is, of course, a question for international relations theorists rather than for legal scholars, we note that some empirical studies find that narrowing power differentials do not necessarily, or even usually, lead to preventive attacks. See RANDALL L. SCHWELLER, UNANSWERED THREATS: POLITICAL CONSTRAINTS ON THE BALANCE OF POWER 22–23 (2006) ("[T]he nature and success of the established powers' responses to rising powers has varied not only from one historical epoch to another but on a case-by-case basis within the same era."); Douglas Lemke, *Investigating the Preventive Motive for War*, 29 INT'L INTERACTIONS 273, 288 (2003) ("[T]he preventive motive is not statistically linked to the probability of war . . . Is war the only preventive option states might have in the face of relative decline? Almost certainly not."). In any case, the thesis that the United States is a "declining" power is itself doubtful. See WALTER RUSSELL MEAD, GOD AND GOLD: BRITAIN, AMERICA, AND THE MAKING OF THE MODERN WORLD 346–56 (2007).

below is that the current U.N. Charter use-of-force rules, at least as widely understood, are unrealistic and unworkable.

We have recently argued for a post-U.N. Charter regime of international law for regulating the use of force, including both preventive and humanitarian interventions.⁶² The overarching goal of this regime should be the maintenance of international peace and stability as a means of advancing global welfare. Under this approach, the international legal system should be designed to produce international public goods. These public goods include ensuring the safety and security of civilian populations from both internal and external threats, reducing grave human rights abuses such as genocide and ethnic cleansing, and promoting the nonproliferation of weapons of mass destruction. Unlike the U.N. Charter system, which is designed to drive the use of force by states to near zero, a reconstructed international legal system based on global welfare would seek to enable and induce states to provide the optimal level of force, thus allowing armed interventions in proper cases for the purpose of preventing catastrophic harms.

The emerging rationales, both for preventive wars intended to protect civilian populations from mass killing at the hands of rogue states or terrorist groups and for humanitarian interventions intended to forestall mass human rights abuses by governments against their own populations, are fundamentally similar. As argued above, there is a deep structural resemblance between these two forms of modern warfare, both of which in practice typically contravene the Charter's proscriptions.

Attempting to frame guidelines or criteria for evaluating proposed interventions, in light of the overarching global welfare norm, is not easy, and this Essay does not propose to provide definitive guidance of that kind. Nonetheless, five operational criteria are tentatively offered that may prove useful in evaluating whether a potential preventive war would serve global welfare. These criteria are closely modeled on similar criteria that may already be emerging in evaluating armed humanitarian interventions,⁶³ and they ultimately derive from classic *jus ad bellum* teaching. If over time the practices and

62. See Delahunty & Yoo, *supra* note 7.

63. See INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT § 4.16 (2001), available at <http://www.iciss.ca/report2-en.asp>.

opinions of states gradually conform to these criteria, then a new norm of international law might be said to have emerged for regulating preventive military interventions. This Essay addresses only the following two cases in which intervention against a state is contemplated. In the first, a state has publicly and credibly threatened the mass destruction of innocent civilian lives in another state (as Iran has threatened the Israeli population), or its recent conduct indicates—even in the absence of such public statements—that it poses a threat of that nature and gravity (as Iraq's pre-2003 conduct toward Iran, Kuwait, and its own Kurdish and Shi'ite populations demonstrated). In the second, a terrorist group, by its public statements or recent conduct, has threatened the mass destruction of innocent civilian lives, and operates within a state that either deliberately supports it, wrongfully neglects to counteract it, or is in a failed or failing condition and therefore unable to suppress it (as evidenced by al Qaeda's presence in Afghanistan in late 2001).

First, such a preventive war or armed intervention should only be undertaken after the prospective intervenor has announced that it is aggrieved by the wrongdoing state's (or group's) statements and conduct, has explained to other governments and the world media (as far as the security of its intelligence methods and sources permits) the nature and gravity of the threat its civilian population faces, has sought redress from the wrongdoing state or group if realistically possible, and has given its prospective target a reasonable opportunity to provide such redress.

Second, the potential intervenor must have the rightful purpose of protecting an innocent civilian population (typically, its own or an ally's) from a threat of mass killing of the kind described above or of a harm of a comparable severity and scale. The expected benefits of intervention, viewed *ex ante*, should outweigh the expected costs, measured in terms of global welfare.⁶⁴ To be sure, a potential intervenor's *stated* purpose may always disguise an improper motive. But there are various side-constraints on proposed interventions that can serve to screen out improper motives, such as a prohibition on annexing any part of the territory or exploiting any of the natural resources of the targeted state in the aftermath of a successful intervention.

64. Clearly, in this metric, the estimated total of lives saved by a preventive intervention will be a crucial element in calculating the intervention's effect on global welfare.

Third is a criterion corresponding to “rightful authority” in the classic *jus ad bellum*. Some might argue that acting in a broad coalition, whether with other great powers or smaller regional powers or both, is an important check on a pretextual use of force. If other nations reach the same judgment on a proposed intervention, it might be thought that there is less likelihood that the intervening powers seek the gain of territory or resources. Moreover, having the support of foreign allies may generate greater domestic support in a democracy for the intervention. And, of course, acting in concert with allies will likely result in more equitable distribution of the costs of the intervention. There is some truth to all these points. But requiring regional support or a great power consensus surely cannot be an absolute and inflexible prerequisite for a valid preventive intervention. Undoubtedly, the populations of the United States, Great Britain, Israel, and now India are far more exposed to transnational terrorist threats than those of other nations. The right and duty of those nations to protect their civilians from such threats cannot hinge on the willingness of comparatively unendangered states to support them. (A requirement of regional support would seem particularly absurd in the case of Israel, given that the chief dangers to its population come from or are based in several of its regional neighbors.) As the American experience in Iraq has shown, regional powers may be unable to come to a consensus concerning an outside intervention, or may even prefer to wait on the sidelines, hoping to profit from an intervention that they are unwilling to assist. In some circumstances, therefore, unilateral action by those states that are especially at risk would be justified.

Fourth, the potential intervenor should have attempted means other than the use of force to dispel the threat or should have reasonably concluded that such means would be unavailing. These alternatives include diplomacy, economic pressures or inducements, deterrence, and containment.

Fifth, the preventive use of force in the situations in question should be proportionate to the threat to which it is addressed. While the requirement of proportionality is, of course, hard to define with any real precision,⁶⁵ it was traditionally regarded as

65. See Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L. 715, 719–34 (2008) (surveying international law relating to proportionality as a requirement of *jus ad bellum*); *id.* at 734 (noting that international law “has not as yet generated a textured, mature jurisprudence conducive to the credible weighing of a military wrong against concomitant countermeasures”).

a rule of the *jus ad bellum*, in cases both of preventive war and otherwise.⁶⁶ In the context of this Essay, proportionality requires that the preventive intervention entail no more death and destruction than is needed to eliminate the threat. Furthermore, it is at least arguable that "proportionality" requires respect for the sovereignty of the targeted state as far as effective prevention of the threat it poses permits. Thus, a preventive intervention may require an outcome as drastic as regime change (as in Iraq in 2003), but only in an extreme case where no less intrusive measures would effectively remove the threat.

CONCLUSION

This brief Essay has sought to establish three points. First, the Bush Doctrine was by no means an anomaly, as many of its critics have alleged. Rather, that Doctrine—whatever its flaws in execution may have been—fell within the broad traditions of American strategic thought. American diplomacy and military practice over the past two centuries, like those of other great powers, reveal many instances in which preventive wars or other armed interventions of a preventive kind have been contemplated, openly threatened, or actually conducted.

Second, the justifications for a preventive war fought to protect the nation's civilian population from the threat of mass killing have a deep resemblance to the justifications now commonly given, and accepted, for preventive "humanitarian" interventions. In contrast, a legal position that would forbid preventive war in all circumstances, but allow humanitarian intervention, would be incoherent.

Third, and most tentatively, a variety of tests have been suggested for making a normative judgment on the permissibility of a particular preventive war or intervention. Even if these criteria prove unsatisfactory on more sustained examination, whether because they are too lax or too restrictive, *some* tests should, and eventually will, supplant the U.N. Charter's use-of-force rules in this area.

66. See, e.g., CHRISTOPHER GREENWOOD, *ESSAYS ON WAR IN INTERNATIONAL LAW* 16 (2007). Separate and distinct from the *jus ad bellum* requirement of proportionality, the conduct of a belligerent in its military operations must also observe the standards of "proportionality" imposed by the *jus in bello*.

PUBLIC BIOETHICS AND THE BUSH PRESIDENCY

O. CARTER SNEAD*

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* Associate Professor, Notre Dame Law School. Many thanks to Bill Kelley, Rick Garnett, Yuval Levin, John Meiser, and Leigh Fitzpatrick Snead.

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INTRODUCTION

"Bioethics" emerged in America as a field of scholarly reflection in the 1960s.¹ The field concerns itself with fundamental questions, including what it means to be human, the nature and value of human life (and death), the ends of medicine, and the purpose of science. It began with a series of conferences convened to discuss the tensions between the humanistic and scientific dimensions of medical practice wrought by extraordinary advances in biomedical science and biotechnology.²

1. GILBERT C. MEILAENDER, *BODY, SOUL, AND BIOETHICS* 1 (1995) ("Albert Jonsen dates the 'birth of bioethics' from the year 1962, when Shana Alexander's article describing the Seattle dialysis selection committee appeared in *Life* magazine. Elsewhere, Jonsen describes 1965-75 as the 'formative decade' for bioethics in this country. David Rothman, in what is the first history of the bioethics movement, dates its beginning with the 1966 publication of Henry Beecher's articles exposing abuses in human experimentation."). The origin of the term "bioethics" is contested, though its first usage appeared in 1970. It has been attributed both to Sargent Shriver (original funder of the Georgetown Kennedy Institute of Ethics) and Van Rensselaer Potter (research oncologist from University of Wisconsin). Whereas Shriver used the term to denote the ethical analysis of the development and application of biomedical science, Potter seemingly meant something more capacious, encompassing the relationship between man, his environment, and the civilized world. Shriver's definition more closely approximates the meaning of the term as it is used in America. For a discussion of the history of the term, see ALBERT R. JONSEN, *THE BIRTH OF BIOETHICS* 26-27 (1998).

2. Such conferences included *Great Issues of Conscience in Modern Medicine*, held at Dartmouth College in 1960, *Man and His Future*, held by the Ciba Foundation in London in 1962, the Nobel Laureate Series at Gustavus Adolphus College, which included *Genetics and the Future of Man* (held in 1965, featuring a presentation by William Shockley on eugenics, and a rebuttal by Paul Ramsey), and *The Human Mind* (in 1967, featuring a presentation by James Gustafson). For a detailed discussion of these events, see JONSEN, *supra* note 1, at 13-15. Dr. S. Marsh Tenney

Shortly thereafter, several centers were founded to explore bioethical questions in a sustained and rigorous way.³ As with many of the most compelling and contentious matters of moral concern, bioethics also captured the attention of those charged with making and enforcing the law at both the federal and state levels. In the same years that scholars were turning to these questions at conferences and in academic centers, Congressmen and Senators were holding hearings of their own.⁴ This constellation of governmental activity marked the birth of a new branch of bioethics—*public bioethics*—concerned with the *governance* of medicine, science, and biotechnology in the name of ethical goods. Since its emergence in American law, public bioethics has been a permanent fixture in the halls of government and the public square. Issues such as abortion, embryo research, assisted reproduction, end of life matters, genetic screening and engineering, organ transplantation, human cloning, and

(then Dean of Dartmouth Medical School) noted at one of the very first such events, "Although [medicine's] foundations have become more rational, its practice—the welding of science and humanism—is said to have become more remote and indifferent to human values, and once again medicine has been forced to remind itself that it is often the human factors that are determinant." *Id.* at 13.

3. Such institutions included The Hastings Center (opened in 1969 to study ethical issues relating to death and dying, behavioral control, genetic engineering and counseling, and population control), *id.* at 20–21, the Society for Health and Human Values (opened in 1968 in response to concerns about an undue emphasis on mechanistic explanations in medical education), *id.* at 24–25, and the Kennedy Institute of Ethics at Georgetown University (opened in 1971 to study issues in reproduction and ethics), *id.* at 22–23.

4. *Id.* at 92–100. Senator Walter Mondale convened hearings in 1968 in connection with his proposal to create a "President's Commission on Health Science and Society," which would recommend policies on organ transplantation, genetic engineering, behavior control, human subjects protections, and the financing of research. *See id.* at 90. In 1973, Senator Edward Kennedy convened hearings to discuss proposed research on living fetuses slated for abortion and race discrimination in human subjects abuses (such as those that had occurred in Tuskegee, Alabama). *See id.* at 95. These hearings resulted in the passage of the National Research Act, Pub. L. No. 93-348, 88 Stat. 342 (1974), which created the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, charged "to identify the basic ethical principles that should underlie the conduct of biomedical and behavioral research involving human subjects and develop guidelines that should be followed in such research," and to conduct a "comprehensive study of the ethical, legal and social implications of advances in biomedical research." JONSEN, *supra* note 1, at 99–100. The Secretary of Health, Education, and Welfare (now known as the Secretary of Health and Human Services) was directed by law to implement the advice received by the National Commission within a stated period of time, or to show cause why such action was not taken.

the relationship between mind, brain, and behavior, have proliferated as political questions and quite often, by extension, legal matters. These issues are now routinely the subject of both political campaigns and concrete actions by the political branches of government.

Public bioethics figured prominently during the tenure of President George W. Bush. This Article explores the Bush legacy in this domain. It begins by articulating and examining the grounding norms of President Bush's approach to public bioethics. Next, it analyzes how these norms were applied to concrete areas of concern. Building on this analysis, the next section reflects on what the President's actions illustrate about the capacity of the Executive Branch to shape public bioethics. The Article concludes with a brief discussion of the possible metrics by which the Bush Administration's efforts might be judged, and then offers several assessments according to the various standards identified.

I. THE BUSH ADMINISTRATION'S APPROACH TO PUBLIC BIOETHICS: GROUNDING GOODS

A. *The Fundamental Equality of All Human Beings*

In justifying the bioethics policy of the Administration, President Bush repeatedly and unambiguously cited one particular grounding good: respect for the intrinsic and fundamental equality of all human beings.⁵ Indeed, this was arguably the most commonly invoked normative principle during his tenure in office (though many have and will continue to object vigorously to how he defined the substance and scope of human

5. See, e.g., Remarks on Signing the Fetus Farming Prohibition Act and Returning Without Approval to the House of Representatives the "Stem Cell Research Enactment Act of 2005," 42 WEEKLY COMP. PRES. DOC. 1362, 1364 (July 19, 2006) ("America was founded on the principle that we are all created equal and endowed by our Creator with the right to life."). Some might argue that "human dignity" was the grounding norm, and it is true that President Bush sometimes used that term to describe his approach. That said, the concept of dignity is famously contested and difficult to define. See PRESIDENT'S COUNCIL ON BIOETHICS, HUMAN DIGNITY AND BIOETHICS (2008). Moreover, the President's recurrent theme was the equal value and "matchless worth" of all human lives. In defending this good, the President regularly invoked the Declaration of Independence and similar sources. Accordingly, this Article will treat "equality" as the appropriate term to describe his grounding norm for public bioethics.

equality, as well as the means he employed to pursue it).⁶ In his first inaugural address, President Bush appealed to a robust notion of equality to defend his domestic agenda (particularly regarding the problem of poverty): "The grandest of [our Nation's] ideals is an unfolding American promise that everyone belongs, that everyone deserves a chance, that no insignificant person was ever born."⁷ The intrinsic equality and worth of every human being was also the stated norm underlying the President's Malaria Initiative (PMI), begun in 2005 to ameliorate and ultimately eradicate the disease in Africa. On Malaria Awareness Day in 2007, President Bush described the program as rooted in the notion that "[e]very life matters to the American people. Every life is precious."⁸ Similarly, President Bush has defended the President's Emergency Plan for AIDS Relief (PEPFAR), meant to fight the global AIDS pandemic in Africa and the Caribbean. Upon signing the Tom Lantos and Henry Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, President Bush noted that "[w]ith this legislation, America is showing its tremendous regard for the dignity and worth of every human being."⁹ Indeed, President Bush invoked the intrinsic equality of every human being as the primary justification for his highly controversial approach to promoting freedom and fighting tyranny around the globe (including in Afghanistan and Iraq):

From the day of our founding, we have proclaimed that every man and woman on this Earth has rights and dignity and matchless value, because they bear the image of the Maker of heaven and Earth. Across the generations, we have proclaimed the imperative of self-government, because no one is fit to be a master and no one deserves to be a slave. . . .

So it is the policy of the United States to seek and support the growth of democratic movements and institutions in

6. For a very brief discussion of how such supporters and critics might appraise the Bush Administration's legacy for public bioethics, see *infra* Part III.D–E.

7. Inaugural Address, 1 PUB. PAPERS 1, 1 (Jan. 20, 2001).

8. Remarks on the Observance of Malaria Awareness Day, 43 WEEKLY COMP. PRES. DOC. 525 (Apr. 25, 2007).

9. Remarks on Signing the United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, 44 WEEKLY COMP. PRES. DOC. 1045 (July 30, 2008).

every nation and culture, with the ultimate goal of ending tyranny in our world.¹⁰

The most distinctive feature of President Bush's conception of human equality was its unconditional and uncontingent nature. According to this view, all human beings are equal in value simply by virtue of their membership in the species; because of *who* they are as members of the human family. It is intrinsic to every human being irrespective of his age, size, location, race, sex, usefulness (or burdensomeness) to others, possession or lack of certain favored physical or mental capacities, or the worth assigned to him by others.¹¹ President Bush conceived of equality as a pre-political attribute of the human being; the state can neither confer nor negate it.¹²

President Bush implicitly rejected the notion that an individual's moral status (and the attendant protections that it entails) waxes and wanes according to the judgment of others, in light of physical, mental, or circumstantial criteria that such others might establish.¹³ He regarded this competing approach as standing the

10. Inaugural Address, 41 WEEKLY COMP. PRES. DOC. 74 (Jan. 20, 2005). Obviously, some would take strong issue with this justification and would argue to the contrary that the President's doctrine of preemption reflects an unequal valuation of American lives (risked by the threat of terrorism) compared to the lives of innocent civilians living in terrorist-supporting regimes targeted by the U.S. military.

11. *See, e.g.*, Telephone Remarks to the March for Life, 42 WEEKLY COMP. PRES. DOC. 101 (Jan. 23, 2006) ("You believe, as I do, that every human life has value, that the strong have a duty to protect the weak, and that the self-evident truths of the Declaration of Independence apply to everyone, not just to those considered healthy or wanted or convenient. These principles call us to defend the sick and the dying, persons with disabilities and birth defects, all who are weak and vulnerable, especially unborn children."). *See also* the discussion of the Bush Administration's policy for federal funding of embryonic stem cell research, *infra* Part II.A, and the case of Terri Schiavo, *infra* Part II.D.2.

12. *See, e.g.*, Remarks to March for Life Participants, 44 WEEKLY COMP. PRES. DOC. 93 (Jan. 22, 2008) ("This America is the destiny of a people whose founding document speaks of the right to life that is a gift of our Creator, not a grant of the state.").

13. President Bush's conception of human equality stands in stark contrast to those frameworks that define "persons" (that is, rights-bearing individuals who merit moral concern and forbearance) in a more exclusive fashion—according to more exacting criteria such as the presence or absence of certain active capacities (such as sentience, the ability to feel pain, and so on). This competing approach is reflected in H. Tristram Englehardt's argument that "persons" are those who have the ability to be "concerned about moral arguments and . . . convinced by them. They must be self-conscious, rational, free to choose, and must possess moral concern." MEILAENDER, *supra* note 1, at 109–10 (quoting H. TRISTRAM ENGLEHARDT, JR., *THE FOUNDATIONS OF BIOETHICS* 105 (1986)). In a similar vein, bioethicist Ronald Green has argued that the criteria for personhood need to be determined

equality principle on its head—privileging the claims of the strong over those of the weak. He believed that this principle of contingent personhood would produce monstrous practical results—including, for example, a sliding scale of moral and legal standing for people based on their cognitive ability, usefulness, strength, and so on. In this way, President Bush's approach appears to have taken its bearings from Hans Jonas's injunction that "utter helplessness demands utter protection."¹⁴ And he said many times that the fundamental purpose of government is to protect the weak from the strong.¹⁵

As will be discussed in detail below, the key concrete ethical entailment of this conception of basic human equality for biomedical research is that no human subject (regardless of his age, size, or circumstance) shall be intentionally instrumentalized or destroyed for the benefit of others.¹⁶ For the practice of medicine, this principle of equality entitles patients to care and concern regardless of their condition of dependency or disability, and precludes the withholding or withdrawal of care (or, for that matter, active killing) based on others' judgments that such a life is not worth living. Also, this particular vision of equality grants all health care providers, without discrimination, the right to pursue their vocations without being compelled to act against their consciences.

by those who are indisputably persons (that is, members of the able-minded community of reasoners), according to their judgments about how granting or withholding moral personhood might affect the liberty interests of the decisionmakers. See Ronald Green, *Toward a Copernican Revolution in Our Thinking About Life's Beginning and Life's End*, 66 *SOUNDINGS* 152, 152–57 (1983). Under these and related approaches, "personhood" or moral worth is something that is earned or accrued, and thus is possessed by a subset of human beings. It is not a universal, intrinsic quality, co-extensive with merely being a living human being.

14. Hans Jonas, *Philosophical Reflections on Experimenting with Human Subjects*, 98 *DAEDALUS* 219, 240 (1969).

15. See, e.g., Statement on Signing Legislation for the Relief of the Parents of Theresa Maria Schiavo, 41 *WEEKLY COMP. PRES. DOC.* 484 (Mar. 21, 2005).

16. See, e.g., Remarks on Returning Without Approval to the Senate the "Stem Cell Research Enhancement Act of 2007," 43 *WEEKLY COMP. PRES. DOC.* 832 (June 20, 2007) ("Destroying human life in the hopes of saving human life is not ethical . . ."); Telephone Remarks to the March for Life, 38 *WEEKLY COMP. PRES. DOC.* 101 (Jan. 22, 2002) ("[A]nd a compassionate society will defend a simple, moral proposition: Life should never be used as a tool or a means to an end."); George W. Bush, Op-Ed., *Stem Cell Science and the Preservation of Life*, *N.Y. TIMES*, Aug. 12, 2001, at WK13 ("There is at least one bright line: We do not end some lives for the medical benefit of others.").

B. *Pursuit and Application of Biomedical Knowledge
for the Common Good*

The Bush Administration asserted that its second animating good for bioethics policy (to be pursued within the ethical boundaries defined by the conception of equality laid out above) was a robust commitment to supporting biomedical research, aimed ultimately at the alleviation of human suffering as well as the humane and competent medical practice that it augmented.¹⁷

II. IMPLEMENTATION OF THE GROUNDING GOODS

The narrative of the Bush Administration's approach to public bioethics can largely be described as an effort to find the proper relationship between its two grounding principles—profound respect for the fundamental equality of every human being and vigorous support for biomedical research and the healing arts. The search for a fitting balance between these competing goods unfolded in a variety of public bioethical contexts, most notably in the debates over embryonic stem cell research (and related questions, such as human cloning), end of life matters, abortion, and conscience protections for healthcare providers.

The governance of biomedical research and medical practice in the name of ethical goods can take many forms. The public bioethics spectrum includes a vast array of governmental activity, including (from most permissive to least permissive types of interventions): formal endorsement and support (typically in the form of federal funding), silent permission (the default rule in the face of governmental inaction), permission with surveillance (such as reporting requirements), permission with conditions (such as licensure and certification), and outright criminal bans. The executive branch of the federal government has manifold tools at its disposal to implement a public bioethics agenda, including the issuance of executive directives (such as executive memoranda or orders), the operation of administrative agencies, the legislative process (where the President can shape, promote, or block relevant bills), appointments to the

17. See Message to the House of Representatives Returning Without Approval the "Stem Cell Research Enhancement Act of 2005," 42 WEEKLY COMP. PRES. DOC. 1365 (July 19, 2006) ("Like all Americans, I believe our Nation must vigorously pursue the tremendous possibilities that science offers to cure disease and improve the lives of millions.").

judiciary, and the use of the unparalleled bully pulpit of the presidency. The Bush Administration deployed all of these mechanisms in pursuing its bioethics agenda.

A. *Embryonic Stem Cell Research and Related Issues*

The moral, legal, and public policy dispute over embryonic stem cell research (and related matters, such as human cloning) is the most prominent issue in public bioethics of the past decade. Since the derivation of human embryonic stem cells in 1998 at the University of Wisconsin,¹⁸ the issue has been debated and discussed by scholars, politicians, members of the popular media, and the public at large. It has been a recurring issue in political campaigns and the activities of the political branches of government at the state and federal level. Without question, it is the defining issue for President Bush's contribution to public bioethics.

The primary question raised by the practice of embryonic stem cell research is whether it is morally defensible to disaggregate (and thus destroy) living human embryos in order to derive pluripotent cells for purposes of basic research that may someday yield regenerative therapies.¹⁹ The embryos used in this kind of research are typically donated by individuals or couples who conceived them by in vitro fertilization (IVF) in the context of receiving assisted reproduction treatment, but who no longer need or want them for such a purpose. There are reports of some researchers creating embryos by IVF solely for use (and destruction) in research.²⁰ Theoretically, embryos for use in stem cell research could also be created by somatic cell nuclear transfer (that is, human cloning for biomedical re-

18. James A. Thomson et al., *Embryonic Stem Cell Lines Derived from Human Blastocysts*, 282 *SCIENCE* 1145 (1998).

19. Pluripotent cells are unique and valuable because they are undifferentiated (meaning that they have the capacity to become any kind of tissue in the body) and, in principle, self-renewing (that is, they can reproduce themselves indefinitely without losing their pluripotency). They can be derived from the inner-cell mass of the early embryo (embryonic stem cells), the gonadal ridge of the early fetus (embryonic germ cells), and perhaps from a variety of other sources, including amniotic fluid, bone marrow, adipose cells, and so on. Recent developments suggest that adult cells can be reprogrammed to pluripotency through the introduction of certain genetic factors. See, e.g., Kazutoshi Takahashi et al., *Induction of Pluripotent Stem Cells from Adult Human Fibroblasts by Defined Factors*, 131 *CELL* 861 (2007).

20. See Sheryl Gay Stolberg, *Scientists Create Scores of Embryos to Harvest Cells*, *N.Y. TIMES*, July 11, 2001, at A1.

search, or so-called “therapeutic cloning”), though efforts to derive pluripotent cells from cloned human embryos have not yet succeeded.²¹ The scientific aspirations for embryonic stem cell research are manifold, including the goals of understanding the mechanisms of early human development, testing and developing pharmaceuticals, and ultimately devising new regenerative therapies. According to prominent researchers in this field, realizing these aspirations will require the creation of a bank of embryonic stem cell lines large enough to be sufficiently diverse both for the creation of models to study all relevant diseases or injuries that might admit of regenerative cell-based therapy, and for purposes of immunocompatibility (should such therapies be developed). This program will thus require the use and destruction of millions of human embryos. Given the scarcity of donated IVF embryos for this purpose,²² creating embryos by IVF or cloning solely for the sake of research is a necessity.²³

The moral permissibility of embryonic stem cell research depends ultimately on the status of the human embryo that is necessarily destroyed in this process. In resolving this question, President Bush appealed both to his radical conception of human equality and the findings of modern embryology. The relevant science confirmed that the five- to six-day-old human embryo used and destroyed in stem cell research is a complete, living, self-directing, integrated, whole individual²⁴ member of

21. For extended discussion of the science, ethics, and public policy of embryonic stem cell research and human cloning, see PRESIDENT’S COUNCIL ON BIOETHICS, MONITORING STEM CELL RESEARCH (2004) [hereinafter MONITORING STEM CELL RESEARCH], and PRESIDENT’S COUNCIL ON BIOETHICS, HUMAN CLONING AND HUMAN DIGNITY: AN ETHICAL INQUIRY (2002) [hereinafter HUMAN CLONING AND HUMAN DIGNITY]. See also O. Carter Snead, Keynote Address: *Preparing the Groundwork for a Responsible Debate on Stem Cell Research and Human Cloning*, 39 NEW ENG. L. REV. 479 (2005).

22. The most comprehensive study to date, conducted by RAND in 2003, estimated that there are 400,000 or so embryos in cryopreservation, only 2.8% of which have been formally designated for donation. See David I. Hoffman et al., *Crytopreserved embryos in the United States and their availability for research*, 79 FERTILITY & STERILITY 1063, 1068 (2003).

23. See Robert Lanza & Nadia Rosenthal, *The Stem Cell Challenge*, SCI. AM., June 2004, at 92.

24. In making his stem cell funding decision, President Bush implicitly rejected the argument that because the embryos used in stem cell research are capable of “twinning,” they are not yet stable individuals, and thus not entitled to substantial moral respect. “Twinning” is the process by which cells that become disarticu-

the human species, who, given the proper environment, will (if all goes well) move itself along the trajectory of human biological development from embryo, to fetus, to neonate, to child, to adolescent, to adult.²⁵ The biological status of embryos as human organisms did not, however, settle the question of their moral status. For this judgment, President Bush reflected on the notion of human equality as a principle of classical liberalism underlying the nation's founding. He concluded that the only coherent (non-self-destroying) understanding of human equality is one that encompasses all human beings without discrimination on the basis of accidental characteristics such as age, size, condition of dependency or vulnerability, circumstances, or the esteem of others. Accordingly, President Bush concluded that the intentional use and destruction of embryos in stem cell research is gravely immoral and unjust. Furthermore, he took the position that the intentional creation of embryos (by IVF or cloning) for use and destruction in research is, *a fortiori*, morally unacceptable.²⁶

lated from the embryo sometimes, through a process of restitution and regulation, resolve themselves into a new, whole organism. It is believed that twinning occurs in very few cases; monozygotic twins are rare, accounting for only 1 in 240 births. President Bush may have been moved by the argument that, as a biological matter, "indivisibility" is not regarded as a necessary criterion for individuation in an organism. Other species are clearly classified as individual organisms, despite their capacity for the biological equivalent of twinning (for example, flatworms). Rather, organisms are defined according to the level of integration and organization of their constituent parts. Human embryos show highly integrated organization, specialization, and differentiation well before the blastocyst phase of development (that is, when they are used in stem cell research). Accordingly, there is strong support for the proposition that a blastocyst is clearly an individuated organism—that is, a whole, individual member of the human species. See, e.g., Louis Guenin, *The Nonindividuation Argument Against Zygotic Personhood*, 81 *PHILOSOPHY* 463 (2006) (arguing in favor of embryo research on other grounds). Moreover, opponents of the twinning argument cite recent research (showing a dramatic increase in incidence of monozygotic twinning after preimplantation genetic diagnosis) to support the notion that monozygotic twinning is caused by an extrinsic disruption (for example, blastomere biopsy, as performed in PGD), and is not an intrinsic quality of the early embryo.

25. See Bush, *supra* note 16.

26. President Bush has also expressed several other ethical concerns about human cloning for biomedical research, including that its practice makes reproductive cloning inevitable (as the only remaining step for that procedure is a transfer of the cloned embryo to a woman's uterus), that it represents an unprecedented step toward more refined techniques of engineering human organisms with a pre-selected genetic constitution, and that the massive number of ova required to conduct cloning research creates dangerous incentives to exploit women, particularly poor women, as sources.

In making this judgment, President Bush implicitly rejected the arguments of those who assert that the human embryo is not entitled to a high degree of moral respect because it lacks certain preferred capacities or characteristics.²⁷ This, in President Bush's mind, was tantamount to the most unjust and invidious kind of discrimination. He likewise rejected the more limited argument in favor of using and destroying donated embryos from fertility clinics because they are destined to be discarded and destroyed in any event. President Bush's understanding of equality dictated that living human beings should not be treated as raw materials to be exploited and destroyed for biomedical research purposes simply because someone else has made the decision that their lives were no longer useful and thus should be terminated.²⁸ And his devotion to the principle of radical equality and, in his words, respect for the "matchless worth" of every individual, led him to reject a straightforward utilitarian argument that assumed the personhood of the embryo, but nevertheless justified its use in research simply by virtue of the hoped-for lifesaving promise of the therapies that might emerge from it.²⁹

Having explored the way in which President Bush applied his principle of radical equality to the ethical question of embryonic stem cell research as a general matter, let us examine the concrete actions he took as head of the executive branch in this regard.

27. A prominent proposed characteristic for this purpose is the "primitive streak"—a biological structure that marks the location of the vertebral column and indicates the anterior-posterior axis of the organism (though recent evidence suggests that polarity may be established much earlier, perhaps by the locus of penetration of the egg by the sperm). The primitive streak also marks the moment after which "twinning" is no longer possible. Other suggested capacities marking personhood include the nervous system, the brain, and more mature human somatic form. For a review of these arguments and rejoinders to them, see MONITORING STEM CELL RESEARCH, *supra* note 21.

28. For an extended exploration of this argument, see Gilbert Meilaender, *Spare Embryos*, WKLY. STANDARD, Aug. 26–Sept. 2, 2002, at 25.

29. See, e.g., Julian Savulescu, *The Embryonic Stem Cell Lottery and the Cannibalization of Human Beings*, 16 *BIOETHICS* 508, 529 (2002) ("ES cell technology stands to benefit everyone It is this property that may make it reasonable to kill some embryos to conduct ES cell research even if the embryo is a person."). One might take issue with the claim on its own terms in light of the speculative nature of the promise of embryonic stem cell research compared to the certainty of the destruction of the embryonic human life on which it depends. Also, the possibility that other non-embryonic sources of pluripotent cells—for example, adult stem cells, or reprogrammed adult cells—might yield similar therapies further complicates the utilitarian calculus in this context.

1. Executive Actions

a. Presidential Directives and Agency Actions

One of the first major actions of the President's tenure was to set the federal policy for funding embryonic stem cell research. In fact, prior to September 11, 2001, this issue was the most hotly debated of his presidency. When President Bush took office, there was a nearly thirty year history of gridlock among the political branches on the question of federal funding for research entailing the destruction of embryos. At various periods, Congress would favor such funding, but the White House would not, and vice versa.³⁰ The practical result of the stalemate was that the federal government had never provided funding for research that depended on the destruction of human embryos. After much deliberation, President Bush announced his policy in the first televised address of his presidency on August 9, 2001. He spent the bulk of the address discussing the competing ethical goods, namely, respect for the equality of every human life, and the moral obligation to advance scientific knowledge aimed at the amelioration of human suffering wrought by debilitating injuries and dread diseases. He concluded that, although he strongly supported biomedical research aimed at these ends, he firmly held the view that such research must operate within the boundaries dictated by the ethical norm of respect for human equality. Accordingly, he authorized federal funding for all types of stem cell research that met these criteria and would not create incentives for the further destruction of human lives at the embryonic stage of development. Obviously, all forms of non-embryonic stem cell research would be eligible for funding under this plan, including so-called adult stem cell research (meaning pluripotent or multipotent cells derived from differentiated tissue, including bone marrow, umbilical cord blood, and the like). President Bush also authorized funding for embryonic stem cell research using cell lines that had been derived from embryos that had been destroyed prior to the announcement of the policy. He

30. For a discussion of this debate and the various actions taken by Congress and the White House, see O. Carter Snead, *The Pedagogical Significance of the Bush Stem Cell Policy: A Window into Bioethical Regulation in the United States*, 5 YALE J. HEALTH POL'Y L. & ETHICS 491 (2005).

said that funding work using these lines would move the science forward without incentivizing future embryo destruction (given that no federal funding would be available for work on lines derived after August 9, 2001).

When he announced the policy, he said that there were more than sixty genetically diverse lines that met the funding criteria.³¹ In the days that followed, other qualifying lines were identified, bringing the number to seventy-eight. Though seventy-eight lines were eligible for funding, far fewer were available for research, for reasons relating both to scientific and intellectual property related issues.³² At the moment, there are twenty-one lines available for use, and nearly one thousand shipments of cell preparations from these lines have been shipped to researchers.³³ As of July 2007, the Administration had made more than \$3 billion available for all eligible forms of research, including more than \$130 million for embryonic stem cell research.³⁴

In 2007, in the wake of a series of revolutionary developments in non-embryonic stem cell research,³⁵ including, most prominently, the development of a technique for reprogramming adult stem cells to a state of pluripotency merely by introducing a small number of genetic factors ("induced pluripo-

31. Bush, *supra* note 16.

32. The President's Council on Bioethics explained the process by which an eligible cell line becomes available for use:

The process of establishing a human embryonic stem cell line, turning the originally extracted cells into stable cultured populations suitable for distribution to researchers, involves an often lengthy process of growth, characterization, quality control and assurance, development, and distribution. In addition, the process of making lines available to federally funded researchers involves negotiating a contractual agreement (a "materials transfer agreement") with the companies or institutions owning the cell lines, establishing guidelines for payment, intellectual property rights over resulting techniques or treatments, and other essential legal assurances between the provider and the recipient.

MONITORING STEM CELL RESEARCH, *supra* note 21, at 43.

33. The recently announced Phase I clinical trials for embryonic-stem-cell-based therapies sponsored by Geron use Bush-approved cell lines. Peter Benesh, *Stem Cell Companies See Signs of Hope, Obama's Position a Plus with Fewer Restrictions*, INVESTOR'S BUS. DAILY, Feb. 9, 2009, at A8.

34. See Exec. Order No. 13,435, 72 Fed. Reg. 34,591 (June 20, 2007); President's Message to the Senate Returning Without Approval the "Stem Cell Research Enhancement Act of 2007," 43 WEEKLY COMP. PRES. DOC. 833 (June 20, 2007).

35. See, e.g., Paolo De Coppi et al., *Isolation of amniotic stem cell lines with potential for therapy*, 25 NATURE BIOTECH. 100 (2007).

tent state cells" or "iPS cells"),³⁶ President Bush expanded the National Institutes of Health Stem Cell Registry to list all forms of pluripotent cell research eligible for funding.³⁷ The registry was renamed the "NIH Human Pluripotent Stem Cell Registry" to emphasize the function of the cells rather than their origins. He also directed the Secretary of Health and Human Services (HHS) to "prioritize[] research with the greatest potential for clinical benefit," and to "take[] into account [alternative, non-embryo-destructive] techniques outlined by the President's Council on Bioethics."³⁸ The Executive Order clearly stated that the activities of the federal government in this context must be consistent with "the principle that no life should be used as a mere means for achieving the medical benefit of another."³⁹ Consistent with this principle, the government should "move forward vigorously with medical research."⁴⁰ In this way, the 2007 Executive Order captures the balance at the heart of President Bush's approach to public bioethics.

The Food and Drug Administration (FDA) also played a significant role in facilitating the President's stem cell funding policy. It issued guidance documents and sent letters to interested parties (including Congressmen) making clear that there would be no problem in administering the approval process for therapeutic products using the approved lines, should any be devel-

36. See Takahashi et al., *supra* note 19; Junying Yu et al., *Induced Pluripotent Stem Cell Lines Derived from Human Somatic Cells*, 318 *SCIENCE* 1917 (2007). The world's leading stem cell researchers hailed the development of these iPS cells as groundbreaking because these new cells were easier to produce than embryonic stem cells, they appeared to have all the characteristics of their embryonic counterparts, they were immunocompatible with the donor of the reprogrammed skin cell, and they were ethically uncontroversial in that their derivation required neither an embryo nor human ova. Some have raised safety concerns about the kinds of genes used (some were oncogenes associated with formation of tumors) and the viral vectors used to introduce the genes. Defenders of the research respond that embryonic stem cells have been associated with the formation of tumors. In any event, several papers have been published achieving the same results without using either the controversial oncogenes or viral vectors (retroviruses). Very recently, a paper was published describing a technique for reprogramming adult cells without the need for any viral vector at all (thus removing a key safety concern). See Knut Woltjen et al., *piggyBac transposition reprograms fibroblasts to induced pluripotent stem cells*, *NATURE*, Mar. 1, 2009, at 1.

37. Exec. Order No. 13,435, 72 Fed. Reg. 34,591 (June 20, 2007).

38. *Id.*

39. *Id.*

40. *Id.*

oped. In particular, the FDA offered assurances that there were no novel xenotransplantation issues presented relating to the culture of some of the cell lines on murine (mouse) feeder layers.⁴¹

Separately, the FDA took action consistent with the President's view that human beings at the embryonic stage of development are entitled to deep moral respect. The agency issued an interim final rule in 2005 and a final rule in 2007 regarding its regulatory regime for "Human Cells, Tissues, and Cellular and Tissue-Based Products," which clarified that the related provisions for donor screening and testing would not preclude "adoption" of embryos from fertility clinic patients that might otherwise be destroyed.⁴²

Also within HHS, the Secretary's Advisory Council on Human Research Protections (SACHRP), tasked with providing "advice relating to the responsible conduct of research involving human subjects,"⁴³ took a symbolic step affirming President Bush's commitment to human equality in the context of embryo research. It formally amended its charter to include explicitly embryos as human subjects for purposes of the committee's work. This action did not have any concrete legal effects given that the federal statutory scheme for human subjects protections does not include embryos *in vitro* within its ambit.⁴⁴

b. Interventions in Intergovernmental Fora

The Bush Administration pursued and defended its conception of radical human equality through various international instruments concerning public bioethics. The most notable example of this effort is the four-year negotiation of the United

41. See, e.g., Letter from Bernard A. Schwetz, Acting Principal Deputy Comm'r, Food & Drug Admin., to Senator Edward M. Kennedy (Sept. 5, 2001), available at <http://www.fda.gov/oc/stemcells/kennedyltr.html> ("Thus, as intended and practiced, the FDA regulation of xenotransplantation products, while aimed first and foremost at safeguarding the public health, should not impose a substantial impediment to xenotransplantation product development, including HEPSC that are produced by culture in vitro with mouse cells.").

42. Human Cells, Tissues, and Cellular and Tissue-Based Products, 70 Fed. Reg. 29,949 (May 25, 2005) (interim final rule); 72 Fed. Reg. 33,667 (June 19, 2007) (final rule).

43. Sec'y of Health & Human Servs., Charter, Secretary's Advisory Committee on Human Research Protections (Sept. 25, 2008), available at <http://www.hhs.gov/ohrp/sachrp/charter.htm>.

44. See PRESIDENT'S COUNCIL ON BIOETHICS, REPRODUCTION AND RESPONSIBILITY: THE REGULATION OF NEW BIOTECHNOLOGIES 131 (2004) [hereinafter REPRODUCTION AND RESPONSIBILITY].

Nations Declaration on Human Cloning.⁴⁵ The United States vigorously supported the efforts of Costa Rica and other nations to adopt a declaration calling upon member states to ban all forms of human cloning. Conversely, the United States adamantly opposed any instrument that would seek to ban cloning to produce children (that is, the transfer of a cloned embryo to a woman's uterus in order to initiate a pregnancy meant to result in a live-born child; this is sometimes called "reproductive cloning") while approving or remaining silent on the issue of cloning for biomedical research (in which the cloned embryo is disaggregated for purposes of deriving embryonic stem cells, sometimes called "therapeutic cloning"). The United States took the position that a ban on cloning to produce children alone would be ineffective. But more importantly, the mechanism of such a ban would be the prohibition of transfer of cloned embryos to a woman's uterus—effectively requiring the destruction of any embryo produced by cloning. A law that required the killing of an entire category of living human organisms (that is, cloned embryos) ran squarely afoul of President Bush's principle that all human lives are equal, regardless of developmental stage or circumstance. Through the efforts of the United States working along with a diverse array of nations, a declaration calling for a ban on all forms of cloning passed, 84-34 (with 37 nations abstaining).⁴⁶

Similarly, at the United Nations Education, Science, and Culture Organization (UNESCO), the United States pressed the Administration's commitment to radical human equality in the negotiation of the Universal Declaration on Bioethics and Human Rights, adopted in 2005.⁴⁷ During this process, the United

45. United Nations Declaration on Human Cloning, G.A. Res. 59/280, U.N. Doc. A/RES/59/280 (Mar. 23, 2005). See generally Rev. Robert John Araujo, *The UN Declaration on Human Cloning: A Survey and Assessment of the Debate*, 7 NAT'L CATH. BIOETHICS Q. 129 (2007); Nigel M. de S. Cameron & Anna V. Henderson, *Brave New World at the General Assembly: The United Nations Declaration on Human Cloning*, 9 MINN. J.L. SCI. & TECH. 145 (2008).

46. Press Release, Gen. Assembly, General Assembly Adopts United Nations Declaration on Human Cloning by Vote of 84-34-37, U.N. Doc. GA/10333 (Aug. 3, 2005). Some of the abstaining nations later came forward in support of the declaration.

47. Universal Declaration on Bioethics and Human Rights, UNESCO Gen. Conference Res. 33/36 (Oct. 19, 2005). From 2004–2005, the Author led the U.S. delegation for the negotiation of the Universal Declaration on Bioethics and Human Rights. Currently, the Author is serving a four-year term as a member of UNESCO's Inter-

States successfully lobbied against the inclusion of language that would endorse embryonic stem cell research or human cloning. Moreover, the United States succeeded in including several clauses that advanced the principle of radical human equality, including language that one of the principal aims of the Declaration was to “promote . . . respect for the life of human beings.”⁴⁸

c. President’s Council on Bioethics

As his predecessors had done, President Bush created a commission to advise him on public bioethics. In particular, the commission (the President’s Council on Bioethics⁴⁹) was charged:

- (1) to undertake fundamental inquiry into the human and moral significance of developments in biomedical and behavioral science and technology;
- (2) to explore specific ethical and policy questions related to these developments;
- (3) to provide a forum for a national discussion of bioethical issues;
- (4) to facilitate a greater understanding of bioethical issues; and
- (5) to explore possibilities for useful international collaboration on bioethical issues.⁵⁰

The Council, chaired by Dr. Leon R. Kass (from 2001–2005), and later Dr. Edmund Pellegrino (from 2005–2009), held regular public meetings to discuss a variety of ethical issues arising from advances in biomedical science and biotechnology. Much of its work centered on the issues of embryonic stem cell research and related topics, including human cloning and the synthesis of assisted reproduction and genomic knowledge. The Council was composed of seventeen members, selected for

national Bioethics Committee, which, among other things, is charged with monitoring the implementation of all UNESCO instruments relating to bioethics.

48. *Id.* For a full discussion of the negotiation process and the ways in which the final declaration signals respect for human life, broadly understood, see O. Carter Snead, *Assessing the Universal Declaration of Bioethics and Human Rights: Implications for Human Dignity and the Respect for Human Life*, 7 NAT’L CATH. BIOETHICS Q. 53 (2007).

49. From October 2002 until July 2005, the Author served as General Counsel to the President’s Council on Bioethics.

50. Exec. Order No. 13,237, 66 Fed. Reg. 59,851 (Nov. 28, 2001).

their expertise in science, medicine, ethics, political theory, law, and social science. The members had widely differing views on most issues that came before the Council, and were quite divided as to the moral status of the embryo and the appropriate policies for stem cell research. A substantial number of members openly and vigorously disagreed with President Bush's funding policy for stem cell research.

The Council has produced several reports advising the White House on the issue of stem cell research and the related issues of cloning and the synthesis of assisted reproductive technologies and genomic knowledge. The first report, *Human Cloning and Human Dignity: An Ethical Inquiry*, elaborated the arguments for and against human cloning, both for purposes of biomedical research and producing children.⁵¹ In the descriptive sections of the report it also discussed the state of the science, and reflected on the importance of terminology that fully and fairly captured the ethical matters in dispute. The report concluded with majority and minority recommendations. Ten members of the Council voted to ban cloning to produce children and to impose a five-year moratorium on cloning for biomedical research.⁵² Seven members voted to ban cloning to produce children, but voiced support for cloning for biomedical research, subject to the creation of a sound regulatory regime.⁵³

The Council's report entitled *Monitoring Stem Cell Research* surveyed the developments in scientific research and ethical discourse since the announcement of the Bush funding policy.⁵⁴ It offered an ethical account of the President's policy and discussed all of the arguments for and against it that had emerged since its announcement. No formal recommendations were offered in this report. The Council's report, *Reproduction and Responsibility*, examined the current governance of the activities at the intersection of assisted reproduction, genetics, and embryo research,⁵⁵ and concluded by offering unanimous recommendations for legislation and self-regulation by professional societies to remedy weaknesses in the prevailing regime.⁵⁶ Finally, the

51. HUMAN CLONING AND HUMAN DIGNITY, *supra* note 21.

52. *Id.* at 202.

53. *Id.*

54. MONITORING STEM CELL RESEARCH, *supra* note 21.

55. REPRODUCTION AND RESPONSIBILITY, *supra* note 44.

56. *Id.* at 207–09, 215.

Council's white paper, *Alternative Sources of Pluripotent Cells*, provided a scientific and ethical analysis of four proposed techniques for obtaining stem cells without destroying or seriously harming human embryos.⁵⁷

The work of the Council supported President Bush's public bioethics agenda for stem cell research and related matters by reflecting on, giving further content to, and elaborating the ethical principles underlying his approach. The Council reports offered a rigorous and comprehensive account of (including arguments for and against) his principle of radical human equality as applied to the context of embryonic stem cell research and cloning. Because of its unusual degree of ideological diversity and its rules of procedure (which explicitly rejected consensus as a standard for agreement), the Council was able to offer advice that included vigorous challenges to the President's premises and conclusions. In addition to its advisory function, the Council tried to inform and promote public discussion on these issues more broadly.

2. *Legislative Actions*

President Bush actively intervened in the legislative process on several occasions to promote and defend his views regarding stem cell research and cloning. The first two vetoes of his Administration came in response to bills intended to liberalize his stem cell funding policy. The proposed Stem Cell Research Enhancement Act of 2005 and the Stem Cell Research Enhancement Act of 2007 provided federal funding for research on embryos that were originally conceived for use in assisted reproduction therapy but no longer wanted or needed for this purpose. Because President Bush regarded these measures as creating an incentive for the instrumentalization and destruction of embryonic human beings (subsidized by American taxpayers, a substantial portion of whom were deeply morally opposed to the practice), he vetoed both bills.⁵⁸

He promoted bills that he believed reflected the proper balance between respect for human equality and the obligation to pursue biomedical research for the common good. One success

57. PRESIDENT'S COUNCIL ON BIOETHICS, *ALTERNATIVE SOURCES OF HUMAN PLURIPOTENT STEM CELLS*, at x (2005).

58. *Supra* notes 17, 34.

in this regard was the Stem Cell Therapeutic and Research Act of 2005, which established and funded a new federal program to acquire and store umbilical cord blood, and expanded the pre-existing bone marrow program to include cord blood. The Bush Administration supported, but failed to secure passage of, another bill—the Hope Offered through Principled and Ethical Stem Cell Research Act (the HOPE Act)—which would have directed the Secretary of Health and Human Services to pursue and promote research involving alternative sources of pluripotent cells.⁵⁹

President Bush also promoted bills meant to prevent research practices that he believed directly contravened his fundamental principle of human equality. His chief success in this regard was the Fetus Farming Prohibition Act of 2006, which made it a federal crime for anyone:

involved or engaged in interstate commerce to . . . solicit or knowingly acquire, receive, or accept a donation of human fetal tissue knowing that a human pregnancy was deliberately initiated to provide such tissue; or . . . knowingly acquire, receive, or accept tissue or cells obtained from a human embryo or fetus that was gestated in the uterus of a nonhuman animal.⁶⁰

The Act was a response to a unanimous recommendation of the President's Council on Bioethics that such practices be banned.⁶¹ President Bush also supported the successful inclusion of an appropriations amendment (the "Weldon Amendment") that prohibited the patenting of human embryos.⁶²

59. Following the defeat of the bill in the House (it had passed the Senate with 70 votes), President Bush issued the Executive Order discussed above, *supra* notes 37–40 and accompanying text, which included essentially the same directives for HHS.

60. Pub. L. No. 109-242, 120 Stat. 570 (codified at 42 U.S.C. 289g-2).

61. REPRODUCTION AND RESPONSIBILITY, *supra* note 44, at 218–24 (recommending that "Congress should consider some limited targeted measures . . . proposed as moratoria").

62. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 634, 118 Stat. 3, 101 ("None of the funds appropriated or otherwise made available under this Act may be used to issue patents on claims directed to or encompassing a human organism."); *see also* REPRODUCTION AND RESPONSIBILITY, *supra* note 44, at 162–63 ("Recently, Congress enacted a measure effectively prohibiting the issuance of patents on human organisms. The Consolidated Appropriations Act of 2004 provides, 'None of the funds appropriated or otherwise made available under this Act may be used to issue patents on claims directed to or encompassing a human organism.' As further indication of the intended scope of this provision, the man-

President Bush was unsuccessful in supporting a ban on all forms of human cloning (though the measure passed twice in the House of Representatives). He lobbied members of Congress and regularly expressed support for the bill in his State of the Union addresses. Additionally, his Assistant Attorney General for the Office of Legislative Affairs argued in his testimony to Congress that anything short of a total ban on human cloning would be practically unenforceable. Specifically, he argued that the competing proposal—a bill that would ban only the transfer of a cloned embryo to a woman's uterus to initiate a pregnancy (that is, cloning to produce children), while offering support for cloning to produce embryos for use in stem cell research (that is, cloning for biomedical research, or "therapeutic" cloning)—would be impossible to implement for a variety of reasons.⁶³ Nevertheless, no comprehensive ban ever made it to the President's desk for signature.

Viewed from another perspective, however, President Bush was instrumental in defeating the competing bill mentioned above that banned cloning to produce children while endorsing cloning for biomedical research. He opposed it because it operated by effectively mandating, under pain of criminal law, the destruction of all cloned human embryos—a measure deeply at odds with his commitment to the fundamental equality of all

ager's statement for this amendment points to a June 22, 2003, colloquy wherein Rep. David Weldon (the amendment's sponsor) assured Rep. David Obey (the ranking minority member of the House Committee on Appropriations) that the amendment 'would not interfere' with any existing patents on human genes or human stem cells. Weldon further noted that the purpose of the amendment was to affirm that 'human life in any form should not be patentable.' The Weldon Amendment thus proscribes the patenting of human organisms at any stage of development. It will remain effective for the duration of the relevant appropriations period, namely, for the fiscal year ending September 30, 2004. To continue in affect, it would have to be included in subsequent appropriations bills or be enacted as a freestanding, permanent law." (internal citations omitted)). The Weldon Amendment has been reauthorized every year since its enactment.

63. Written statement from Daniel J. Bryant, Assistant Att'y Gen., Office of Legislative Affairs, U.S. Dep't of Justice, to the H. Subcomm. on Criminal Justice, Drug Policy & Human Resources of the Comm. on Government Reform, 107th Cong. (May 15, 2002), *available at* http://www.nrlc.org/killing_embryos/Justice_Dept_on_cloning.pdf (noting, among other things, that the prohibited action, "transfer of an embryo to a uterus," was routinely done with IVF embryos, which were impossible to distinguish from cloned embryos *in vitro*, and observing that "once a pregnancy were established, any government-directed attempt to terminate a cloned embryo *in utero* would create problems enormous and complex" (internal quotations omitted)).

human beings. Additionally, the bill explicitly endorsed and protected the intentional creation and destruction of human embryos (through cloning) solely for purposes of research—clearly something that the President's conception of human equality could not abide. Moreover, if passed, the new law would have marked a radical shift away from the federal government's longstanding position of neutrality with respect to the practice of embryo destructive research (that is, permitting it in the private sector but withholding federal support). The ban on "reproductive cloning" only was defeated in the House, and no vote on either cloning ban ever reached the Senate floor.

President Bush also used the threat of veto to shape legislation that he believed ran afoul of his equality principle in the embryonic stem cell research context. Specifically, following the Democrats' 2006 victories that gave them control of both Houses of Congress, President Bush sent a letter to the new Senate Majority Leader, Harry Reid, and the new Speaker of the House, Nancy Pelosi, stating unambiguously that he would "veto any legislation that . . . encourages the destruction of human life at any stage."⁶⁴

3. *Bully Pulpit and the Pedagogical Authority of the Presidency*

As the head of the executive branch of the federal government, the only federal official elected by the entire country, and the leader of the most powerful nation on Earth, the President of the United States enjoys an unparalleled platform from which to disseminate his views and influence the consciences of the American people and the world in accordance with his normative commitments. President Bush made some use of this pedagogical mechanism to promote and defend his conception of human equality in the context of embryonic stem cell research.

As noted above, his first televised address to the nation announcing the policy included an extended reflection on the proper relationship between his principle of radical human equality and vigorous support of biomedical science. In five of his eight State of the Union addresses, President Bush reaf-

64. Letter from George W. Bush, U.S. President, to Harry Reid, Majority Leader of U.S. Senate (May 3, 2007), available at <http://www.nrlc.org/Records/PresidentBushtoReidVetoWarning.pdf>; Letter from George W. Bush, U.S. President, to Nancy Pelosi, Speaker of U.S. House of Representatives (May 3, 2007), available at <http://www.nrlc.org/Records/PresidentBushToPelosiProLifeVetoes.pdf>.

firmed his equality principle in the biomedical research context and called on Congress to pass laws that reflected this principle (including bans on cloning, selling or patenting embryos, creation of human-animal hybrids for research, initiating pregnancies for research, and the like).⁶⁵ At his veto ceremonies for the 2005 and 2007 Stem Cell Research Enhancement Acts, he delivered speeches reaffirming his core principles in this area and promoted embryo adoption (featuring at one event a number of “snowflake” children who had been adopted as embryos), as well as research using alternative sources for pluripotent cells (featuring at another event patients who had benefited from such therapies). He also reprised these themes in his annual phone call to the March for Life participants.

B. *Abortion*

Abortion is arguably the most contentious and inflamed public question in America. The lines of disagreement are familiar. The principal arguments in favor of abortion rights (sometimes made individually, sometimes in conjunction) are first, that the fetus is not a person (and thus not entitled the moral concern and protections owed to a post-natal human being), and second, that the pregnant woman’s interest in bodily autonomy gives her the sole right to choose to either carry the fetus to birth or terminate the pregnancy (and thus its life).⁶⁶ Those opposed to abortion rights respond that because the fetus is an innocent living member of the human species, it is gravely unjust to intentionally kill the child, absent the most compelling

65. See, e.g., Address Before a Joint Session of the Congress on the State of the Union, 41 WEEKLY COMP. PRES. DOC. 126 (Feb. 2, 2005); Address Before a Joint Session of the Congress on the State of the Union, 42 WEEKLY COMP. PRES. DOC. 145 (Jan. 31, 2006); Address Before a Joint Session of the Congress on the State of the Union, 44 WEEKLY COMP. PRES. DOC. 117 (Jan. 28, 2008).

66. There are, obviously, many different permutations of this argument. One variation is a “developmental” approach to moral status, which accords increasing moral worth to the fetus (and its interests as against the claims of the mother) as it progresses through the gestational stages. Other arguments focus on the dependency of the fetus on the mother for bodily support, and weigh its claim to life more heavily in comparison with the mother’s autonomy rights as it becomes more biologically independent (that is, “viable”). As Gilbert Meilaender has observed, these arguments about “personhood” and “bodily support,” though analytically distinct, are deeply intertwined. See MEILAENDER, *supra* note 1, at 114.

justification (for example, to save the life of the mother, or perhaps when the pregnancy resulted from rape or incest).⁶⁷

President Bush's approach to abortion was also driven by his particular conception of the radical equality of all human beings. He rejected the notion that the moral status or "personhood" of the unborn was something earned, accrued, or conferred based on the needs or wants of others. He held to the view that human equality is truly an intrinsic, pre-political attribute—one that does not depend on accidental characteristics such as gestational stage, condition of dependency, or the value judgments of others. For him, the notion that the moral status of the fetus should increase as it grows stronger, less vulnerable and less biologically dependent on its mother, effectively inverted the fundamental ethical obligation of the strong to care for the weak. The idea that one human being is entitled to kill another because she considers that life to be unwanted, burdensome to others, not worth living, or an obstacle to her own full participation in social and economic life⁶⁸ was, for President Bush, contrary to the principle of equality on which the nation was founded.

The particular actions of the Bush Administration with respect to the issue of abortion were calculated to vindicate these principles to the extent permitted by the prevailing legal regime.⁶⁹ Such actions will be discussed below according to the legal mechanisms deployed for their implementation.

67. President Bush took the position that a woman has the right to choose to terminate a pregnancy resulting from rape or incest. See Interview With the Danish Broadcasting Corporation, 41 WEEKLY COMP. PRES. DOC. 1099, 1101 (June 29, 2005).

68. Both Justice Ginsburg and Reva Siegel have sought to justify the right to abortion on sex equality grounds. See *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) (arguing that the right to abortion protects "a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature"); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007).

69. It bears noting that since *Roe v. Wade*, the Supreme Court has effectively reserved to itself the principal responsibility to define the contours of the law of abortion. The abortion precedents of the Supreme Court facing the Bush Administration upon its arrival in 2001 strongly privileged the pregnant woman's interests over those of the fetus, allowing, for example, a woman to terminate her pregnancy at any gestational stage whenever she and her abortion provider concluded that it was in the interests of her health—defined capaciously to encompass virtually all aspects of well being, such as "physical, emotional, psychological, [and] familial" concerns. *Doe v. Bolton*, 410 U.S. 179, 192 (1973). The breadth of the health exception has been confirmed by several federal courts having invalidated limits on abortion

1. *Executive Directives, Administrative Agency Actions, and Foreign Policy*

President Bush used his authority to issue presidential directives in an effort to reduce the number of abortions worldwide and to avoid compelling American taxpayers to subsidize organizations that promote or provide abortions. Two days after his inauguration, President Bush issued an Executive Memorandum to the Administrator of the United States Agency for International Development ordering the restoration of the "Mexico City Policy," which

required nongovernmental organizations to agree as a condition of their receipt of Federal funds that such organizations would neither perform nor actively promote abortion as a method of family planning in other nations.⁷⁰

The policy was originally established in 1984 by President Ronald Reagan to fill a perceived loophole in the Foreign Assistance Act of 1961, which prohibits federally funded nongovernmental organizations (NGOs) from using such funds "to pay for the performance of abortions as a method of family planning or to motivate or coerce any person to practice abortions."⁷¹ President Reagan concluded that any federal support for such organizations would indirectly promote abortion, given the fungibility of such funds. The Mexico City Policy remained in effect until shortly after the inauguration of President Clinton, who rescinded it.⁷²

because they lacked exceptions for "serious non-temporary threat[s] to a pregnant woman's mental health." *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 209 (6th Cir. 1997). Thus, for much of the Bush presidency, the political branches of government were only able to regulate the manner in which abortions were procured (for example, through the enactment of waiting periods, informed consent requirements, parental involvement laws, and the like). In April 2007, the Court upheld the first restriction on a particular abortion procedure in its history. The federal Partial Birth Abortion Ban Act lacked a health exception, but the law was upheld in part because the law did not ban alternative safe and effective abortion procedures. See *Carhart*, 550 U.S. at 157-64; see also O. Carter Snead, *Unenumerated Rights and the Limits of Analogy: A Critique of the Right to Medical Self-Defense*, 121 HARV. L. REV. F. 1 (2007), <http://www.harvardlawreview.org/forum/issues/120/may07/snead.pdf>.

70. Memorandum on Restoration of the Mexico City Policy, 1 PUB. PAPERS 10 (Jan. 22, 2001).

71. 22 U.S.C. § 2151b(f)(1) (2006).

72. See Memorandum on the Mexico City Policy, 1 PUB. PAPERS 10 (Jan. 22, 1993). President Obama likewise rescinded the policy on his third full day in office. Mexico

In a separate Executive Memorandum, President Bush transferred funding previously allocated to the United Nations Population Fund (UNPFA) to the Child Survival and Health Program Fund (administered by USAID “in support of reproductive health and maternal health and related programs”).⁷³ The stated grounds for defunding UNPFA was that its alleged “support of, and involvement in, China’s population-planning activities allow[ed] the Chinese government to implement more effectively its program of coercive abortion.”⁷⁴ UNPFA received no further funding during President Bush’s tenure in office.

As the head of the executive branch, President Bush directed administrative agencies to promote his efforts to reduce the incidence of abortion and advance his conception of human equality in this context. He also consistently selected key political appointees who, like himself, regarded abortion as the unjust taking of innocent life.⁷⁵

The Department of Health and Human Services (HHS) was the most important administrative agency for promoting President Bush’s vision regarding the equal moral status of the child *in utero*. As part of its administration of the President’s Faith and Community Based Initiative (designed to facilitate the provision of social services to the poor), HHS directed over sixty million dollars in grants to pro-life crisis pregnancy centers.⁷⁶ Additionally, in October 2002, HHS issued a final rule

City Policy and Assistance for Voluntary Population Planning, 45 WEEKLY COMP. PRES. DOC. 1 (Jan. 23, 2009).

73. Memorandum on the Transfer of Funds From International Organizations and Programs Funds to the Child Survival and Health Programs Fund, 38 WEEKLY COMP. PRES. DOC. 1660, 1661 (Sept. 30, 2002).

74. Todd S. Purdum, *U.S. Blocks Money for Family Clinics Promoted by U.N.*, N.Y. TIMES, July 23, 2002, at A1. The report of the China UNPFA Independent Assessment team recommended that “unless and until all forms of coercion in the PRC law and in practice are eliminated, no U.S. Government funds be allocated for population programs in the PRC.” U.S. DEP’T OF STATE, REPORT OF THE CHINA UNPFA INDEPENDENT ASSESSMENT TEAM (2002), available at <http://www.state.gov/g/prm/rls/rpt/2002/12122.htm>. Supporters of UNPFA vigorously dispute the assertion that it supports China’s program of coerced abortion in any fashion, and thus oppose the Bush Administration’s actions in this regard.

75. For example, he selected U.S. Senator John Ashcroft to lead the Department of Justice, and Wisconsin Governor Tommy Thompson as head of the Department of Health and Human Services, two agencies that play potentially significant roles in the abortion policy context.

76. Thomas B. Edsall, *Grants Flow To Bush Allies On Social Issues*, WASH. POST, Mar. 22, 2006, at A1.

clarifying that the term “child” in the State Children’s Health Insurance Program (a program designed to distribute matching funds to states to provide insurance coverage for children whose family income did not qualify them for Medicaid) included “the period from conception to birth.”⁷⁷ Secretary Leavitt also took steps to enforce the provisions of the Born Alive Infants Protection Act (discussed below). He issued “clear guidance that withholding medical care from an infant born alive may constitute a violation of the federal Emergency Medical Treatment and Labor Act and the Medicare Conditions of Participation.”⁷⁸

President Bush used his authority to shape U.S. foreign policy as another mechanism to promote his views on abortion. In addition to the funding decisions discussed above, the Bush Administration worked to advance its agenda in intergovernmental fora. Most of the efforts in these contexts were defensive—U.S. delegations were tasked with resisting perceived efforts to elevate the right to abortion to the status of an international human right. To this end, U.S. delegations to intergovernmental fora would frequently intervene to prevent inclusion of language in international instruments that appeared to promote abortion. The 2005 negotiations surrounding the “Review and Appraisal of the Beijing Declaration and Platform for Action” at the United Nations Conference on the Status of Women provides a representative illustration. At that negotiation, the U.S. delegation offered an amendment to the draft resolution under discussion (to reaffirm and build upon the Beijing Declaration) that would clarify that the proposed instrument did not create an international right to abortion. After receiving assurances on the record from other delegations that the instrument was not meant to create such a right, the U.S. withdrew its amendment. At the conclusion of the proceedings, the United States made an official statement reaffirming its understanding of the scope of the document.⁷⁹

77. 42 C.F.R. § 457.10 (2008). In 2007, efforts to codify this language in the bill reauthorizing SCHIP failed.

78. National Right to Life, Statement on Announcement by D.H.H.S. on Born-Alive Infants Protection Law, (Apr. 22, 2005), available at http://www.nrlc.org/federal/Born_Alive_Infants/StatementonDHHS042205.html.

79. For a description of the U.S. government’s efforts at this negotiation, compare Feminist Majority Found., Women’s Rights Coalition Demands Withdrawal of Bush’s Nomination of Sauerbrey (Oct. 18, 2005), <http://www.feminist.org/news/newsbyte/uswirestory.asp?id=9335> (criticizing the U.S. delegation), and Janice Shaw

2. Promoting, Shaping, and Blocking Legislation

Many of President Bush's most significant efforts to promote his conception of equality in the abortion context were directed at the legislative process. He used his influence as President to shape legislation, offering support or opposition (often backed by a veto threat).

During his time in office, President Bush actively supported and ultimately signed several bills into law that reflected his normative outlook on abortion. Most prominent, perhaps, was the Partial Birth Abortion Ban Act,⁸⁰ which criminalized a particularly grisly and controversial form of abortion, namely "in-tact dilation and extraction," which entailed:

[the] deliberate[] and intentional[] vaginal[] deliver[y of] a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus.⁸¹

President Bush used the threat of veto to deter congressional efforts to weaken federal laws limiting abortion. Following the 2006 elections in which Democrats won control of both houses of Congress, President Bush sent letters to Senate Majority Leader Harry Reid and House Speaker Nancy Pelosi in which he flatly stated, "I will veto any legislation that weakens current Federal policies and laws on abortion, or that encourages the destruction of human life at any stage."⁸² The letters specifi-

Crouse, Concerned Women of Am., *The United States Hangs Tough: Sauerbrey shows savvy and strength* (Mar. 7, 2005), available at <http://www.cwfa.org/articledisplay.asp?id=7622> (praising the U.S. delegation).

80. 18 U.S.C. § 1531 (2006).

81. *Gonzales v. Carhart*, 550 U.S. 124, 142 (2007) (upholding the ban against a challenge of facial unconstitutionality). For a discussion of the case, see Snead, *supra* note 69, at 5–6 (2007), <http://www.harvardlawreview.org/forum/issues/120/may07/snead.pdf> ("*Carhart* is particularly noteworthy in that the government interest cited for the abortion restriction was *not* the direct preservation of fetal human life. Rather, the law aimed to promote respect for human life, to prevent the coarsening and numbing of society's moral sense, and to safeguard the integrity of the medical profession by banning what Congress judged to be a particularly shocking and brutal procedure bearing a striking resemblance to infanticide. In other words, the purpose of the law was to prevent the moral degradation of society.").

82. Letter from George W. Bush to Harry Reid, *supra* note 64; Letter from George W. Bush to Nancy Pelosi, *supra* note 64.

cally mentioned federal laws and policies that preclude federal funding of abortion domestically and internationally, and related measures such as the "Mexico City Policy" and the funding limits on UNFPA.⁸³

In addition to laws regulating abortion, President Bush also signed laws that reflected his conception of radical human equality in other *in utero* contexts. Such laws offered protection and legal recognition to unborn and newly born children without imposing any limits on the practice of abortion itself. One such law was the Born-Alive Infants Protection Act of 2002,⁸⁴ which provided that for purposes of federal law, "the words 'person', 'human being', 'child', and 'individual', shall include every infant member of the species *homo sapiens* who is born alive at any stage of development."⁸⁵ Furthermore, the law made clear that in this context, "born alive"

means the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.⁸⁶

The purpose of the law was to remove any doubt about the personhood of newborns who survive abortions, for purposes of federal law. The President and congressional supporters of the law were motivated by the concern that such newborns might be denied emergency medical treatment. Indeed, at a congressional hearing, witnesses recounted instances in which they personally observed infants surviving abortions being left to die.⁸⁷

President Bush also signed into law the Unborn Victims of Violence Act of 2004 ("Laci and Conner's Law"), which recognizes "a child in utero" (defined as "a member of the species *homo sapiens*, at any stage of development, who is carried in the womb") as a legal victim when he or she is injured or killed dur-

83. See Letter from George W. Bush to Harry Reid, *supra* note 64; Letter from George W. Bush to Nancy Pelosi, *supra* note 64.

84. Pub. L. No. 107-207, 116 Stat. 926 (codified at 1 U.S.C. § 8 (2006)).

85. 1 U.S.C. § 8(a).

86. 1 U.S.C. § 8(b).

87. H.R. REP. NO. 107-186, at 9-11 (2001).

ing the commission of a federal crime of violence.⁸⁸ Though it does not apply to abortion, the law clearly reflects the principle of equality that animated President Bush's approach to that issue.

During his time in office, President Bush offered his support for bills limiting abortion that never made it to his desk. One such bill, the Child Custody Protection Act, was killed procedurally in the Senate after its passage in the House (where it was known as the Child Interstate Abortion Notification Act.). The bill was meant to prohibit the transport of minors across state lines for purposes of avoiding the relevant home-state parental notification abortion laws.⁸⁹

President Bush also intervened in the legislative process to assist women facing crisis pregnancies (as he had done via HHS's efforts to support crisis pregnancy centers with federal funding from his Faith and Community Based Initiative). For example, the budget he submitted to Congress in 2005 included ten million dollars to support maternity group homes.⁹⁰

3. *Shaping the Judiciary*

President Bush never explicitly linked his power to shape the judiciary to the question of abortion. Indeed, he regularly denied that he imposed any ideological "litmus test" for his nominees to the bench. He frequently stated, however, that he aspired to appoint judges and Justices who would "faithfully interpret the law," and not "legislate from the bench."⁹¹ This struck many commentators as a shorthand description of a jurisprudence unfriendly to the proposition that the Constitution provides a right to abortion. Though they would not speak to this question during their confirmation hearings, many commentators believe that Chief Justice Roberts's and Justice Alito's approach to constitutional interpretation would lead them to overturn *Roe v. Wade* (and its progeny), thus returning the question of abortion to the political branches for resolution

88. Pub. L. No. 108-212, 118 Stat. 568 (codified at 18 U.S.C. § 1841 (2006)).

89. Child Interstate Abortion Notification Act, H.R. 1063, 110th Cong. (2007).

90. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2005, at 456 (2004).

91. See, e.g., Address Before a Joint Session of the Congress on the State of the Union, 41 WEEKLY COMP. PRES. DOC. 126, 129 (Feb. 2, 2005).

through the legislative process.⁹² If this speculation is accurate, there are currently four votes for this position.

In any event, one can say with certainty that by replacing Justice O'Connor with Justice Alito, President Bush affected abortion jurisprudence in a dramatic and concrete way, providing the fifth vote to sustain the federal Partial Birth Abortion Ban Act against a facial challenge to its constitutionality on the grounds that it was fatally vague, and lacked an exception for a woman's health. Seven years earlier, Justice O'Connor had joined the majority in a 5-4 decision striking down nearly identical state laws in *Stenberg v. Carhart*.⁹³ One might infer from the outcome of this case that there are now five votes to sustain limits on abortion that Justice O'Connor would not have abided. If this proves to be true, it will constitute another significant impact of the Bush Administration on public bioethics.

4. *Invoking the Pedagogical Authority of the Presidency*

The most prominent forum in which President Bush used his office to speak to the nation (and the world) about how the principle of equality should shape the law and public policy of abortion was the State of the Union Address. In 2003, President Bush urged the creation of "a culture that values every life," and to that end asked Congress to "to protect infants at the very hour of their birth and end the practice of partial-birth abortion."⁹⁴ In 2004, he noted that our moral tradition "teaches that each individual has dignity and value in God's sight."⁹⁵ In 2005, President Bush argued that "[b]ecause a society is measured by how it treats the weak and vulnerable, we must strive to build a culture of life."⁹⁶ In 2006, he affirmed that "[h]uman life is a gift from our Creator, and that gift should never be dis-

92. Interestingly, the majority opinion joined by Chief Justice Roberts and Justice Alito in *Gonzales v. Carhart* merely "assume[d]" the validity of the framework established by *Planned Parenthood v. Casey* for purposes of its reasoning. Conspicuously, it did not reaffirm *Casey*. See *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007).

93. 530 U.S. 914 (2000).

94. Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 82, 84-85 (Jan. 28, 2003).

95. Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 81, 88 (Jan. 20, 2004).

96. Address Before a Joint Session of the Congress on the State of the Union, 41 WEEKLY COMP. PRES. DOC. 126, 129 (Feb. 2, 2005).

carded, devalued, or put up for sale.”⁹⁷ In 2008, he asserted that we must “ensure that all life is treated with the dignity it deserves.”⁹⁸ President Bush also expanded and deepened these themes in his annual speech (usually by telephone) to the attendees of the annual March for Life in Washington, D.C.⁹⁹ He also used the occasion of bill signing ceremonies (for the laws discussed above) to reaffirm his belief in the equal moral worth of all human beings, born and unborn.

C. *Conscience Protections for Health Care Providers*

Another context in which President Bush pursued his public bioethics agenda concerned the question of conscience protections for health care providers. His actions in this domain reflected the same fundamental principle of respect for human equality that animated his bioethics agenda in other contexts. Here, President Bush sought to preserve the equal right of all health care providers to pursue their vocations without fear of discrimination based on their refusal to provide, pay for, participate in, or refer for abortions. In taking this position, he implicitly rejected the counterargument that health care providers have a professional obligation to ensure patient access to all legal treatments that meet the relevant standard of professional care.

1. *Executive Actions*

The highest profile action of the Bush Administration in this context was the issuance by HHS of a final rule that clarified and strengthened the protection of existing federal laws on healthcare provider conscience.¹⁰⁰ Specifically, the new rule was promulgated to:

97. Address Before a Joint Session of the Congress on the State of the Union, 42 WEEKLY COMP. PRES. DOC. 145, 151 (Jan. 31, 2006).

98. Address Before a Joint Session of the Congress on the State of the Union, 44 WEEKLY COMP. PRES. DOC. 117, 120 (Jan. 28, 2008).

99. See, e.g., Remarks to March for Life Participants, 44 WEEKLY COMP. PRES. DOC. 93 (Jan. 22, 2008).

100. 45 C.F.R. § 88.1 (2009) (“The purpose of this Part is to provide for the implementation and enforcement of the Church Amendments of the Public Health Service Act, and the Weldon Amendment (collectively referred to as the federal healthcare conscience protection statutes). These statutory provisions protect the rights of health care entities/entities, both individuals and institutions, to refuse to perform health care services and research activities to which they may object for religious, moral, ethical, or other reasons.” (citations omitted)).

Clarify that non-discrimination protections apply to institutional health care providers as well as to individual employees working for recipients of certain funds from HHS; Require recipients of certain HHS funds to certify their compliance with laws protecting provider conscience rights; Designate the HHS Office for Civil Rights as the entity to receive complaints of discrimination addressed by the existing statutes and the proposed regulation; and Charge HHS officials to work with any state or local government or entity that may be in violation of existing statutes and the proposed regulation to encourage voluntary steps to bring that government or entity into compliance with the law. If, despite the Department's efforts, compliance is not achieved, HHS officials will consider all legal options, including termination of funding and the return of funds paid out in violation of the nondiscrimination provisions.¹⁰¹

The final rule took effect one day before the inauguration of President Obama.

2. *Legislative Actions*

On the legislative side, President Bush vigorously supported and signed into law the Weldon Amendment, an appropriations rider providing that no federal, state, or local government agency or program receiving federal funds may discriminate against any health care provider (including individual professionals as well as hospitals, HMOs, insurers, or "any other kind of health care facility, organization or plan") for refusing to "provide, pay for, provide coverage of, or refer for abortions."¹⁰² Also, in his letters to Majority Leader Reid and Speaker Pelosi (following the 2006 election victories that gave their party control of Congress), President Bush warned that he would veto any legislative efforts to remove such federal protections.¹⁰³

101. U.S. Dep't of Health & Human Servs., Regulation Proposed to Help Protect Health Care Providers from Discrimination (Aug. 21, 2008), <http://www.hhs.gov/news/press/2008pres/08/20080821a.html>.

102. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 508(d)(1)-(2), 118 Stat. 2809, 3163 (2004) [hereinafter Weldon Amendment]. President Bush signed the Weldon Amendment into law on December 8, 2004. The previous month, President Bush had sent a letter to the House Appropriations Committee Chair, Representative Bill Young, urging the retention of the provision in the omnibus appropriations bill.

103. See *supra* note 64.

D. End-of-Life Matters

While President Bush's efforts to promote and defend his public bioethics agenda generally centered on the ethical issues at the beginning of life, there were two very notable exceptions that shed light on how his principle of equality maps on to the end-of-life context. The first related to Oregon's regime of legalized physician-assisted suicide, and the second concerned the case of Theresa Marie Schiavo. The details of the Bush Administration's involvement in these matters will be explored below, but it bears noting at the outset that his interventions seemed to reflect his concern about the potential for abusive discrimination against persons based on others' appraisals of their quality of life. Concretely, in the context of governing end-of-life decision making for profoundly cognitively disabled persons, President Bush defended his actions as necessary safeguards against the risk that surrogate decision makers would terminate life sustaining measures based on their paternalistic judgment that a particular life was not worth living, without any serious effort to discern the patient's wishes.

President Bush did not elaborate on his concerns about physician-assisted suicide, but judging from his comments about end-of-life decision making more generally,¹⁰⁴ one might reasonably infer that he harbored similar concerns about the possibility of discrimination and abuse in practice. That is, he may have worried that a regime of legalized assisted suicide opened the door to coercion of patients by their physicians, family members, or even society at large to choose to end their lives to discontinue the burdens that they imposed on others. President Bush may have also been concerned that legalized physician-assisted suicide was merely a transitional measure on the way to legalized euthanasia, which presented in his mind far greater temptations and opportunities for abuse (for example, unconsented mercy killing) based on discriminatory quality of life judgments.

Thus, in the end-of-life context, President Bush's concrete interventions appear to have been grounded in the same norm of radical human equality that drove his approach to those questions arising at the beginning of life. His worries about discrimination

104. E.g., Statement on the Terri Schiavo Case, 41 WEEKLY COMP. PRES. DOC. 458 (Mar. 17, 2005); see *infra* Part II.D.2.

against the profoundly disabled obviously outweighed the competing concern about possible limitations on patient autonomy that might result from a legal system that erects a very high bar of certainty about patient intent to justify discontinuing treatment, and certainly a regime that bans assisted suicide.

1. *Executive Actions*

a. *Administrative Agency Actions*

The Controlled Substances Act (CSA), which criminalizes “the unauthorized manufacture, distribution, dispensing, and possession of substances classified in any of the Act’s five schedules,”¹⁰⁵ provides that certain drugs be available only by written prescription (that is, “Schedule II” drugs).¹⁰⁶ In 1971, the Attorney General promulgated a regulation requiring that prescriptions be used “for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.”¹⁰⁷ The CSA further requires physicians who prescribe controlled substances to register with the Attorney General, according to the rules and regulations that he establishes.¹⁰⁸ The Attorney General may suspend, revoke, or deny any registration determined to be “inconsistent with the public interest,”¹⁰⁹ in light of five statutory factors.¹¹⁰ In 2001, Attorney General John Ashcroft, relying on legal analysis provided by the Office of Legal Counsel, issued an interpretive rule declaring that dispensing or prescribing controlled substances for assisted suicide was not part of “legitimate medical practice,” and was thus illegal under the CSA.¹¹¹ His purpose in doing so was to nullify the effect of the Oregon Death with Dignity Act (enacted in 1994), which, at the time was the only law in the nation permitting physician-assisted suicide.¹¹² The action was challenged as unconstitutional, and ultimately, in a 6-3 decision, the United States Supreme Court agreed, holding that the At-

105. *Gonzales v. Oregon*, 546 U.S. 243, 250 (2006).

106. 21 U.S.C. § 829(a) (2006).

107. 21 C.F.R. § 1306.04(a) (2008).

108. 21 U.S.C. § 822(a)(2) (2006).

109. 21 U.S.C. § 823(f) (2006).

110. *See* 21 U.S.C. §§ 822(a)(2), 823(f), 824(a)(4) (2006) (specifying the factors).

111. *Gonzales v. Oregon*, 546 U.S. 243, 249 (2006).

112. *See id.* at 248–49.

torney General's judgment was not entitled to deference (under the prevailing administrative law standards), and that his actions went beyond the authority delegated to him by the Controlled Substances Act.¹¹³

b. The President's Council on Bioethics

In its report, *Taking Care: Ethical Caregiving in Our Aging Society*, the President's Council on Bioethics provided a normative reflection on the obligations to care for the elderly who are unable to care for themselves, and the crisis that will soon emerge as this population increases. The report offered the following suggestion regarding life-sustaining treatment:

We emphasize both the singular importance of seeking to serve the life the patient still has and the moral necessity of never seeking a person's death as a means of relieving his suffering. At the same time, we emphasize also that serving the life the patient still has does not oblige us always to elect life-sustaining treatments, when those interventions impose undue additional burdens on that life or interfere with the comfortable death of a person irretrievably dying. Even when the doctor's black bag of remedies is empty, comfort and care remain inviolable duties.¹¹⁴

The report concluded with concrete recommendations to caregivers, including: (a) a categorical moral injunction against euthanasia and assisted suicide; (b) ethical caregiving should aim at benefiting the life the patient has; it is not simply to extend life at any cost; and (c) life-sustaining treatments may be discontinued if the intervention itself is either unduly burdensome to the patient or not efficacious.¹¹⁵ The report provided similar advice to law- and policymakers. Among other things, these recommendations urged caution against undue reliance on living wills or advance directives, and urged more reliance on proxy decision-making aimed at benefiting the life the patient now has.¹¹⁶ Finally, the Council urged the creation of a Presidential Commission on Aging, Dementia, and Long-Term Care.¹¹⁷

113. *Id.* at 248–49, 275 (2005).

114. PRESIDENT'S COUNCIL ON BIOETHICS, *TAKING CARE: ETHICAL CAREGIVING IN OUR AGING SOCIETY*, at x (2005).

115. *Id.* at 210–13.

116. *Id.*

117. *Id.* at 214–22.

2. Legislative Actions

The case of Theresa Marie Schiavo also provides a window into the Administration's approach to public bioethics in the end-of-life context.¹¹⁸ Mrs. Schiavo was a profoundly cognitively disabled woman with no written instrument declaring her preferences for medical treatment. She was not dying, but did require delivery of nutrition and hydration by means of a percutaneous endoscopic gastrostomy tube. Her husband (Michael Schiavo) and parents (the Schindlers) violently disagreed as to what course of treatment to pursue. Mr. Schiavo argued that it was her wish under such circumstances to discontinue artificial nutrition and hydration so that she could be "allowed to die." The Schindlers asserted that she had expressed no such wish and had indeed expressed the contrary view on several occasions. The case made it to the Florida state courts, which purported to apply guardianship laws that aimed to discern and implement her actual wishes if possible, and failing that, to act in her best interests. The law directed the courts to resolve any evidentiary ambiguities in favor of continuing life-sustaining treatment. The burden was thus on Mr. Schiavo to prove by "clear and convincing evidence" (the highest standard of proof in the civil context) that she would have wanted to withdraw artificial nutrition and hydration under these precise circumstances.

On the basis of four oral statements made by Mrs. Schiavo (in various informal settings many years prior to her collapse) recounted by Mr. Schiavo, his brother, and his sister-in-law, the Florida trial court held that the standard had been met.¹¹⁹ The Schindlers appealed repeatedly over a period of several years pursuant to a number of different theories, but ultimately did

118. For a comprehensive discussion of the facts surrounding the Schiavo case, see O. Carter Snead, *Dynamic Complementarity: Terri's Law and Separation of Powers Principles in the End-of-Life Context*, 57 FLA. L. REV. 53, 55-71 (2005) [hereinafter Snead, *Dynamic Complementarity*], and O. Carter Snead, *The (Surprising) Truth About Schiavo: A Defeat for the Cause of Autonomy*, 22 CONST. COMMENT. 383, 384-86 (2005) [hereinafter Snead, *(Surprising) Truth*].

119. See *In re the Guardianship of Schiavo*, No. 90-2908GD-003, 2000 WL 34546715, at *6-7 (Fla. Cir. Ct. Feb. 11, 2000) (granting authorization to Michael Schiavo to discontinue artificial life support for Theresa Marie Schiavo); see also *Schindler v. Schiavo*, 780 So. 2d 176, 180 (Fla. Dist. Ct. App. 2001) (upholding trial court's order). For an extended criticism of the trial court's disposition of this question, see Snead, *(Surprising) Truth*, *supra* note 118, at 393-403 (arguing that the court gravely misapplied the "clear and convincing evidence" standard).

not prevail.¹²⁰ Because of persistent doubts about the soundness of the Florida courts' rulings, the Florida Legislature passed a law allowing the governor to issue a temporary stay of the order to terminate Mrs. Schiavo's nutrition and hydration and allowing the relevant Florida state judicial authority to appoint a guardian ad litem to make recommendations about the case to the governor and the court.¹²¹ The Florida Supreme Court struck down the law as an unconstitutional violation of the principle of separation of powers.¹²²

At the urging of the Schindlers, as well as of prominent members of the disability rights community, civil rights leaders (including the Rev. Jesse Jackson), consumer advocates (including Ralph Nader), religious advocates for the sanctity of life (including prominent Catholic public figures), and politicians of both parties (including social conservatives such as Sam Brownback and social liberals such as Tom Harkin, Joe Lieberman, and a substantial percentage of the Congressional Black Caucus), Congress authorized a federal intervention, granting authority to the federal district court in Florida to review *de novo* any claims of civil rights violations arising from the proceedings. Not a single U.S. senator objected to this intervention. President Bush signed the bill into law.¹²³ Ultimately, the federal courts declined the Schindler family's petitions for relief under the new law,¹²⁴ and Mrs. Schiavo died shortly thereafter.

Of all the available evidence during his tenure in office, President Bush's signing statement yields the most insight about his approach to end-of-life matters:

The case of Terri Schiavo raises complex issues. Yet in instances like this one, where there are serious questions and substantial doubts, our society, our laws, and our courts should have a presumption in favor of life. Those who live at the mercy of others deserve our special care and concern. It should be our goal as a nation to build a culture of life, where all Americans

120. See *Bush v. Schiavo*, 885 So. 2d 321, 324–28 (Fla. 2004).

121. See *id.* at 328–29 (citing 2003 Fla. Laws 418).

122. *Id.* at 337. For an extended criticism of the Florida Supreme Court's decision, see Snead, *Dynamic Complementarity*, *supra* note 118, at 88–89 (2005).

123. An Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005).

124. *Schiavo ex rel. Schindler v. Schiavo*, 358 F. Supp. 2d 1161 (M.D. Fla. 2005), *aff'd*, 403 F.3d 1289 (11th Cir. 2005), *reh'g denied*, 404 F.3d 1282 (11th Cir. 2005), *reh'g en banc denied*, 404 F.3d 1270 (11th Cir. 2005).

are valued, welcomed, and protected—and that culture of life must extend to individuals with disabilities.¹²⁵

It seems from the foregoing statement that President Bush's equality principle, discussed above, likewise animates his approach to end-of-life matters. His justification for signing into law the Congressional intervention was to explore "serious questions and substantial doubts" about the fair adjudication of the Schiavo matter. He was concerned that in cases involving end-of-life decision-making for patients who are living in a severely diminished state, surrogate decision makers would be strongly tempted to choose termination of artificial nutrition and hydration because of their subjective appraisal of the patient's quality of life rather than in the name of the patient's actual wishes. This is a species of discrimination that is deeply inconsistent with President Bush's principle that every life should be accorded equal moral worth.

III. ASSESSING THE BUSH ADMINISTRATION

A. *Harnessing the Tools of the Executive Branch*

The foregoing examination of the Bush Administration's implementation of its public bioethics agenda revealed a multifaceted effort to utilize a host of mechanisms uniquely available to the President of the United States, including: acting unilaterally through executive orders and memoranda (pursuant, of course, to legal authority conferred by the Constitution or delegated by statute); operating by extension through the work of administrative agencies and other advisory bodies; setting foreign policy (particularly in the negotiation of international instruments); intervening in the legislative process to promote, shape, or block relevant bills; shaping the character of the federal judiciary (including especially the Supreme Court) through the appointments power; and using the unparalleled moral and pedagogical authority of the American presidency to educate and persuade the nation and the world of the soundness of the moral principles underlying the proposed policies, as well as the manner in which they are applied. President Bush's ef-

125. Statement on the Terri Schiavo Case, 41 WEEKLY COMP. PRES. DOC. 458 (Mar. 17, 2005).

forts revealed that the President of the United States has an enormous array of resources at his disposal to shape public bioethics at home and abroad.

B. The Problem of Metrics

President Bush governed the conduct of biomedical research and the practice of medicine in the name of one principal overarching good: respect for the fundamental equality of all human beings, regardless of their developmental stage, condition of dependency, quality of life, circumstance, or the extent to which they are esteemed or valued by others. Consistent with this principle, President Bush purported to vigorously support biomedical research and the competent and humane practice of medicine.

How can one begin to assess the success or failure of his efforts? As with most issues in public bioethics, judging a particular governmental action as a success or failure is impossible to disentangle from one's substantive appraisal of underlying moral norms, and the manner in which they were applied. Whether President Bush's rendering of the concept of human equality was sound as a theoretical matter is a deeply complicated question well beyond the scope of this Article. For present purposes, it will suffice to make a few brief concluding observations about how the Administration's public bioethics agenda accords with certain procedural values of liberalism (specifically, respect for pluralism and public reason) and how the Administration's actions might be regarded by both those who reject the central animating good of radical equality (as President Bush understood and applied it) and by those who accept it.

C. The Metric of the Procedural Values of Liberalism

What can be said to evaluate the Bush Administration's efforts in public bioethics from the perspective of the core procedural values of liberalism, namely respect for pluralism and public reason? On the one hand, the norm that animated all of President Bush's efforts may have been too strong and contested to justify government actions in a pluralistic society. His conception of human equality was indeed extremely robust (even radical), sweeping within its ambit human beings in all developmental stages, in all conditions (including those whose capacity for physical and mental functioning was severely diminished), and in all circumstances. It is a conception of equality that is vigorously debated, supported by some and opposed by others. Ac-

cordingly, it may have been too strong a principle to impose on a society with widely divergent normative opinions.

On the other hand, the above criticism is ironic and arguably internally inconsistent. That is, the degree of respect for pluralism should, in principle, track the strength of one's commitment to equality. Indeed, respect for pluralism makes little sense absent a robust first-order judgment that all people are fundamentally equal.

In addition, the centerpiece of President Bush's public bioethics agenda—the federal funding policy for stem cell research—was deeply solicitous of pluralism in that it sought to promote biomedical science while also preventing American taxpayers from being compelled to subsidize a highly controversial species of research. Indeed, some commentators criticize the policy precisely on the grounds that it did nothing to abate embryo-destructive research in the private sector. As for the other state actions that restricted private conduct (for example, bans on all forms of cloning, prohibiting physician-assisted suicide, and abortion restrictions), such restrictions are the usual consequence of governmental intervention. Whenever the state acts (regardless of the goods in whose name it does so), it will affect private interests.

Moreover, President Bush was entitled by virtue of his election to govern according to his conception of the moral goods at issue in public bioethics. Public bioethics was a prominent feature of his 2000 and 2004 campaigns, during which he was explicit about where he stood on the most hotly contested questions. Thus his governing actions were surely legitimate, as they were grounded in the outcome of two elections in which the relevant issues were discussed and debated in an unusually full manner.

Once elected, President Bush articulated and defended his policies in a manner fully consistent with the liberal requirements of public reason. That is, contrary to the claims of some critics,¹²⁶ he framed and justified the reasons for his policies in terms that could be accepted or rejected irrespective of one's adherence to a particular faith tradition. For example, in his August 9, 2001 address on stem cells, President Bush made it

126. See, e.g., Geoffrey R. Stone, *Religious rights and wrongs*, CHI. TRIB., July 26, 2006, at 27 ("What Bush describes neutrally as 'ethics' is simply his own sectarian religious belief.").

clear that his federal funding policy was driven by two premises: first, that embryos are living members of the human species, and second, that all such members of the human family are entitled to equal moral respect sufficient to preclude their unconsented use and destruction in biomedical research.¹²⁷ The first premise is confirmed by modern embryology, and the second is grounded in the classical liberal principle of equality reflected in our nation's foundational legal instruments. Although one might disagree with how President Bush formulated his policy (and indeed, many thoughtful people do), one cannot fairly claim that it was based on assertions intelligible only through the lens of revealed dogma (religious or otherwise).

D. *The Metric of Substantive Disagreement*

Turning from process to substance, it is not difficult to see how President Bush's public bioethics agenda would be assessed by those who disagree with the scope, substance, or application of his chief normative principle. For those who believe that President Bush's conception of radical human equality was overbroad (and did not otherwise have separate reasons to agree with the outcomes of his actions¹²⁸), the bioethics policies built on that premise (which is to say all of them) must be seen as disastrously misguided. President Bush's commitment to equality as he understood it defined the outer boundaries for ethical biomedical research and medical practice. If, for example, he was wrong to extend maximal moral regard to human embryos, fetuses, and severely cognitively impaired patients, the consequences of this error were serious.

127. Address to the Nation on Stem Cell Research, 2 PUB. PAPERS 953 (Aug. 9, 2001).

128. There are commentators, for example, who either reject or are not certain that human embryos are the moral equivalent of born persons, but nevertheless favor the Bush restrictions on federal funding for embryonic stem cell research, and who support a ban on all forms of cloning. Such individuals occupy all points on the political spectrum, from conservatives such as Leon Kass to liberals like Dan Callahan. See, e.g., Leon Kass, *Human Frailty and Human Dignity*, NEW ATLANTIS, Fall 2004–Winter 2005, at 110, 118 (“And since I don’t know whether the early embryo is or is not one of us, . . . I am inclined not to treat human embryos less well than they might deserve.”); Dan Callahan, *Promises, Promises: Is embryonic stem-cell research sound public policy?*, COMMONWEAL, Jan. 14, 2005, at 12, 14 (“If the moral claims for the full humanity of the embryo are weak, the moral claims for an obligation to carry out embryonic stem-cell research are even weaker. Respect for embryos in any meaningful sense is, at the least, incompatible with destroying them solely for our medical benefit.”).

Concretely, this meant no federal funding for embryonic stem cell research using new cell lines, arguably slowing the pace of scientific progress in this context, allowing other nations to move ahead in pursuing and reaping the benefits of innovation,¹²⁹ and ultimately pushing possible therapies further into the future. It meant criminalizing the efforts of scientists to derive stem cells from cloned human embryos. It meant trying to impose restrictions on a woman's right to abortion, thus limiting her ability to terminate a pregnancy that might inhibit her full participation in economic and social life as she sees fit. It meant being hyper-scrupulous about determining the treatment preferences of disabled people whose life quality and prospects were severely diminished. It meant allowing health-care providers to subordinate the interests of patients seeking access to abortions to their own moral principles. Not surprisingly, those who disagreed with the Bush Administration (including many members of his own Council on Bioethics) were, and continue to be, vigorous and spirited in their opposition to his approach to public bioethics. This is, of course, as it should be, given that the stakes were enormously high, and the costs of error quite serious in human terms.¹³⁰

E. Judgment According to Bush's Own Principles

What might be the appraisal of the Bush Administration's approach to public bioethics among those who hold, along with President Bush, that the only coherent (indeed non-self-destroying) conception of equality is one that understands it to

129. For a debate as to whether the limits imposed by President Bush on the federal funding of embryonic stem cell research adversely affected U.S. competitiveness in the field, see the exchange between Eric Cohen and Jonathan Moreno in *Stem-Cell Back and Forth*, NAT'L REV. ONLINE, June 13, 2006, <http://article.nationalreview.com/?q=MmQ2MmNINTIzY2E2YjZjNTgyY2IyMWM4YjY3NDJkODI=>.

130. For strong criticisms of "conservative" bioethics, see R. Alta Charo, *Passing on the Right: Conservative Bioethics is Closer Than it Appears*, 32 J.L. MED. & ETHICS 307 (2004), Ruth Macklin, *The New Conservatives in Bioethics: Who Are They and What Do They Seek?*, HASTINGS CTR. REP., Jan.-Feb. 2006, at 34, Susan M. Wolf, *Law & Bioethics: From Values to Violence*, 32 J.L. MED. & ETHICS 293 (2004), and Steven Pinker, *The Stupidity of Dignity: Conservative bioethics' latest, most dangerous ploy*, NEW REPUBLIC, May 28, 2008, at 28. For a defense of "conservative" bioethics, see Eric Cohen, *Conservative Bioethics and the Search for Wisdom*, HASTINGS CTR. REP., Jan.-Feb. 2006, at 44, Yuval Levin, *The Paradox of Conservative Bioethics*, NEW ATLANTIS, Spring 2003, at 53, and Gilbert Meilaender, *In Search of Wisdom: Bioethics and the Character of Human Life* (Jan. 2002), available at <http://www.bioethics.gov/background/meilaenderpaper.html>.

be a pre-political attribute intrinsic to all human beings? It is likely that such individuals would find his efforts largely successful. In every instance in which the current legal framework permitted him to make a decision that advanced this conception of human equality, he consistently did so. His federal funding policy for stem cell research was designed to avoid offering material incentives for the future destruction of human embryos and provided incentives for researchers to find alternative means of pluripotent cells (including the revolutionary iPS cells). He vetoed efforts to undo the stem cell funding policy. He supported a ban on all forms of human cloning at home and abroad. He signed a ban on the use of tissue harvested from fetuses conceived and gestated for research. His Department of Health and Human Services promoted research on alternative sources of pluripotent cells. He worked to reduce the number of abortions in this country and abroad by restricting its practice (through, for example, signing the ban on partial birth abortion and restricting funding of NGOs who promote or provide abortions overseas), and supporting women in crisis (by seeking funding for maternity group homes and crisis pregnancy centers). He promoted and signed the Unborn Victims of Violence Act to symbolically and actually offer protection to victims of crime *in utero*. He promoted and signed the Born Alive Infants Protection Act to ensure that children surviving abortions would receive emergency medical assistance. His delegations to intergovernmental fora opposed what was perceived to be an effort to establish the freedom to choose abortion as an international human right. And he made use of the bully pulpit to shape the consciences of the American people and the people of the world in accordance with this capacious understanding of human equality.

Thus, for those who shared his view that all human beings have “matchless worth” and are entitled to the moral concern of their neighbors and the protection of the law, there was much to like about President Bush’s public bioethics agenda.

That said, one can also imagine possible angles of criticism according to the very metric of President Bush’s aspirational norm of human equality. First, one might take issue with the strength of the normative principle and the relative modesty of the policies that it animated. For example, one might argue that merely restricting federal funding for the intentional exploitation and destruction of human life in biomedical research is a

woefully inadequate and indeed unserious response to a fundamental injustice. One who shares President Bush's commitment to radical human equality might further argue that providing funding for research on human embryonic stem cell lines derived before the announcement of the policy constitutes indefensible complicity in the original act of embryo destruction, and indeed rewarded the scientists who engaged in such unjust actions, even in the absence of market incentives. Worse still, the Administration's funding of approved embryonic stem cell lines moved the science forward as a general matter, and thus actually created incentives for those researchers funded by states or private interests to push forward with the disaggregation of more embryos to derive lines for use in research.

Those who share President Bush's commitment to radical human equality might argue that he did not fully utilize the bully pulpit to promote his views. Though he did indeed dedicate his first televised address to defending his stem cell funding policy, the balance of the communications efforts were intermittent, limited to a few lines in the State of the Union Address, the annual March for Life telephone call, and a few veto ceremonies. Such critics might argue that the strength of the principle and the scope of the injustice of its persistent violation compelled a more comprehensive and sustained communications strategy.

There are, of course, rejoinders to these criticisms. First, a defender of the Administration might say, for example, that the modesty of President Bush's approach to embryonic stem cell research reflected a pragmatic judgment that a more sweeping effort to ban all embryo destruction would have been met with a vigorous and devastating backlash. Perhaps his judgment was that a prudential incrementalism was better suited to preparing the hearts and minds of the American people to accept his principle of equality for the long term. As to the claim that his funding policy made taxpayers complicit in the original destructive act, a defender of the Administration might reply that the taint of injustice from the original embryo-destructive act was ameliorated by the President's public declaration of its wrongness and his subsequent steps to remove incentives to its recurrence.¹³¹ Furthermore, a defender of the Administration

131. See MONITORING STEM CELL RESEARCH, *supra* note 21.

might argue that, far from incentivizing future derivations of embryonic stem cell lines (and the destruction of human life that this entails), his policy provided enormous incentives for scientists to find alternative sources of pluripotent cells. Thus, the policy spurred innovation that culminated in the development of iPS cells, which may very well displace embryonic stem cell research among the world's elite scientists (leaders in the field appear to be already shifting their resources in pursuit of this approach¹³²). And finally, as to the claim of insufficient or ineffective use of the bully pulpit, a defender of the Administration might cite the extraordinary set of challenges facing the President during his tenure, including two wars, the threat of terrorism, and an economy in deep distress, as regrettably having limited the amount of time he could spend publicly defending any one set of issues, regardless of their importance.

CONCLUSION

The foregoing Article offered a reflection on the Bush Administration's contribution to public bioethics. It revealed that the American presidency offers an extraordinary array of mechanisms by which the holder of that office can put his stamp on this domain, effectively embedding a particular set of ethical goods in the fabric of the law, with far reaching practical consequences for science, medicine, and indeed how human beings understand what (and who) they are, as well as their obligations to one another.

132. For example, Ian Wilmut—the embryologist who cloned Dolly the sheep in 1997—and Jamie Thomson—the first researcher to successfully isolate human embryonic stem cell lines—have both shifted their research to iPS cells. See Sally Lehrman, *No More Cloning Around*, *SCI. AM.*, Aug. 2008, at 100, available at <http://www.sciam.com/article.cfm?id=no-more-cloning-around>.

SPEAKING UP FOR MARRIAGE

WILLIAM C. DUNCAN*

In a weekly radio address in 2004, President George W. Bush said: "If courts create their own arbitrary definition of marriage as a mere legal contract and cut marriage off from its cultural, religious, and natural roots, then the meaning of marriage is lost and the institution is weakened."¹ Although fewer and fewer politicians are willing to speak up so forthrightly for the traditional understanding of marriage, President Bush was right to do so. Ultimately, his steadfast defense of marriage as the union of a man and a woman may be among the Administration's most important contributions.

I. MARRIAGE IN 2000

The legal definition of marriage became an issue for President Bush even before his election.² On the ballot for the March 2000 election in California was Proposition 22, a citizen initiative to add to California's Family Code a provision stating, "Only marriage between a man and a woman is valid or recognized in California."³ As the issue gained national prominence,

* Director, Marriage Law Foundation.

1. The President's Radio Address, 40 WEEKLY COMP. PRES. DOC. 1253, 1253-54 (July 10, 2004).

2. This Essay will primarily address the question of whether marriage is to be redefined to include same-sex couples. For a broader review of family themes in the Bush Administration, see Allan Carlson, *Discounting Family Values*, AM. CONSERVATIVE, Nov. 17, 2008, at 12, available at <http://www.amconmag.com/article/2008/nov/17/00012/>. An important marriage-related development beyond the scope of this Essay is President Bush's Healthy Marriage Initiative, which promoted marriage education services for couples who chose to marry, as a way of encouraging protection for children and spouses from poverty. See Admin. for Children & Families, U.S. Dep't of Health & Human Servs., The Healthy Marriage Initiative, <http://www.acf.hhs.gov/healthymarriage/about/mission.html> (last visited Feb. 12, 2009).

3. CAL. FAM. CODE § 308.5 (2000).

the legal definition of marriage arose in debates and commentary during the 2000 presidential campaign.⁴

Although the first lawsuit challenging a state's definition of marriage as the union of a man and a woman had been raised decades before, resulting in a United States Supreme Court decision,⁵ the issue assumed truly national stature in 1993. That year, the Hawaii Supreme Court issued a plurality opinion narrowly deciding that the state's marriage law was presumptively unconstitutional as a form of sex discrimination.⁶ The court remanded the case to the circuit court for a hearing on whether the state had a compelling interest in maintaining its marriage law. The circuit court, predictably, found that it did not.⁷ The passage of a state constitutional amendment, however, rendered the decision moot and reserved to the legislature the ability to define marriage as the union of a man and a woman.⁸

But before the amendment passed, the Hawaii courts' decisions raised a major national issue: If Hawaii began to issue marriage licenses to same-sex couples, would other states be obligated to recognize these marriages? This question spawned

4. See David Orgon Coolidge & William C. Duncan, *Reaffirming Marriage: A Presidential Priority*, 24 HARV. J.L. & PUB. POL'Y 623, 624–26 (2001).

5. See *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of substantial federal question*, 409 U.S. 810 (1972). A dismissal for want of a substantial federal question is a decision on the merits, and therefore binding on lower courts. See *Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975). Interestingly, the United States Supreme Court decided to dismiss the appeal in *Baker* just five years after its landmark ruling in *Loving v. Virginia*, 388 U.S. 1 (1967), suggesting that the Court did not see a link between the constitutional mandate to remove racial restrictions on marriage and a fundamental redefinition of marriage as the union of any two persons.

6. *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993) (plurality opinion).

7. See *Baehr v. Miiike*, CIV. No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997).

8. See HAW. CONST. art. I, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples."). While the lower court decision was pending review in Hawaii, a trial court in Alaska issued a decision to the same effect (and added, for good measure, that the marriage statute impinged upon a constitutional right to choose one's "life partner"). *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998). The Alaska decision was also reversed by a state constitutional amendment. See ALASKA CONST. art. I, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."). See generally Kevin G. Clarkson, David Orgon Coolidge & William C. Duncan, *The Alaska Marriage Amendment: The People's Choice on the Last Frontier*, 16 ALASKA L. REV. 213 (1999) (describing the origins and history of the Alaska marriage amendment and analyzing its constitutionality).

a wave of law journal articles arguing in the affirmative,⁹ a series of state laws (thirty-seven in total) enacted to prevent such a result,¹⁰ and ultimately the federal Defense of Marriage Act (DOMA).¹¹ Overwhelming margins in both the House (342 to 67) and the Senate (84 to 14) approved the Act, and President Bill Clinton signed it into law on September 21, 1996.¹² DOMA defined marriage for federal purposes as the union of a man and a woman and asserted Congress's authority to give parameters to the Constitution's Full Faith and Credit Clause by allowing states to refuse to recognize same-sex marriages contracted in other states.¹³

In the wake of DOMA, activist groups in New England sued to invalidate Vermont's marriage law. The Vermont Supreme Court ultimately decided the case in 1999.¹⁴ Although the court rejected the plaintiffs' invitation to redefine marriage, it did interpret the Vermont Constitution as requiring the state to extend the benefits of marriage to same-sex couples.¹⁵ In response, the Vermont legislature created a legal status, "civil union," for same-sex couples. Now, wherever the state statutes referred to marriage or spouses, the statutes would include partners in a civil union.¹⁶

II. MARRIAGE 2001–2008

A few months after President Bush's inauguration, the group responsible for the Vermont litigation launched a carefully planned marriage lawsuit in Massachusetts, *Goodridge v. Depart-*

9. See Ralph U. Whitten, *The Original Understanding of the Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255, 256 (1998) (listing articles).

10. John King & Dana Bash, *Bush: States shouldn't change marriage*, CNN, Jan. 21, 2004, <http://www.cnn.com/2004/ALLPOLITICS/01/20/same.sex.marriage/index.html>; see also Memorandum from Johanna Mihok, Marriage Law Project, to Anne Collins, Marriage Law Project, State DOMA's (Nov. 20, 2004), available at <http://marriagelaw.cua.edu/DOMA.pdf> (collecting the relevant statute and constitutional provision for each state).

11. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

12. See Coolidge & Duncan, *supra* note 4, at 630 n.34.

13. See Defense of Marriage Act.

14. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

15. *Id.* at 886–88.

16. See VT. STAT. ANN. tit. 15, § 1204 (1999).

ment of Public Health.¹⁷ Although the plaintiffs failed at the trial court level, in 2003 the Massachusetts Supreme Judicial Court ruled 4-3 that the Massachusetts Constitution mandated a redefinition of marriage.¹⁸ Coming on the heels of, and generously citing, *Lawrence v. Texas*,¹⁹ the United States Supreme Court's ruling invalidating state sodomy laws, the *Goodridge* litigation dramatically returned same-sex marriage to the national stage.

Soon after *Goodridge*, activist groups launched similar lawsuits in several states. When deciding which states were most likely to hold in their favor, the activists considered such factors as the openness of the state's judiciary to creative interpretation of constitutional principles, the difficulty of amending the state constitution in response to a ruling adverse to traditional marriage, and the state's general social trends regarding marriage and the family.²⁰

But the record for such lawsuits was mixed. In fact, the Eighth Circuit and appellate courts in Indiana, Maryland, New York, and Washington all upheld statutes defining marriage as the union of a man and a woman.²¹ In 2008, however, the high courts of California and Connecticut ruled by one-vote margins that these states had to redefine marriage.²²

Concurrent with the continued litigation against the inherited understanding of marriage, a new effort arose to provide

17. 798 N.E.2d 941, 950 (Mass. 2003).

18. *Id.*

19. 539 U.S. 558 (2003).

20. See William C. Duncan, *Avoidance Strategy: Same-Sex Marriage Litigation and the Federal Courts*, 29 CAMPBELL L. REV. 29, 38 (2006); Maggie Gallagher, *Europe's marriage crisis*, TOWNHALL.COM, Feb. 28, 2006, http://townhall.com/columnists/MaggieGallagher/2006/02/28/europes_marriage_crisis (noting that states in which couples were most likely to postpone marriage and having children were "among the first states [in which] gay marriage advocates chose to pursue court-created gay marriage").

21. See *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); *Conaway v. Deane*, 932 A.2d 571, 673 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 338 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006).

22. See *In re Marriage Cases*, 183 P.3d 384, 452-53 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008). The New Jersey Supreme Court, on the other hand, gave the legislature a choice: Within 180 days, it had either to create a new statutory scheme extending the benefits of marriage of same-sex couples or to allow them simply to marry. See *Lewis v. Harris*, 908 A.2d 196, 224 (N.J. 2006).

state constitutional protection to existing marriage laws. After their legislatures failed to enact marriage statutes, the citizens of Nebraska and Nevada amended their constitutions through initiative.²³ In 2004, the small group of states whose constitutions had been amended to preserve the traditional definition of marriage (by now including Alaska and Hawaii) grew much larger. Shortly after *Goodridge*, the mayor of San Francisco began to offer marriage licenses to same-sex couples, contravening California's Proposition 22.²⁴ Perhaps as a response to these developments, the legislatures or voters (acting through initiative) of thirteen states placed proposed marriage amendments on the ballot in 2004. The voters approved all of them.²⁵ Between 2005 and 2007, another ten states approved marriage amendments.²⁶ Most recently, voters in Arizona, California, and Florida enacted marriage amendments in November 2008.²⁷

As already noted, the California marriage saga began with Proposition 22 and continued with San Francisco's disregarding it. This latter event prompted a full-scale legal attack on Proposition 22's validity. A few months after the California Supreme Court ruled that the city lacked the authority to disregard state marriage law,²⁸ the superior court in San Francisco County held that the Family Code provisions limiting marriage to opposite-sex couples "violate[d] the equal protection clause of the California Constitution."²⁹ The court of appeals re-

23. See NEB. CONST. art. I, § 29; NEV. CONST. art. I, § 21.

24. See *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 464–65 (2004).

25. See ARK. CONST. amend. 83; GA. CONST. art. I, § 4, ¶ 1; KY. CONST. § 233a; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. XIV, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; UTAH CONST. art. I, § 29.

26. See ALA. CONST. art. I, § 36.03; COLO. CONST. art. II, § 31; IDAHO CONST. art. III, § 28; KAN. CONST. art. XV, § 16; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13.

27. See ARIZ. CONST. art. XXX, § 1; CAL. CONST. art. I, § 7.5; FLA. CONST. art. I, § 27. The *Goodridge* decision and its reliance on *Lawrence v. Texas* and other federal authority also prompted efforts to amend the U.S. Constitution in 2004 and 2006. See *infra* Part III.

28. See *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 499 (2004).

29. *In re Marriage Cases*, No. 4365, 2005 WL 583129, at *12 (Cal. Super. Ct. Mar. 14, 2005), *rev'd*, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006), *rev'd*, 183 P.3d 384 (Cal. 2008).

versed,³⁰ but in May 2008 the California Supreme Court finally issued a 4-3 ruling that California's definition of marriage was unconstitutional.³¹ The people of California responded by approving Proposition 8 in November 2008. The proposition amended the California Constitution to provide that "[o]nly marriage between a man and a woman is valid or recognized in California."³²

The campaign for Proposition 8 highlighted a development that had emerged during the Bush Administration's tenure—the increasing conflict between laws giving legal status to same-sex couples and the rights of third parties, especially religious believers and organizations. For instance, in the wake of the *Goodridge* decision, Massachusetts Catholic Charities sought an exemption from a state law requiring adoption agencies to make no distinctions on the basis of sexual orientation, because it could not do so consistent with its religious mandate.³³ The legislature refused the exemption, and Catholic Charities withdrew from providing adoption services.³⁴ The *Goodridge* court's equation of parenting by same-sex couples and married couples seemed to preclude any judicial relief.³⁵

Redefining marriage in Massachusetts also required public schools to modify their curricula to reflect the change, invariably provoking concern from parents. In a recent case, parents of young elementary school students objected to books meant to

30. *In re Marriage Cases*, 49 Cal. Rptr. 3d at 726–27.

31. *In re Marriage Cases*, 183 P.3d at 452–53. In reaching this decision, the court first held that sexual orientation was a suspect classification and that limiting marriage to opposite-sex couples impinged upon a fundamental privacy interest, triggering strict scrutiny. *Id.* at 440–46. The court then concluded that the state's interest was not "sufficiently compelling" under this standard of review. *Id.* at 452.

32. CAL. CONST. art I, § 7.5.

33. See Daniel Avila, *Same-Sex Adoption in Massachusetts, the Catholic Church, and the Good of the Children: The Story Behind the Controversy and the Case for Conscientious Refusals*, 27 CHILD. LEGAL RTS. J. 1 (2007).

34. See Maggie Gallagher, *Banned in Boston*, WKLY. STANDARD, May 15, 2006, at 20; John Garvey, *State putting Church out of adoption business*, BOSTON GLOBE, Mar. 14, 2006, at A15.

35. See Avila, *supra* note 33, at 11 ("While not directly concerning the question of same-sex adoption, the ruling in the *Goodridge* case will undoubtedly have a long term and far-reaching impact In effect the *Goodridge* majority declared . . . that the defense of traditional marriage is an invidious threat to the common good, and that its adherents espouse an intolerable public evil.").

teach children to respect marriages and families involving same-sex couples.³⁶ The parents argued that the school's refusal to give them advance notice and the ability to opt out of instruction regarding same-sex couples violated the Free Exercise Clause and their substantive parental and privacy due process rights.³⁷ The First Circuit, however, rejected their claims, holding that although the plaintiffs' "sincerely held religious beliefs were deeply offended, . . . they have not described a constitutional burden on their rights, or on those of their children."³⁸

Similarly, shortly after the California Supreme Court redefined marriage, the court heard a case involving a doctor who had referred a woman in a same-sex relationship to another doctor for in vitro fertilization because of his religious concerns about participating in the procedure.³⁹ The court stated that even if the civil rights law under which the plaintiffs sued were subject to strict scrutiny, the doctor still could claim no religious exemption because California's compelling interest in ending sexual orientation discrimination would outweigh even a "substantial[] burden" on religious belief.⁴⁰

In New Jersey, the Division on Civil Rights found probable cause to charge a Methodist camp association with violating New Jersey's antidiscrimination laws after the association declined to allow a same-sex couple to use a portion of its property for a civil union ceremony.⁴¹ In New Mexico, a member of a same-sex relationship successfully sued a wedding photographer for declining to photograph her commitment ceremony.⁴²

36. See Parker v. Hurley, 514 F.3d 87, 92–93 (1st Cir. 2008).

37. See *id.* at 90.

38. *Id.* at 99.

39. See N. Coast Women's Care Med. Group v. San Diego County Superior Court, 189 P.3d 959, 964 (Cal. 2008).

40. *Id.* at 968.

41. See Press Release, Div. on Civil Rights, Office of the Att'y Gen., N.J. Dep't of Law & Pub. Safety, Division on Civil Rights Finds Probable Cause in Ocean Grove Camp Meeting Association Case on Civil Union Ceremonies (Dec. 29, 2008), available at <http://www.nj.gov/oag/newsreleases08/pr20081229a.html>. See generally Ocean Grove Camp Meeting Ass'n v. Papaleo, Civil Action No. 07-3802 (JAP), 2007 WL 3349787, slip op. at *1–2 (D.N.J. Nov. 7, 2007) (describing the history of the Ocean Grove Camp Meeting Association and the origins of the litigation).

42. Willock, HRD No. 06-12-20-0685, slip op. at 6, 19 (N.M. Human Rights Comm'n April 9, 2008), available at <http://www.law.georgetown.edu/moralvaluesproject/News/documents/ElainePhotographycase.pdf>.

These examples are not exhaustive, and further legal recognition of same-sex relationships as marriages (or an equivalent) will probably create additional conflicts for religious liberty.

These conflicts illustrate the logical extension of the idea that redefining marriage is a civil right—that those who oppose redefinition are bigots and discriminators who merit legal and social obloquy. Thus, it should not have been surprising that following the approval of Proposition 8, advocacy groups petitioned the California Supreme Court to invalidate the vote, arguing that “by effectively eliminating the courts’ ability to enforce the guarantee of equal protection for gay and lesbian persons with respect to the fundamental right to marry, Proposition 8 substantially alters our constitutional scheme and thus may not be enacted through the initiative process.”⁴³ California’s attorney general went further.⁴⁴ Proposition 8, he charged, impinged upon an unwritten right, inherent in Article I of the California Constitution, so fundamental that it cannot even be the subject of initiative amendment by California’s citizens;⁴⁵ instead, the court should ultimately decide whether the amendment, already approved by the voters, “sufficiently furthers the public health, safety, and welfare.”⁴⁶ Because the court

43. Amended Petition for Extraordinary Relief, Including Writ of Mandate and Request for Immediate Injunctive Relief; Memorandum of Points and Authorities at 18, *Strauss v. Horton*, No. S168047 (Cal. Nov. 5, 2008).

44. See Answer Brief in Response to Petition for Extraordinary Relief at 77–78, *City & County of San Francisco v. Horton*, No. S168078 (Cal. Dec. 19, 2008) [hereinafter Answer Brief] (“Although petitioners have couched their complaint in terms of the amendment-revision dichotomy, this litigation, perhaps for the first time, poses a more fundamental question: Is the initiative-amendment power wholly unfettered by the California Constitution’s protection of the People’s fundamental right to life, liberty, and privacy?”).

45. See *id.* at 75–90.

46. *Id.* at 89. This argument strikes at the rule of law. As concisely described by John Adams in the Massachusetts Constitution, government should be “a government of laws and not of men.” MASS. CONST. pt. I, art. XXX; see also *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 463 n.1 (Cal. 2004). Such government consists of “uniform and predictable rules of conduct within a jurisdiction.” FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 291 (1985). California’s constitution provides a clear means for its own amendment, and the proponents of Proposition 8 availed themselves of these means to express their reasonable belief that the California Constitution should provide protection to the understanding of marriage as a union of a man and a woman. But the theories advanced in support of invalidating Proposition 8 would introduce subjectivity and confusion into the amendment process, under-

had already struck down Proposition 22 on these grounds, it should likewise strike down Proposition 8.⁴⁷ In effect, the premise of the California attorney general's challenge to Proposition 8 is simply that the understanding of marriage as the union of a man and a woman is now beyond the pale.

Nonetheless, at the end of the Bush Administration, a nationwide snapshot of marriage law would have revealed that although two states had redefined marriage to include same-sex couples by judicial decree, four state high courts had refused to do so, thirty states contain marriage amendments in their constitutions, and forty-one states had specific statutory provisions defining marriage as the union of a man and a woman.⁴⁸ Thus, despite the prominence of the topic in public debate, the laws of the United States overwhelmingly endorse our inherited understanding of marriage.

cutting the rule of law. They would thrust the court into the unnecessary position of determining whether any amendment not only complied with the mandate of the California Constitution (an appropriately objective inquiry that comports with the rule of law), but also whether it affected matters on which policymaking was forbidden to the public either because of super-constitutional principles (in the attorney general's proposed formulation) or because a law otherwise simple and narrow is transformed into a major structural change because it limits the courts' discretion (as the petitioners propose). Such an inquiry would be inherently subjective. Ironically, the California Supreme Court seemed to have understood this in its decision on the validity of the San Francisco marriage licenses. *Cf. Lockyer*, 95 P.3d at 463 ("[A]lthough the present proceeding may be viewed by some as presenting primarily a question of the substantive legal rights of same-sex couples, in actuality the legal issue before us implicates the interest of all individuals in ensuring that public officials execute their official duties in a manner that respects the limits of the authority granted to them as officeholders. In short, the legal question at issue—the scope of the authority entrusted to our public officials—involves the determination of a fundamental question that lies at the heart of our political system: the role of the rule of law in a society that justly prides itself on being 'a government of laws, and not of men' (or women).").

47. See Answer Brief, *supra* note 44..

48. See *supra* notes 6–8, 10, 13–14. In addition to those statutes, the following define marriage without specifying the effect of out-of-state same-sex marriages: MD. CODE ANN., FAM. LAW § 2-201 (2006) and WYO. STAT. ANN. § 20-1-101 (2007). Since the Obama Administration began, however, the Iowa Supreme Court ruled unanimously that the Iowa Constitution mandated a redefinition of marriage in that state. *Varnum v. Brien*, No. 07-1499, 2009 WL 874044 (Iowa Apr. 3, 2009). Additionally, the Vermont Legislature approved a bill that would redefine marriage in that state. S. 115, 2009–2010 Leg. Sess. (Vt. 2009).

III. MARRIAGE AND THE ADMINISTRATION

Two factors necessarily limited the President's role in these developments. First, marriage policymaking typically occurs at the state level. DOMA largely settled areas of federal authority, such as defining marriage for federal law purposes, before President Bush took office. In the case of the federal marriage amendment, although the President could offer his opinion, he had no formal role because the amendment process is left to Congress and the States.

Second, advocacy organizations have further limited the Administration's role by purposely avoiding bringing lawsuits in federal courts because they believe the current U.S. Supreme Court would not be sympathetic to their claims. Of course, this is not to say that they do not believe that the courts should interpret the Constitution to support their ideology—they do.⁴⁹ Rather, they tactically have avoided federal litigation in the short term because it seems unlikely to succeed at this point. Unsuccessful federal litigation could create negative precedent that would hinder the ultimate goal of a national redefinition of marriage. Thus, these groups are content to wait.

Still, some attorneys and individuals, acting on their own and contrary to the wishes of larger advocacy groups, have challenged the traditional definition of marriage in the federal courts. In some cases, the larger advocacy groups have successfully opposed the litigation because it threatens to interfere with their avoidance-for-now strategy.⁵⁰ In the isolated cases that did reach the federal courts, however, President Bush's steadfast support for marriage may have been directly helpful. The Department of Justice worked diligently—and in the end successfully—to hold off these challenges to DOMA.⁵¹ The decisions in these cases may very well provide persuasive precedent when other federal courts inevitably are asked to weigh in on the constitutionality of marriage laws.

49. See Duncan, *supra* note 20, at 42.

50. See *id.* at 39–43.

51. See *Smelt v. County of Orange*, 374 F. Supp. 2d 861 (C.D. Cal. 2005), *aff'd in part, vacated in part*, 447 F.3d 673 (9th Cir. 2006); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004).

Less directly, but still importantly, President Bush was strong and consistent in his support for the most significant federal initiative related to the definition of marriage—the proposed federal marriage amendments. The first amendment effort came in response to the *Goodridge* decision and the actions of the San Francisco officials.⁵² Shortly after *Goodridge*, the President alluded to the decision in his January 2004 State of the Union address: “Activist judges, however, have begun redefining marriage by court order If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process. Our nation must defend the sanctity of marriage.”⁵³ He also discussed the San Francisco events in a February press conference.⁵⁴ That same month, the President called on Congress to pass a federal marriage amendment, noting the possibilities that a state might be forced to recognize another’s same-sex marriages or that a federal court might rule DOMA invalid.⁵⁵ He said that America’s freedom “does not require the redefinition of one of our most basic social institutions,”⁵⁶ and in a March address to the National Association of Evangelicals, the President explained further:

Ages of experience have taught humanity that the commitment of a husband and wife to love and to serve one another promotes the welfare of children and the stability of society. And Government, by recognizing and protecting marriage, serves the interest of all. It is for that reason I

52. The proposed amendment read:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.

S.J. Res. 40, 108th Cong. (2004); accord H.R.J. Res. 106, 108th Cong. (2004). There had been other amendments introduced previously that did not result in a vote. See S.J. Res. 26, 108th Cong. (2003); H.R.J. Res. 56, 108th Cong. (2003).

53. Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 81, 88 (Jan. 20, 2004).

54. See Remarks Prior to Discussions With President Zine El Abidine Ben Ali of Tunisia and an Exchange With Reporters, 1 PUB. PAPERS 240, 241 (Feb. 18, 2004).

55. See Remarks Calling for a Constitutional Amendment Defining and Protecting Marriage, 1 PUB. PAPERS 263, 263–64 (Feb. 24, 2004).

56. *Id.* at 264.

support a constitutional amendment to protect marriage as the union of a man and a woman.⁵⁷

Congress held hearings on a proposed amendment in May 2004.⁵⁸ The amendment was reintroduced in July.⁵⁹ Later that month, the President devoted his weekly radio address to making the case for the amendment:

When judges insist on imposing their arbitrary will on the people, the only alternative left to the people is an amendment to the Constitution—the only law a court cannot overturn. A constitutional amendment should never be undertaken lightly. Yet to defend marriage, our Nation has no other choice.

A great deal is at stake in this matter. The union of a man and woman in marriage is the most enduring and important human institution, and the law can teach respect or disrespect for that institution. If our laws teach that marriage is the sacred commitment of a man and a woman, the basis of an orderly society, and the defining promise of a life, that strengthens the institution of marriage.⁶⁰

The Senate filibustered the amendment, however, and a cloture vote that would have allowed a vote on the amendment failed 48-50.⁶¹ The House did vote on the measure, but it received only 227 votes, short of the two-thirds majority needed.⁶²

Despite the defeat of this specific proposal, the President continued to express support for a marriage amendment. In a speech to the Southern Baptist Convention in 2005, the President reiterated his support for an amendment, saying, "Because marriage is a sacred institution and the foundation of society, it should not be redefined by local officials and activist judges. For the good of families, children, and society, I support a constitutional amendment to protect the institution of marriage."⁶³

57. Satellite Remarks to the National Association of Evangelicals Convention, 1 PUB. PAPERS 355, 356 (Mar. 11, 2004).

58. 150 CONG. REC. D502 (daily ed. May 13, 2004).

59. S.J. Res. 40, 108th Cong. (2004).

60. The President's Radio Address, 40 WEEKLY COMP. PRES. DOC. 1253, 1253-54 (July 10, 2004).

61. 150 CONG. REC. S8090 (daily ed. July 14, 2004).

62. 150 CONG. REC. H7933-34 (daily ed. Sept. 30, 2004).

63. Satellite Remarks to the Southern Baptist Convention Annual Meeting, 41 WEEKLY COMP. PRES. DOC. 1041 (June 21, 2005).

The next major effort to enact a national amendment came in the summer of 2006.⁶⁴ Proponents introduced this proposed amendment against the backdrop of a series of lower court decisions, including a federal district court case in Nebraska, arguing that various state marriage laws were unconstitutional.⁶⁵ The Marriage Protection Amendment tracked the language of the previous proposed amendments almost exactly.⁶⁶

The President again made the argument for an amendment in his radio address.⁶⁷ He held a special meeting on the amendment on June 5 and addressed supporters of the amendment, saying he was “proud to stand with [them]” and calling on Congress to pass the amendment.⁶⁸ At the same meeting, he reviewed the recent court decisions on marriage and raised the possibility that federal courts might strike down DOMA.⁶⁹ The proposed amendment in the Senate, he said, “would fully protect marriage from being redefined”; rather than taking the issue from the States, as some had argued the amendment would do, “[i]t would take the issue away from the courts and put it directly before the American people.”⁷⁰ His speech included a strong statement about marriage:

64. The Marriage Protection Amendment was introduced in the Senate in January 2005, S.J. Res. 1, 109th Cong. (2005), and in the House in June 2006, H.R.J. Res. 88, 109th Cong. (2006).

65. See *Citizens for Equal Prot. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005), *rev'd*, 455 F.3d 859 (8th Cir. 2006); *In re Marriage Cases*, No. 4365, 2005 WL 583129 (Cal. Super. Ct. Mar. 14, 2005), *rev'd*, 49 Cal. Rptr. 3d 675 (Ct. App. 2006), *rev'd*, 183 P.3d 384 (Cal. 2008); *Hernandez v. Robles*, 794 N.Y.S.2d 579 (Sup. Ct. 2005), *rev'd*, 805 N.Y.S.2d 354 (App. Div. 2005), *aff'd*, 855 N.E.2d 1 (N.Y. 2006); *Li v. State*, No. 0403-03057, 2004 WL 1258167, (Or. Cir. Ct. Apr. 20, 2004), *superse- ded by constitutional amendment*, OR. CONST. art. XV, § 5a; *Castle v. State*, No. 04-2-00614-4, 2004 WL 1985215 (Wash. Super. Ct. Sept. 7, 2004), *rev'd sub nom. Andersen v. King County*, 138 P.3d 963 (Wash. 2006); *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004), *rev'd*, 138 P.3d 963 (Wash. 2006).

66. Compare S.J. Res. 1, 109th Cong. (2005), and H.R.J. Res. 88, 109th Cong. (2006), with S.J. Res. 40, 108th Cong. (2004), and H.R.J. Res. 106, 108th Cong. (2004).

67. See The President's Radio Address, 42 WEEKLY COMP. PRES. DOC. 1073 (June 3, 2006).

68. Remarks on a Proposed Constitutional Amendment To Protect Marriage, 42 WEEKLY COMP. PRES. DOC. 1076, 1076 (June 5, 2006).

69. See *id.* at 1076-77.

70. *Id.* at 1077.

The union of a man and a woman in marriage is the most enduring and important human institution. For ages, in every culture, human beings have understood that marriage is critical to the well-being of families. And because families pass along values and shape character, marriage is also critical to the health of society. Our policies should aim to strengthen families, not undermine them. And changing the definition of marriage would undermine the family structure.

America is a free society which limits the role of government in the lives of our citizens. In this country, people are free to choose how they live their lives. In our free society, decisions about a fundamental social institution as marriage should be made by the people.⁷¹

Once again, the Senate filibustered the amendment, and the cloture motion received only forty-nine votes.⁷² The House vote also failed, garnering only 236 supporters.⁷³ But the President remained optimistic: "Today's Senate vote on the marriage protection amendment marks the start of a new chapter in this important national debate. . . . My position on this issue is clear: Marriage is the most fundamental institution of our society, and it should not be redefined by activist judges."⁷⁴ Although there were no subsequent attempts to pass a marriage amendment, the President continued to express his support for one.⁷⁵

It is difficult to assess whether and how President Bush's advocacy affected the nationwide support for state marriage

71. *Id.* at 1076.

72. See 152 CONG. REC. S5534 (daily ed. June 7, 2006). It is interesting that three of the state court decisions upholding marriage laws noted in the previous Part, *see supra* notes 18, 20, 22 and accompanying text, were issued in just more than a month after the unsuccessful Senate vote on the amendment. See *Citizens for Equal Prot. v. Bruning*, 368 F. Supp. 2d 980 (D. Neb. 2005); *Hernandez v. Robles*, 794 N.Y.S.2d 579 (Sup. Ct. 2005); *Andersen v. King County*, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004).

73. See 152 CONG. REC. H5320 (daily ed. July 18, 2006).

74. Statement on Senate Action on Marriage Protection Legislation, 42 WEEKLY COMP. PRES. DOC. 1099, 1099 (June 7, 2006).

75. See Press Release, Office of the Press Sec'y, Statement by Assistant to the President for Domestic Policy Karl Zinsmeister on Sanctity of Marriage (Oct. 10, 2008), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2008/10/20081010-6.html>; Press Release, Office of the Press Sec'y, Press Briefing by Tony Fratto (June 17, 2008), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2008/06/print/20080617-6.html>.

amendments. This support does not seem invariably to track partisan affiliation or voting; marriage is bigger than political parties or candidates. But it certainly could not have hurt to have President Bush's support for these measures.

Importantly, the President's support for marriage may have helped to counteract the idea that support for marriage is just irrational bigotry. For instance, he supported and signed the Support Our Scouts Act, included in the National Defense Authorization Act for Fiscal Year 2006, which prohibited federal agencies, states, and municipalities receiving funding under the Housing and Community Development Act of 1974 from discriminating against the Boy Scouts and other youth groups.⁷⁶ The Scouts have been the subjects of a campaign analogous to the effort to stigmatize marriage supporters because they do not allow openly homosexual individuals to serve as Scoutmasters.⁷⁷

In a time when powerful forces consider support for marriage as the union of a man and a woman a benighted bigotry that ought to be forced out of the public conversation, it may become rare for prominent political leaders to speak up for marriage. Voters in California had no such benefit from their political leaders as their Republican governor, along with most state political leaders, opposed Proposition 8.⁷⁸ Against this backdrop, perhaps President Bush's steadfast willingness to speak in favor of marriage will be one of his more important contributions. As he reiterated time and time again, "I believe a marriage is between a man and a woman."⁷⁹

CONCLUSION

The ideological position President George W. Bush resisted recasts marriage as a government creation—an administrative unit for dispensing benefits including both social welfare programs and less tangible goods such as "dignity." It is premised

76. See Support Our Scouts Act of 2005, Pub. L. No. 109-148, § 8126, 119 Stat. 2728 (repealed 2006).

77. See Al Knight, *The war on the Boy Scouts*, DENV. POST, Dec. 19, 2007, at B7.

78. See Kevin Yamamura, *Governor Won't Join Prop. 8 Fight: Schwarzenegger: Courts Will Decide*, MODESTO BEE, Nov. 17, 2008, at A10.

79. The President's News Conference, 39 WEEKLY COMP. PRES. DOC. 1003, 1008 (July 30, 2003).

on an egalitarian notion that all sexual relationships are essentially alike and deserving of the government's endorsement and approbation, and it seeks to appropriate the immense social capital of the marriage institution to advance this non-marriage purpose. It regards children as, at best, incidental to marriage. At worst, it regards children as instrumental to fulfilling adults' desires by giving adults the "right" to create or acquire children who will necessarily be either motherless or fatherless.

In contrast to this statist, adult-centered institution, the marriage ideal endorsed by President Bush understands marriage to be a pre-political institution, prior both in time and in prominence to the state. It is perhaps the primary example of a mediating institution providing meaning and purpose apart from state purposes, shielding individuals from the otherwise all-powerful state. The ideal promotes family autonomy by creating and nurturing family ties independent of state involvement.

And because marriage is made up of men and women, potential and actual mothers and fathers, it is child-centered. It has served in virtually all human societies to encourage men and women who may create a child to take responsibility for that child and for one another. As such, it is the most effective way for society to promote the child's opportunity to know and be raised by his or her own mother and father. Even those married couples who do not have children as a result of their marriage relationship can still provide a mother and father to those who are otherwise deprived of that opportunity. Married couples who are faithful to one another but who do not have children also promote children's best interests by not creating motherless and fatherless children. Finally, marriage promotes the integration of men and women; by treating both as essential to society's most basic and foundational unit, it rejects the idea that men and women, mothers and fathers, are fungible.

Given the unique social role of marriage as we have inherited it from millennia of human experience, President George W. Bush was undoubtedly right to speak and work in its defense. These days, it is not insignificant that the leader of the free world would do so.

FAITH-BASED INITIATIVE 2.0: THE BUSH FAITH-BASED AND COMMUNITY INITIATIVE

STANLEY W. CARLSON-THIES*

Critics of President George W. Bush's faith-based initiative¹ often claimed that it was not a serious public policy effort, but rather a political ploy aimed at pleasing the Republican white evangelical "base" and poaching African-American and Hispanic pastors and voters from the Democratic Party. However, even casual observers should have known better. If the initiative was just about politics, why did some thirty-six states, led by both Democrats and Republicans, create their own initiatives, maintaining them even when state leadership changed from one party to the other?² Why did the Pew Charitable Trusts invest in an eight-year project, the Roundtable on Religion and Social Welfare Policy, to track the initiative's goals, outcomes, and legal reforms? If the initiative was mere low politics, why did it spark so many books, journal and law review articles, and dissertations?³

* Stanley Carlson-Thies is the founder and president of the Institutional Religious Freedom Alliance, which works to safeguard the religious identity and standards of community-serving faith-based organizations. He was part of the original staff of the White House Office of Faith-Based and Community Initiatives and served for many years as the director of social policy studies for the Center for Public Justice.

1. This Essay will follow convention and use this short form, rather than the more precise name, the Bush Faith-Based and Community Initiative.

2. See IRA C. LUPU & ROBERT W. TUTTLE, *THE ROUNDTABLE ON RELIGION & SOCIAL WELFARE POLICY, THE STATE OF THE LAW—2008: A CUMULATIVE REPORT ON LEGAL DEVELOPMENTS AFFECTING GOVERNMENT PARTNERSHIPS WITH FAITH-BASED ORGANIZATIONS* (2008), available at http://www.religionandsocialpolicy.org/docs/legal/state_ofthe_law_2008.pdf [hereinafter STATE OF THE LAW].

3. See, e.g., AMY E. BLACK ET AL., *OF LITTLE FAITH: THE POLITICS OF GEORGE W. BUSH'S FAITH-BASED INITIATIVES* (2004); LEWIS D. SOLOMON, *IN GOD WE TRUST?: FAITH-BASED ORGANIZATIONS AND THE QUEST TO SOLVE AMERICA'S SOCIAL ILLS* (2003); Vernadette Ramirez Broyles, *The Faith-Based Initiative, Charitable Choice, and Protecting the Free Speech Rights of Faith-Based Organizations*, 26 HARV. J.L. & PUB. POL'Y 315 (2003); Linda C. McClain, *Unleashing or Harnessing "Armies of Compassion"?: Reflections on the Faith-Based Initiative*, 39 LOY. U. CHI. L.J. 361 (2008).

Any doubts that the Bush initiative was a serious policy should have been finally dispelled on July 1, 2008, when Democratic presidential candidate Barack Obama proclaimed that he would expand and improve the initiative;⁴ or when, during the transition period, he mandated a serious review of the initiative and its administrative apparatus; or when, soon after becoming President, he announced the formation of the White House Office of Faith-Based and Neighborhood Partnerships, his version of the Bush faith-based office, and appointed Joshua DuBois to head the new office.⁵ Expanding and improving, reviewing and evaluating, new leadership and a renamed effort: There must have been a great deal of substance to the Bush faith-based initiative for Obama to take these actions.

But what was that substance? What did the Bush initiative aim to achieve and what is its legacy?

I. REENGINEERING GOVERNMENT

When evaluating the initiative, the focus should not be on whether, or how much, federal money flowed to faith-based organizations during the Bush Administration. The key question should concern what resulted from the spending. Unfortunately, outcome evidence is scarce, as it is uniformly in social services. It is even difficult to measure the effect of the initiative on the proportion of providers that are faith-based.⁶ Extensive government collaboration with religiously affiliated social-service organizations was already decades old at the start of the initiative, and statistics on the subject, both older and more

4. Jeff Zeleny & Michael Luo, *Obama Seeks Bigger Role for Religious Groups*, N.Y. TIMES, July 2, 2008, at A1; see also OBAMA FOR AMERICA, PARTNERING WITH COMMUNITIES OF FAITH 2 (2008), available at http://obama.3cdn.net/c2c74198bb57fc007c_e906mvlj.pdf.

5. Press Release, The White House, Office of the Press Sec'y, Obama Announces White House Office of Faith-based and Neighborhood Partnerships (Feb. 5, 2009), available at http://www.whitehouse.gov/the_press_office/ObamaAnnouncesWhiteHouseOfficeofFaith-basedandNeighborhoodPartnerships/.

6. For efforts to measure changes in participation by faith-based organizations, see JONATHAN JACOBSON ET AL., MATHEMATICA POLICY RESEARCH, INC., STATE AND LOCAL CONTRACTING FOR SOCIAL SERVICES UNDER CHARITABLE CHOICE: FINAL REPORT (2005), available at <http://www.mathematica-mpr.com/publications/pdfs/charitablechoice.pdf>; and FREDRICA D. KRAMER ET AL., URBAN INST., FEDERAL POLICY ON THE GROUND: FAITH-BASED ORGANIZATIONS DELIVERING LOCAL SERVICES (2005), available at http://www.urban.org/UploadedPDF/311197_DP05-01.pdf.

recent, are unreliable. Faith-based applicants and grantees are not required to identify themselves as such and, in any case, most federal social service funds go to state and local agencies before being awarded to private groups. Those agencies need not report back to the federal government in detail. In addition, while much of the Bush initiative focused on the rules of government collaboration with faith-based organizations—rules which can serve either to encourage or discourage faith-based participation⁷—an evaluation centered on changes to these rules is too narrow.

After all the key legislative step in creating a level playing field for faith-based providers came—as part of what this Essay will call the first version of the faith-based initiative—during the Clinton Administration: the addition of Charitable Choice provisions to four federal programs.⁸ Even before that, at various times the federal government had carefully crafted its funding rules so that faith-based organizations could be full participants. A notable example is a 1990 child care law that uses vouchers or certificates to enable families to choose faith-based child care programs.⁹ Also notable are longstanding policies of U.S. overseas development, which are designed to accommodate the many religious organizations that have been key government partners in that work.¹⁰

It is more illuminating to regard the Bush faith-based initiative as a determined and sweeping reframing of the relationship between government and civil society. As President Bush put it at the start of his Administration, there was to be a “new attitude” on the part of the federal government “to honor and not restrict faith-based and community initiatives, to accept rather than dismiss such programs, and to empower rather

7. See *infra* Part I.B.

8. See Stanley W. Carlson-Thies, *Charitable Choice: Bringing Religion Back into American Welfare*, in *RELIGION RETURNS TO THE PUBLIC SQUARE: FAITH AND POLICY IN AMERICA* 269, 280–82 (Hugh Heclo & Wilfred M. McClay eds., 2003).

9. For a discussion of the Ford-Durenburger Amendment, see Allen D. Hertzke, *An Assessment of the Mainline Churches Since 1945*, in *THE ROLE OF RELIGION IN THE MAKING OF PUBLIC POLICY* 43, 68 (James E. Wood, Jr. & Derek Davis eds., 1991).

10. See J. BRUCE NICHOLS, *THE UNEASY ALLIANCE: RELIGION, REFUGEE WORK, AND U.S. FOREIGN POLICY* (1988).

than ignore them.”¹¹ This amounted, he said, to “a new role” for the government: It would be the “supporter, enabler, catalyst and collaborator” of these organizations.¹²

This campaign to reframe the relationship between government and civil society in the area of human services came in three forms: stressing the importance of civil society institutions in responding to social needs, modifying, as noted above, the rules governing government collaboration with the religious organizations that are such an important part of civil society, and giving greater prominence to the role of religious organizations in serving the common good.

A. *Highlighting the Vital Social-Service Role of Civil Society Institutions*

Recall Tocqueville¹³ or the encouragement given to nonprofits by U.S. regulations and tax law,¹⁴ and it is obvious that charities, broadly understood, have always had a central place in the American response to social need and community development. Yet, through the twentieth century, with one big boost from the Great Depression and the New Deal response and another from President Lyndon Johnson’s Great Society and War on Poverty, the emphasis shifted more and more to government, and especially the federal government, at the expense of civil society.¹⁵ And although the expanding social services after the mid-1960s were typically delivered by private charities, including religiously affiliated groups, government had the upper hand: These private organizations were carrying out government plans.¹⁶

The Bush Administration took steps to change this relationship. President Bush pressed for changes in government prac-

11. GEORGE W. BUSH, RALLYING THE ARMIES OF COMPASSION: A REPORT TO SUPPORT THE HEROIC WORKS OF FAITH-BASED GROUPS ACROSS AMERICA, H.R. DOC. NO. 107-36, at 6 (2001).

12. *Id.*

13. *See, e.g.*, 2 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 513–17 (J.P. Mayer ed., George Lawrence trans., HarperPerennial 1969) (1835).

14. *See* MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS: FEDERAL AND STATE LAW AND REGULATION 56–67 (2004).

15. *See* Carlson-Thies, *supra* note 8, at 271–73.

16. *See* Stanley Carlson-Thies, *Faith-Based Institutions Cooperating with Public Welfare: The Promise of the Charitable Choice Provision*, in WELFARE REFORM & FAITH-BASED ORGANIZATIONS 29, 35–37 (Derek Davis & Barry Hankins eds., 1999).

tice, notably at the Department of Homeland Security, to coordinate more closely federal efforts with private action, for example, in disaster preparedness and response.¹⁷ He spoke often about how extensively troubled families, poor communities, and places devastated by disaster depend on the freely given help of secular and faith-based organizations. President Bush signed into law measures to encourage greater private giving to these “neighborhood healers,” as he called them.¹⁸ He worked with Congress to create a Compassion Capital Fund that has provided federal support in the form of technical assistance and small grants to help private charities improve their management and programs with no requirement that they partner with the government to deliver services.¹⁹ President Bush also modified the rules governing federal funding for social services so that the collaborations have more of a partnership character.²⁰

B. *Updating the Federal Grant Rules Concerning Religion and Religious Organizations*

This partnership style shows up in various ways, including the systematic use of intermediaries. Intermediaries are larger, experienced organizations that, by taking on a large part of the management and reporting burden of government grants, enable a network of grassroots groups to offer government-funded services without first needing to become more like government—namely, larger and more bureaucratic.²¹ But the new style is particularly evident in the Bush Administration’s revised church-state rules for federal grants.²²

17. See THE WHITE HOUSE, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 49 (2006), available at <http://www.lib.umich.edu/govdocs/pdf/katrina-lessons-learned.pdf>; WHITE HOUSE FAITH-BASED AND COMMUNITY INITIATIVES, GUIDANCE TO FAITH-BASED AND COMMUNITY ORGANIZATIONS ON PARTNERING WITH THE FEDERAL GOVERNMENT 1–2 (2003), available at <http://www.ethicsinstitute.com/pdf/Faith%20Based%20Federal%20Grants.pdf>.

18. See THE WHITE HOUSE, INNOVATIONS IN COMPASSION: THE FAITH-BASED INITIATIVE: A FINAL REPORT TO THE ARMIES OF COMPASSION 39 (2008) [hereinafter INNOVATIONS IN COMPASSION]; cf. ANNE FARRIS ET AL., THE ROUNDTABLE ON RELIGION AND SOCIAL WELFARE POLICY, THE EXPANDING ADMINISTRATIVE PRESIDENCY: GEORGE W. BUSH AND THE FAITH-BASED INITIATIVE (2004).

19. See KRAMER ET AL., *supra* note 6, at 2–3.

20. See STATE OF THE LAW, *supra* note 2, at i–ii.

21. *Id.* at 4.

22. See INNOVATIONS IN COMPASSION, *supra* note 18, at 30–31.

As noted, the major legislative rule changes came before Bush, when President Clinton signed the Charitable Choice rules into law four times, beginning with the 1996 federal welfare reform law.²³ Charitable Choice specifically provides that faith-based organizations are eligible for federal funds without first having to suppress or conceal their religious identity and practices. They are able to participate as robustly religious organizations without being excluded for not appearing secular.²⁴ The rules protect religious boards of directors and mission statements; voluntary, privately paid religious activities, separate from the federally funded services; and the practice of taking account of religion in selecting staff, unless forbidden by the federal law specific to the social service or by a state or local procurement rule.²⁵ However, the faith-based organizations and their secular counterparts must serve all eligible beneficiaries without discriminating on the basis of religion, and officials are obligated to offer an alternative when a beneficiary does not want to be served by a faith-based provider.²⁶

The Bush Administration transformed these innovative principles into changed government practice through a wide range of actions.²⁷ Foundational steps were the promulgation of Charitable Choice regulations and then, following an "Equal Protection" Executive Order issued in December 2002, the adoption of "equal treatment" regulations, similar to the Charitable Choice principles, to govern the expenditure of federal funds in other social service programs.²⁸

These rules require grant officials not to be biased either for or against faith-based applicants, prohibit religious selectivity in providing assistance, and demand that "inherently religious activities" be kept separate from the federally funded services.²⁹

23. See Carlson-Thies, *supra* note 8, at 282.

24. See *id.* at 282–83.

25. For the details of religious hiring, see CARL H. ESBECK ET AL., *CTR. FOR PUB. JUSTICE, THE FREEDOM OF FAITH-BASED ORGANIZATIONS TO STAFF ON A RELIGIOUS BASIS* (2004), <http://www.cpjustice.org/files/religiousstaffing.pdf>.

26. See STANLEY W. CARLSON-THIES, *CHARITABLE CHOICE FOR WELFARE & COMMUNITY SERVICES: AN IMPLEMENTATION GUIDE FOR STATE, LOCAL, AND FEDERAL OFFICIALS 2* (2000).

27. See FARRIS ET AL., *supra* note 18; *INNOVATIONS IN COMPASSION*, *supra* note 18, at i, 30–31.

28. On the legal developments, see *STATE OF THE LAW*, *supra* note 2, at 3–4.

29. See *id.* at 4, 11–12.

Some critics have nonetheless charged the Bush Administration with violating fundamental church-state separation principles.³⁰ The constitutional law experts for the Pew Roundtable were more accurate: The Bush Administration's level playing field for faith-based organizations "reflects a decisive shift in the law of the Constitution's Establishment Clause, away from a regime that excluded 'pervasively sectarian' entities, and toward one that permits a far greater range of partnerships between government and [faith-based organizations]."³¹ The main impact of the initiative was to require the federal government to *catch up* to the changed constitutional standards.³²

C. *Rehabilitating the Public Role of Religious Organizations.*

The two trends just discussed combined in the Bush faith-based initiative to give new attention and emphasis to the important public-service role faith-based organizations play. That role, never absent, had been obscured by a common view that religion is a matter of private beliefs and action, whereas government and the public sphere are naturally or normatively religion-free. That view surely has become highly implausible after more than a dozen years of emphatic federal action designed to enable faith-based organizations to fully participate in government social-service programs. The Bush bully pulpit and the flood of research stimulated by the Bush initiative's spotlight on faith-based social services have foregrounded just how important religious organizations are in responding to needs beyond office hours and in widely distributed locations, as trusted providers of both services and guidance, in building up communities and strengthening families, and in responding quickly and remaining long when natural disasters occur.

30. See, e.g., Philip C. Aka, *Assessing the Constitutionality of President George W. Bush's Faith-Based Initiatives*, 9 J.L. SOC'Y 53, 62 (2008) ("Bush's . . . religion-based initiatives are constitutionally suspect."); Sean T. McLaughlin, *More Than Meets the Eye: President Bush's Faith-Based Initiative*, 33 U. MEM. L. REV. 41, 42 (2002) ("President Bush's plan challenges conventional understandings of religion's role in public life . . ."); Martha A. Boden, Comment, *Compassion Inaction: Why President Bush's Faith-Based Initiatives Violate the Establishment Clause*, 29 SEATTLE U. L. REV. 991 (2006).

31. STATE OF THE LAW, *supra* note 2, at ii (emphasis added).

32. See Ira Lupu, Remarks at the Opening Plenary Session of The Roundtable on Religion & Social Policy 2004 State of the Law Conference (Dec. 9, 2004), available at http://www.religionandsocialpolicy.org/docs/transcripts/12-09-04_Plenary_State_ofthe_Law_2004.pdf.

Though these faith-based groups are without doubt religious organizations, they provide humanitarian assistance. Research demonstrates that America's congregations, not even counting the thousands of separate faith-based nonprofits, constitute a major part of "our social safety net": "[H]elping others has become the norm for most local congregations, regardless of denomination."³³ Similarly, research shows that religious people—more so than nonreligious—give generously of time and talent and money, not only to religious causes, but also to secular causes.³⁴ People and organizations of faith contribute to the common good, not despite their faith, but because of it; they make distinctive *faith-shaped* contributions that are as important to the common good as are secular works.

II. THREE SNAPSHOTS

I have proposed that the major significance of the Bush faith-based initiative was to recast the federal government's social service work as a government partnership with civil society's efforts instead of a substitution for or domination over those efforts. The Administration (optimistically) summarized the impact of the initiative in these words: "[A] bureaucratic culture accustomed to large programs has been opened to localized, community-driven solutions."³⁵ That change of focus or emphasis is reflected in three innovative Bush programs.

A. PEPFAR

The President's Emergency Plan for AIDS Relief, started in 2003 and reauthorized with some changes in 2008, is noteworthy as an "unparalleled commitment" to AIDS prevention and treatment³⁶ and is generally regarded as highly successful, despite controversy about some elements, particularly the stress on abstinence and faithfulness as prevention strategies.³⁷ A no-

33. RAM A. CNAAN ET AL., *THE INVISIBLE CARING HAND: AMERICAN CONGREGATIONS AND THE PROVISION OF WELFARE* 280 (2002).

34. ARTHUR C. BROOKS, *WHO REALLY CARES: AMERICA'S CHARITY DIVIDE: WHO GIVES, WHO DOESN'T, AND WHY IT MATTERS* 38 (2006).

35. *INNOVATIONS IN COMPASSION*, *supra* note 18, at 1.

36. John W. Dietrich, *The Politics of PEPFAR: The President's Emergency Plan for AIDS Relief*, 21 *ETHICS & INT'L AFF.* 277, 277 (2007).

37. See Lisa Smith, *PEPFAR 2: Fighting HIV/AIDS (and Human Nature)*, *HUMANIST*, May–June 2008, at 6.

table feature of the program is its extensive and deliberate use of grassroots groups, with a stress on faith-based organizations, to deliver services. In 2007, nearly a quarter of the program's local partners were faith-based.³⁸

Why look specifically to religious organizations when their involvement in public programs is contentious, especially when the issue is as sensitive as the prevention and treatment of HIV/AIDS? According to the State Department, the importance of religious organizations in society is one reason: "In many focus countries, more than eighty percent of citizens participate in religious institutions. In certain nations, upwards of fifty percent of health services are provided through faith-based institutions, making them crucial delivery points for HIV/AIDS information and services."³⁹ A further reason is precisely the moral sensitivity of the matters at hand: Once given training in how to manage programs and information about successful prevention and treatment practices, faith-based grassroots groups "often design the most culturally appropriate and responsive interventions and have the legitimacy and authority to implement successful programs that deal with normally sensitive subjects."⁴⁰ PEPFAR offers the needed training through its New Partners Initiative.⁴¹

B. *Ready4Work*

The importance of trust, moral authority, and prime location is a reason the Ready4Work pilot prisoner re-entry program was designed to draw into participation faith-based and secular grassroots groups.⁴² To prepare ex-prisoners to become productive citizens in the community, the program built service networks of government agencies, experienced nonprofit organizations, businesses, churches, and neighborhood groups. Employment oppor-

38. INNOVATIONS IN COMPASSION, *supra* note 18, at 6.

39. OFFICE OF THE U.S. GLOBAL AIDS COORDINATOR, THE PRESIDENT'S EMERGENCY PLAN FOR AIDS RELIEF: COMMUNITY AND FAITH-BASED ORGANIZATIONS 2 (2005).

40. *Id.* at 1. For a similar rationale, see THE GLOBAL FUND TO FIGHT AIDS, TUBERCULOSIS AND MALARIA, REPORT ON THE INVOLVEMENT OF FAITH-BASED ORGANIZATIONS IN THE GLOBAL FUND 6-9 (2008), http://www.theglobalfund.org/documents/publications/other/FBOReport/GlobalFund_FBO_Report_en.pdf.

41. Office of the U.S. Global AIDS Coordinator, New Partners Initiative Homepage, <http://www.pepfar.gov/c19532.htm> (last visited Feb. 19, 2009).

42. For an overview of the Ready4Work program, see JOSHUA GOOD & PAMELA SHERRID, WHEN THE GATES OPEN: READY4WORK, A NATIONAL RESPONSE TO THE PRISONER REENTRY CRISIS 2 (2005).

tunities were offered by the businesses. The nonprofits managed the networks and arranged for government services such as housing. The grassroots groups provided mentors, the ingredient missing from previous efforts to help ex-prisoners transition successfully to a life back in society. Ready4Work enlisted “the commitment and credibility of volunteers” from the grassroots organizations.⁴³ Serving as mentors, the volunteers “help returnees change their personal mindsets, deal with workplace challenges and build social relationships.”⁴⁴

C. Access to Recovery

Access to Recover (ATR) funds a different kind of response to addiction from the main federal drug treatment program.⁴⁵ The states and Indian tribes that win ATR awards construct voucher systems through which addicts obtain recovery-support services as well as treatment services. Recovery-support services range from transportation and child-care help to spiritual counseling and mentoring, and the drug-treatment services can include spiritual approaches. Why so much religion, and how can it be included in a federally funded social service?

As to the “why,” perhaps it is enough to remember that Alcoholics Anonymous and similar programs insist that a “higher power” is essential if addicts are to avoid relapses.⁴⁶ The “how” is explained by the Supreme Court’s doctrine on “indirect” funding of services.⁴⁷ In ATR’s vouchers program, if some “faith-integrated” service receives federal dollars, it is because of the choice of an addict, not a government official; it is the consequence of an addict’s constitutionally protected religious exercise, not of an official’s unconstitutional effort to establish a

43. *Id.*

44. *Id.*

45. For an explanation of the main features of the Access to Recovery program, see Press Release, Substance Abuse & Mental Health Serv. Admin., U.S. Dep’t of Health & Human Servs., Access to Recovery: How It Will Work (June 20, 2003), http://www.samhsa.gov/news/newsreleases/030620bg_atr_how.htm.

46. For the important role of religion in drug treatment, see THE NAT’L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUM. UNIV., SO HELP ME GOD: SUBSTANCE ABUSE, RELIGION AND SPIRITUALITY (2001).

47. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 654–55 (2002); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993); *Mueller v. Allen*, 463 U.S. 388, 399 (1983).

religion.⁴⁸ ATR's voucher-based system invests addicts in their own recovery, expands the range and style of services they can use, and improves outcomes by extending assistance beyond the treatment phase. It is striking that, although Connecticut is firmly in the "blue state" category, the commissioner of its mental health department is determined his state should mimic the Bush ATR program.⁴⁹

III. ROOM FOR IMPROVEMENT

The Bush initiative was determined and persistent.⁵⁰ But the federal government is like a supertanker: It changes direction very slowly. The performance of the Bush faith-based initiative lagged its promise.

Consider vouchers, a paradigmatic innovation of the Bush initiative. Vouchers enable faith-integrated services to be funded by the government because the funding is "indirect."⁵¹ They ease the involvement of faith-based groups by eliminating the requirement that inherently religious activities be kept entirely separate from the government-funded services. Vouchers facilitate participation by grassroots organizations because, as part of an array of providers, any individual organization need not offer a large volume of services. And they promote bottom-up innovation by putting a premium on diverse, rather than standardized, services. Yet, despite great interest by the Administration,⁵² and the notable example of the ATR program,

48. Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 927-28 (2003).

49. Thomas A. Kirk, Jr., Comm'r, Conn. Dep't of Mental Health and Addiction Servs., State of Conn., Opportunity for True System Change, Presentation at the White House National Faith-Based and Community Initiatives Conference: Innovations in Effective Compassion (June 26, 2008), available at <http://www.ct.gov/dmhas/lib/dmhas/presentations/062608.pdf>.

50. I think that is the necessary conclusion, notwithstanding imperfect commitment to the initiative by significant forces in the Administration. On the imperfect commitment, see JOHN J. DI IULIO, JR., *GODLY REPUBLIC: A CENTRIST BLUEPRINT FOR AMERICA'S FAITH-BASED FUTURE* (2007). For a less reliable account, see DAVID KUO, *TEMPTING FAITH: AN INSIDE STORY OF POLITICAL SEDUCTION* (2006).

51. Lupu & Tuttle, *supra* note 48, at 927.

52. See, e.g., GRETCHEN KIRBY & ANDREW BURWICK, MATHEMATICA POLICY RESEARCH, USING VOUCHERS TO DELIVER SOCIAL SERVICES: CONSIDERATIONS BASED ON THE CHILD CARE AND DEVELOPMENT FUND (CCDF) AND TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) PROGRAM EXPERIENCES (2007), available at <http://aspe.hhs.gov/hsp/07/vouchers/experiences/report.pdf>.

after eight years of innovation most federal funding remains “direct”—officials select one or a small number of providers and any religious activities have to be kept separate from the services paid for by government dollars.

The lack of greater “voucherization,” to use the policy wonks’ term, is especially puzzling given the Administration’s conviction that mentoring can be vital to producing successful outcomes. The Ready4Work program, Mentoring Children of Prisoners, and other programs count on volunteers to pass on life wisdom and encouraging words to children and adults facing challenging circumstances and choices. But these programs are funded by grants (the mentors are volunteers, but federal dollars support recruitment, training, making matches, and so on), and thus the mentoring must be religion-free. This is so even though the mentors are typically drawn from churches (termed “volunteer-rich environments” by experts),⁵³ and both mentors and mentees, like much of the American public, often have a religious background and regard faith to be an important part of life. Mentors are instructed to defer all talk about religion until the official hour of mentoring is over, no matter how relevant to the interaction both mentor and mentee might regard religion to be, and notwithstanding that the discussion and the relationship itself are consensual.⁵⁴ By the end of the Administration only a little progress had been made to overcome this dysfunctional way of supporting expanded mentoring. A Department of Labor program experimented with “beneficiary-choice contracting,” a way of contracting for services that conforms to the Supreme Court’s “indirect” funding guidelines,⁵⁵ and a portion of the Mentoring Children of Prisoners program was converted to voucher funding.⁵⁶ But these innovations, like ATR, are but exceptions in a sea of continued

53. HOWARD HUSOCK, KENNEDY SCHOOL OF GOVERNMENT CASE PROGRAM, STARTING AMACHI: THE ELEMENTS AND OPERATION OF A VOLUNTEER-BASED SOCIAL PROGRAM 13 (2003), available at <http://www.fastennetwork.org/Uploads/A8BBB2D9-31FD-43F7-9B23-D3D2A9AA16D4.pdf>.

54. See CTR. FOR FAITH-BASED CMTY. INITIATIVES, U.S. DEPT’ OF LABOR, READY4REENTRY: PRISONER REENTRY TOOLKIT FOR FAITH-BASED AND COMMUNITY ORGANIZATIONS (n.d.), available at <http://www.doleta.gov/PRI/PDF/Pritoolkit.pdf>.

55. See STANLEY CARLSON-THIES ET AL., BENEFICIARY-CHOICE CONTRACTING IMPLEMENTATION GUIDE (2009), <http://www.coffeyconsultingllc.com/pdfs/BCGuide01152009.pdf>.

56. Child and Family Services Improvement Act of 2006 § 8(b)(1)(B), Pub. L. No. 109-288, 120 Stat. 1233, 1250 (codified in scattered sections of 42 U.S.C.).

“direct” funding programs that welcome the involvement of faith-based *organizations* but forbid federal support for faith-based *services*.

No progress at all was made in another area where religion and services coincide. Many professions, from doctors, nurses, and hospice care providers to counselors and social workers, now regard religion or spirituality to be a relevant and sometimes even vital aspect of the professional helping relationship. Their practice guidelines now mandate attention to this dimension, recommending the taking of a spiritual inventory and, where appropriate, using spiritual resources to supplement secular care.⁵⁷ Yet government often funds the services these professionals provide, and the funding is usually “direct”: The professionals’ services are contracted. Thus, notwithstanding the practice guidelines, religion is supposed to be excluded from the relationship with the patient or client.

Returning to the patient after-hours to complete a spiritual inventory or to discuss how the patient’s religious faith might enable her to undergo an essential but frightening treatment does not seem to be an adequate answer to the dilemma. Nor is it always obvious how a voucher alternative could be implemented. Should patients be required to interview a series of palliative care nurses about whether religion is incorporated into their treatment routines, with each nurse’s monthly income dependent on those patients’ choices?

These are unnecessary complications. The helping professions have already solved the problem of protecting patients’ religious freedom without a blanket exclusion of religion: The doctor or counselor must seek the patient’s or client’s consent before discussing religion, and is furthermore bound by professional norms not to abuse her position of power and authority in the relationship.⁵⁸ These procedures and norms fully protect patients’ religious freedom. Yet this way of dealing with religion in government-supported services fits neither the “direct” nor the “indirect” funding model. Conceptualizing this

57. Katherine Gergen Barnett & Auguste H. Fortin, *Spirituality and Medicine: A Workshop for Medical Students and Residents*, 21 J. GEN. INTERNAL MED. 481, 481 (2006) (“[G]overning bodies for medical education . . . have recommended that spirituality and religion be incorporated into medical training.”).

58. See Stephen G. Post et al., *Physicians and Patient Spirituality: Professional Boundaries, Competency, and Ethics*, 132 ANNALS INTERNAL MED. 578, 581–82 (2000).

alternative and winning legal acceptance for it was not even on the Bush agenda.⁵⁹

Consider, finally, an entirely different failure. The No Child Left Behind law provides that children assigned to a persistently underperforming public school should be able to transfer to a better public school or should receive extra help from a tutoring service.⁶⁰ Faith-based and secular grassroots groups are among the entities that can apply to become Supplementary Educational Services grantees that offer the tutoring.⁶¹ The SES program, however, is operated through public school districts, which often are leery of faith-based groups, because of a string of Supreme Court cases mandating strict separation of religion and public schools. Worse, the law provides that school districts need not allocate funds to SES grants and that funds not used in that way will be retained by the district for its own uses.⁶² It will come as no surprise, then, that local school districts often have not operated SES grant programs, grassroots groups have often had no chance to apply, and most students have had no access to the tutoring.⁶³ The law authorizes participation by faith-based groups, but, in the same law, this provision, which has nothing specifically to do with religion, largely nullifies the effects of the permissive language. Indeed, the inefficiencies and incoherence of government operations are a major reason why the policy innovations of the Bush faith-based initiative have not changed more significantly how the government provides services.

IV. RELIGION IN AMERICAN PUBLIC LIFE

Sociologist of religion Peter Berger famously said that America is a nation of (religiously committed) Indians governed by an elite of (resolutely secular) Swedes. There are many reasons for the

59. For a fuller discussion of this issue, see Stanley Carlson-Thies, *The Faith-Based Initiative: Both Cause of Contention and the Solution to an Impasse?*, 44 J. ECUMENICAL STUD. 70 (2009).

60. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.).

61. U.S. DEP'T OF EDUC., SUPPLEMENTAL EDUCATIONAL SERVICES: NON-REGULATORY GUIDANCE 10 (2009), available at <http://www.ed.gov/policy/elsec/guid/suppsvcsguid.doc>.

62. Michael J. Petrilli, *Testing the Limits of NCLB: Implementation is not the problem*, EDUC. NEXT, Fall 2007, at 53.

63. *Id.* at 52, 53.

propensity of our governing class to insist on a “naked public square,”⁶⁴ despite the First Amendment requirement that government not hinder the free exercise of religion⁶⁵ and notwithstanding the American liberal tradition’s high valuation of freedom of conviction. An important reason is a casual presumption that the choice is binary between church and state, or religion and the public square: either theocracy or secularism, either a mandated religion or else the enforced retreat of religion from public influence and public affairs. Theocracy being clearly unconstitutional⁶⁶ (not that it has ever been a realistic prospect in the United States), the alternative of secularism must be the normative requirement.

And yet enforced secularism also violates the First Amendment and our liberal tradition. It sits uneasily with the manifest religiosity of American citizens and American civil society, including the many instances of faith in social-service institutions and in the professions. What we need is an alternative framework, something other than either government-mandated religion or government-mandated secularism.

The faith-based initiative—pursued by the Bush Administration and during the Clinton years—provides a model of the alternative we need. This is a model of equal opportunity or accommodation: The government ought to be neither for nor against religion, but rather ought to treat religious and secular options and choices equally.⁶⁷ The faith-based initiative has not been perfect in practice, but its principles are the right ones: honor religious along with secular convictions, accommodate faith-based as well as secular social-service providers, and protect the identity of religious providers while at the same time safeguarding the rights of clients.

V. THE FAITH-BASED INITIATIVE, VERSION 3.0

How will President Obama’s faith-based initiative develop? Will it be an expansion of the Bush initiative or will it develop in

64. RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (2d ed. 1986).

65. U.S. CONST. amend. I.

66. *Id.*

67. For this alternative model, see, for example, STEPHEN V. MONSMA, *POSITIVE NEUTRALITY: LETTING RELIGIOUS FREEDOM RING* (1993); Richard W. Garnett, *Positive Secularism and the American Model of Religious Liberty*, *PUB. DISCOURSE*, Jan. 30, 2009, <http://www.thepublicdiscourse.com/viewarticle.php?selectedarticle=2009.01.30.001.pdart>.

a significantly new direction? Early indications are intriguing. President Obama has criticized the Bush initiative for being politicized, for not expanding spending, and for not sufficiently stressing measurable outcomes.⁶⁸ Yet he often has emphasized his own strong commitment to fully engaging faith-based organizations, along with secular groups, in an “all hands on deck” approach to addressing social needs.⁶⁹ As a candidate he committed to maintaining the federal faith-based offices and the federal partnership with state faith-based offices, while advocating expanded use of intermediaries and even greater efforts to build the management and service capacity of private organizations.⁷⁰

But he has also voiced worries that the Bush initiative was too cavalier about constitutional limitations on religion.⁷¹ If Bush typically praised the “wonder-working power” of faith,⁷² Obama is more likely to emphasize the secular restraints within which faith-based organizations must work. He stresses the secular good that faith-based organizations must accomplish and emphasizes that federal funds must not be used for proselytizing or religious instruction,⁷³ and he has advocated banning religious hiring in programs that faith-based groups operate with federal funds.⁷⁴ Except for the religious hiring restrictions, these are restatements of themes of the Bush initiative, but the tone is one that may encourage a smaller public role for faith-based social services.

If that happens, it will be an unfortunate development for this third version of the faith-based initiative. The Charitable Choice rules (faith-based initiative 1.0) and the Bush equal treatment rules (faith-based initiative 2.0) require government to be biased neither for nor against faith-based providers and to seek to protect equally faith-based organizations and the clients who turn to government-funded services for help. The rules may need to be fine-tuned to better protect the religious freedom of those clients,

68. Amy Sullivan, *Why Obama seized the faith-based mantle*, USA TODAY, July 28, 2008, at A11.

69. OBAMA FOR AMERICA, *supra* note 4, at 2.

70. *Id.*

71. *Id.*

72. President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Jan. 28, 2003).

73. OBAMA FOR AMERICA, *supra* note 4, at 2.

74. *Id.* For the opposite stance of the Bush Administration, see CARL H. ESBECK, ET AL., *supra* note 25.

but better protection for them should not be purchased at the expense of greater restrictions on faith-based organizations.

President Obama should insist not only on protecting clients from unwanted religion but also on meeting the needs of the many clients who value services that include religion. Many Americans are religious believers who do not think that religion is irrelevant to social problems and solutions. I recall a time when I told an audience that Charitable Choice explicitly guarantees clients an alternative if they object to receiving services from a faith-based provider. Two people immediately leapt to their feet and said that they had been through a series of secular drug treatment programs to no avail but had finally gotten effective help when they went to a faith-based program. They both insisted, with great urgency, that if the government really cared for the well-being of citizens, it would add to the Charitable Choice guarantee the promise of faith-infused services for all clients who desire this kind of help.

I hope President Obama will show as much concern for citizens who are convinced of the power of faith as he does for those who are committed to secular methods. Wherever possible, he should work to ensure that there are not only secular alternatives to faith-based providers but also faith-based alternatives to secular services. It will be a very important improvement to the faith-based initiative if the Obama Administration greatly expands the use of "indirect" funding so that faith-integrated services can routinely be offered next to secular services.⁷⁵ The federal collaboration with faith-based organizations will best fulfill the twin requirements of the First Amendment—respect for religious exercise without the establishment of religion—when people seeking help can routinely choose between secular and faith-integrated services.

75. These comments draw from Brookings Inst., Panel, White House Partnerships with Faith-Based Organizations: What Should the New Administration Do? (Dec. 5, 2008), available at http://www.brookings.edu/~media/Files/events/2008/1205_faith_based/20081205_faith_based.pdf (containing the response of Stanley Carlson-Thies to MELISSA ROGERS & E.J. DIONNE JR., BROOKINGS INST., SERVING PEOPLE IN NEED, SAFEGUARDING RELIGIOUS FREEDOM: RECOMMENDATIONS FOR THE NEW ADMINISTRATION ON PARTNERSHIPS WITH FAITH-BASED ORGANIZATIONS (2008), http://www.brookings.edu/~media/Files/rc/papers/2008/12_religion_dionne/12_religion_dionne).

THE BUSH ADMINISTRATION AND AMERICA'S INTERNATIONAL RELIGIOUS FREEDOM POLICY

THOMAS F. FARR* & WILLIAM L. SAUNDERS, JR.**

In February 2002, President George W. Bush appeared at Beijing's Tsinghua University and delivered a speech that was broadcast across China.¹ A substantial portion of the President's remarks focused on the religious nature of the American people, as well as the importance of religious freedom for the United States and for China.² In the United States, religious liberty advocates were greatly encouraged. The President had made it clear to the Chinese government, one of the world's worst violators of religious freedom, that his country stood resolutely for the protection of that right.

Before and during the early years of the Bush Administration, there were reasons for cautious optimism about the cause of international religious liberty. Beginning in 1998, U.S. law mandated that a goal of American diplomacy be the advancement of religious freedom around the world.³ The International Religious Freedom (IRF) Act of 1998 created an office in the State Department, headed by a very senior diplomatic official—an ambassador at large—to lead the new foreign policy

* Visiting Associate Professor of Religion and International Affairs, Edmund A. Walsh School of Foreign Service, Georgetown University; Senior Fellow, Berkley Center for Religion, Peace, and World Affairs. Dr. Farr directs the Religion and Foreign Policy program at the Berkley Center. He was the first director of the State Department's Office of International Religious Freedom.

** Senior Fellow and Director of the Center for Human Life and Bioethics, Family Research Council; J.D., Harvard Law School. Mr. Saunders has worked and written on the subject of religious freedom for many years. He was featured in Harvard Law School's Guide to Conservative Public Interest Law in 2004 and served on the Advisory Committee for Harvard's Celebration of Public Interest Law in 2008. He is the Chair of the Federalist Society's Religious Liberties Practice Group.

1. President George W. Bush, Address at Tsinghua University, Beijing, People's Republic of China (Feb. 22, 2002) (transcript available at <http://merln.ndu.edu/archivepdf/china/WH/20020222.pdf>).

2. *See id.*

3. International Religious Freedom Act of 1998 (IRF Act), Pub. L. No. 105-292, § 2(b), 112 Stat. 2787.

initiative.⁴ The IRF Act also created an independent commission to assess the Department's performance.⁵ President Bush clearly cared deeply about this issue. On several occasions during his tenure, he met with religious dissidents and the victims of religious persecution, sometimes in the face of criticism.⁶

Moreover, after September 11, 2001, the Administration began developing a policy called a "forward strategy of freedom."⁷ The policy sought support for democratic reformers in the greater Middle East to undermine the pathologies feeding Islamist terrorism.⁸ Both common sense and American history suggested that religious liberty would play a role in the new freedom agenda: Any highly religious society must be grounded in religious freedom for democracy to endure. For those who had led the legislative campaign for the IRF Act, it seemed that the stars might finally be coming into alignment: they had a President devoted to religious liberty, a powerful new official in the State Department dedicated to carrying out a statutory mandate, and a national security strategy designed to encourage the institutions and habits of freedom.

This Essay will explore how IRF policy fared under the George W. Bush Administration. In attempting to gauge success and failure, and strength and weakness, this Essay will focus on three issues: the extent to which U.S. diplomacy actually reduced religious persecution, how well it advanced the institutions and habits of religious freedom, and what basis it provided the Obama Administration to make further progress. In each of these areas, the record is, unsurprisingly, mixed. Our overall judgment is that the Administration focused a critically important spotlight on governments that persecute and managed to free some number of religious prisoners. In at least three countries—Sudan, Vietnam, and Saudi Arabia—significant structural steps were taken. Notwithstanding these successes, however, the

4. IRF Act § 101.

5. IRF Act §§ 201–202.

6. *See Bush to meet privately next week with Dalai Lama*, AGENCE FR.-PRESSE, Oct. 11, 2007, http://afp.google.com/article/ALeqM5goA_mx1wCE8baS9pclnJoXmIH9bg;Christian_Chinese_dissidents_meet_Bush_to_talk_about_religious_freedom_in_China, ASIA NEWS, May 11, 2006, <http://www.asianews.it/index.php?l=en&art=6134&size=>.

7. President George W. Bush, Speech at Whitehall Palace, London, England (Nov. 18, 2003) (transcript available at <http://merln.ndu.edu/merln/pfiraq/archive/wh/20031119-1.pdf>).

8. *Id.*

Bush Administration did not make significant progress toward either reducing persecution or advancing religious freedom. Surprisingly, it appears that IRF policy, isolated within the State Department, had virtually no role in democracy promotion, public diplomacy, or counterterrorism strategy.

I. THE INTERNATIONAL RELIGIOUS FREEDOM ACT

When George W. Bush was sworn in as the forty-third President on January 20, 2001, the machinery necessary to promote religious liberty already existed as an element of U.S. foreign policy. Just two years earlier, in October 1998, Congress had unanimously passed the IRF Act, and President William J. Clinton had immediately signed it into law. But the political harmony surrounding the law's passage and signing was deceptive. The questions of whether and how to promote religious freedom abroad had been extremely contentious during the previous two-year debate, both within the Clinton Administration and on Capitol Hill.⁹

The reasons why supporters believed a law was necessary were clear. In their view, the scourge of international religious persecution had taken a back seat in the foreign policy of the Clinton Administration. The genocidal war in Sudan, directed against Christian and animist Africans in the south and the Nuba Mountains, had been largely ignored by the press and the U.S. government, especially the State Department.¹⁰ Other

9. See ALLEN D. HERTZKE, *FREEING GOD'S CHILDREN: THE UNLIKELY ALLIANCE FOR GLOBAL HUMAN RIGHTS* 183–236 (2004).

10. See William L. Saunders, Jr. & Yuri G. Mantilla, *Human Dignity Denied: Slavery, Genocide, and Crimes Against Humanity in Sudan*, 51 CATH. U. L. REV. 715, 721–25 (2002). President Bush actively pursued initiatives regarding Sudan from his first days in office. His achievements there significantly advanced religious freedom even though the State Department's Office of International Religious Freedom only played a very small role in the effort. Bush appointed former Senator John Danforth as "special envoy" to Sudan, and shepherded the Sudan Peace Act through Congress, which he signed in October 2002. Sudan Peace Act, Pub. L. No. 107-245, § 6, 116 Stat. 1504 (2002). U.S. involvement proved crucially important in moving the parties in the civil war to sign the Comprehensive Peace Agreement. The Sudan Peace Act authorized the U.S. government to spend \$100 million in each of the fiscal years 2003, 2004, and 2005 to assist the population in areas of Sudan outside Sudanese government control. Sudan Peace Act § 5. It required the President to certify the good-faith engagement of the Sudanese government in its negotiations with the Sudanese People's Liberation Movement every six months, and authorized U.N. arms embargoes if the Sudanese failed. Sudan Peace Act § 6.

serious problems of religious persecution that occurred in China, India, Saudi Arabia, Egypt, Iran, Iraq, Nigeria, and elsewhere also received scant attention.¹¹

By the mid-1990s, the relative indifference of American policy and media elites had sparked a movement by Christian and human rights activists to make the issue of religious persecution part of the U.S. foreign policy agenda. In the fall of 1997, Congressman Frank R. Wolf (R-Va.) introduced the Freedom From Religious Persecution Act,¹² cosponsored by Senator Arlen Specter (R-Pa.). Wolf-Specter, as it was called, mandated automatic sanctions against governments responsible for religious persecution.¹³ Secretary of State Madeleine Albright opposed the sanctions and other provisions, but she also argued against the very concept of such a bill as creating a "hierarchy among human rights."¹⁴ Within the State Department, considerable skepticism existed about a law perceived as emanating from the Christian right.

Ultimately, the IRF Act replaced Wolf-Specter. Sponsored by Senators Don Nickles (R-Okla.) and Joe Lieberman (D-Conn.), the IRF Act rejected the automatic sanctions upon which Wolf-Specter had been based and placed a greater emphasis on quiet diplomacy. It focused on the public designation of severe violators and the threat of economic sanctions against them as its central policy tools.¹⁵ These provisions reflected political compromises that, when combined with other circumstances, induced the Clinton Administration to sign the bill.¹⁶ But principle-based objections to the IRF Act remained.

11. On more general indifference to religious persecution, see the remarks of Judge John Noonan, Jr. in W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 1, 1 (Johan D. van der Vyver & John Witte, Jr. eds., 1996).

12. Freedom From Religious Persecution Act, H.R. 2431, 105th Cong. (1997).

13. *Id.*

14. Madeline K. Albright, Remarks on Religious Freedom, Columbus School of Law, The Catholic University of America, Washington, D.C. (Oct. 23, 1997) (transcript available at <http://publicaffairs.cua.edu/speeches/albright97.htm>).

15. International Religious Freedom Act of 1998 (IRF Act), Pub. L. No. 105-292, §§ 202, 401-402, 112 Stat. 2787, 2798, 2800, 2802.

16. President Clinton's impending impeachment trial and the 1998 midterm elections were two key political factors that led to the compromise. See HERTZKE, *supra* note 9, at 221-34; see also THOMAS F. FARR, WORLD OF FAITH AND FREEDOM: WHY INTERNATIONAL RELIGIOUS LIBERTY IS VITAL TO AMERICAN NATIONAL SECURITY 111-13 (2008).

The IRF Act required U.S. foreign policy to promote religious liberty. It established an Office of International Religious Freedom in the State Department, headed by an ambassador at large.¹⁷ In a typically American attempt to create checks and balances, the IRF Act also established an independent, bipartisan “watchdog” Commission on International Religious Freedom to issue separate policy recommendations and public critiques of the State Department’s performance.¹⁸ The Act also urged, but did not require, the establishment of a religious freedom advisor on the National Security Council.¹⁹

Although the State Department had issued human rights “country reports” for many years, those reports often deemphasized religious liberty.²⁰ Accordingly, the IRF Act required an annual report to describe the status of religious freedom in some 200 countries.²¹ Just as important, the Act required that those reports state what actions the United States was taking to address problems in those countries where violations were occurring.²² The annual IRF Report has provided the statute’s most consequential challenge to the secular culture of American diplomacy. The reporting requirement requires foreign service officers (FSOs) to engage religious actors, ideas, and communities in their respective countries. Although these officers are typically the most junior in American embassies and consulates, the annual report has ensured that the younger generation of diplomats is exposed to religious factors in a way that most of their elders were not.

During the first decade of IRF Act implementation, from 1998 to 2008, certain patterns of diplomatic action emerged. The Act encouraged a broad array of direct and indirect initiatives, including the use of foreign aid and grants to non-

17. IRF Act § 101.

18. IRF Act §§ 201–202. We do not have space here to provide a thorough treatment of the Commission, but it has fulfilled, in part, its primary mandate by the issuance of its own detailed reports and “countries of particular concerns” recommendations. See United States Commission on International Religious Freedom, <http://www.uscirf.gov>. For a critical discussion of the Commission’s genesis and contemporary role, see FARR, *supra* note 16, at 118–21.

19. IRF Act § 301. Neither Clinton nor Bush considered this position important enough to vest it in a single, senior official.

20. FARR, *supra* note 16, at 335 n.60.

21. IRF Act § 102.

22. IRF Act § 102.

governmental organizations, to advance religious freedom. Most of the Act's language on this subject, however, was non-binding. For example, the IRF Act provides that "in the provision of foreign assistance, the United States should make a priority of promoting and developing legal protections and cultural respect for religious freedom."²³ Title V of the IRF Act amended existing statutes on foreign aid, international broadcasting, international exchanges, and Foreign Service awards to incorporate the advancement of religious freedom as a goal, but not as a mandate.²⁴ On the other hand, the IRF Act *required* public designation of the worst violators.²⁵ Each year, the State Department identifies all violations of religious freedom in its Annual Report on International Religious Freedom.²⁶ The State Department subsequently publishes a list of the "countries of particular concern" (CPCs).²⁷ The first IRF Ambassador, Robert Seiple, called CPCs the "poster child of religious persecution,"²⁸ and he was right. CPCs are governments guilty of perpetrating or acquiescing in "particularly severe violations of religious freedom," such as torture, rape, abduction, clandestine detention, and "other flagrant denial[s] of the right to life, liberty, or the security of persons."²⁹

In determining which nations to designate as CPCs, the Secretary of State takes into account a variety of evidence, including the Department's own reports, the recommendations of the United States Commission on International Religious Freedom, and data from outside sources.³⁰ After publication of the CPC list, the Secretary must choose an action from a menu of options, ranging from very serious economic sanctions to a waiver of any action at all, for each identified CPC.³¹ A waiver

23. IRF Act § 501(a)(2).

24. IRF Act tit. V.

25. IRF Act § 3(11).

26. IRF Act § 102; see U.S. Dep't of State, Diplomacy in Action, International Religious Freedom, <http://www.state.gov/g/drl/rls/irf/> (last visited Mar. 1, 2009).

27. The President delegates to the Secretary of State the authority to designate nations guilty of particularly severe violations of religious freedom as "countries of particular concern." The President's authority to designate "countries of particular concern" is found in section 402(b) of the IRF Act.

28. FARR, *supra* note 16, at 149.

29. IRF Act § 3(11).

30. See IRF Act § 102.

31. IRF Act § 402(c).

can be exercised in three circumstances: when the violations have ceased, when the exercise of the waiver would “further the purposes” of the IRF Act, or when the “important national interest of the United States requires the exercise of such waiver authority.”³²

Over the years, the annual CPC list usually contained six to ten countries, including four perennials: China, Sudan, Burma, and Iran.³³ Other CPCs included in the first designation in 1999 were Saddam Hussein's Iraq, Slobodan Milosevic's Serbia, and the Taliban-controlled Afghanistan.³⁴ In subsequent years, all three were removed from the list because their regimes were overthrown by U.S.-led military campaigns and replaced by democratic governments.³⁵ The Bush Administration added North Korea, Saudi Arabia, Vietnam, Uzbekistan, and Eritrea to the list.³⁶

In sum, the IRF Act established a senior State Department official and a watchdog agency to counter religious persecution and advance religious freedom. It required an annual report, designation of the worst violators, and the threat of economic sanctions. But it also provided authority for a bevy of positive policy actions, including foreign aid, legal development, cultural programs, foreign broadcasting, and international exchanges.

II. IRF POLICY, 2001–2008

The Bush Administration took control of the State Department in January 2001. By June 2001, most of the senior officials

32. IRF Act § 407(a).

33. See, e.g., Designation of Countries of Particular Concern Under The International Religious Freedom Act, 64 Fed. Reg. 59,821, 59,821 (1999).

34. FARR, *supra* note 16, at 225, 330 n.14.

35. *Id.* at 204; see also U.S. DEP'T OF STATE, ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, 2004, at xix–xx (2004) [hereinafter 2004 IRF REPORT], available at <http://www.internationalrelations.house.gov/archives/109/20429.pdf> (noting that in June 2004, “the Secretary acted to remove Iraq's designation as a ‘Country of Particular Concern’ for its severe violations of religious freedom under the regime of Saddam Hussein” which coincided roughly with the “date of the transfer of power from the Coalition Provisional Authority to the Iraqi Interim Government”); U.S. DEP'T OF STATE, ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, 2002, at xxv (2002), available at <http://www.internationalrelations.house.gov/archives/107/82501a.pdf> (“The fall of the Taliban and the subsequent establishment of the interim governments resulted in a major improvement in religious freedom.”).

36. See, e.g., U.S. DEP'T OF STATE, ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, 2007, at xiv–xvii (2008) [hereinafter 2007 IRF REPORT], available at <http://www.internationalrelations.house.gov/110/37767.pdf>.

at the Department—assistant secretaries and higher—had been nominated and confirmed by the Senate, and had assumed their jobs.³⁷ These included the new Assistant Secretary for Democracy, Human Rights, and Labor (DRL). The White House, however, did not nominate an IRF Ambassador at Large until the late fall of 2001, and the new Ambassador, John V. Hanford III, did not take his position until May 2002, after it had been vacant for almost twenty months.³⁸

The Clinton-Albright State Department was responsible for situating the IRF Ambassador at Large and his office in the Bureau of Democracy, Human Rights, and Labor within the State Department (DRL), a placement which made the Ambassador subordinate to the Assistant Secretary of State for Democracy, Human Rights and Labor.³⁹ At one level this made sense; after all, religious freedom was a human right. But this placement conflicts with the typical State Department hierarchy, in which an ambassador at large is senior to an assistant secretary.⁴⁰ Moreover, the IRF Act had designated the IRF Ambassador as “principal adviser to the President and the Secretary of State.”⁴¹ These two factors suggested that the IRF office and its leader should be placed directly under the Secretary, or another more senior official, rather than in a Department bureau.

Nevertheless, Secretary of State Colin Powell did not alter the Clinton Administration’s arrangement; nor did Powell’s successor, Secretary Condoleezza Rice. Moreover, when John Hanford assumed his position in May 2002, he was informed that he would not be part of the regular senior staff meetings chaired by the Secretary.⁴² Notably, other ambassadors at large and all assistant secretaries were part of those meetings. Under the Clinton Administration, Hanford’s predecessor Robert Seiple had been a

37. FARR, *supra* note 16, at 162.

38. See U.S. Dep’t of State, Biography of John V. Hanford III, <http://www.state.gov/r/pa/ei/biog/113758.htm> (last visited Mar. 2, 2009).

39. FARR, *supra* note 16, at 142; see U.S. DEP’T OF STATE, ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, 2001, at xi (2001), available at <http://www.state.gov/documents/organization/9001.pdf>; U.S. Dep’t of State, About the Bureau of Democracy, Human Rights and Labor, <http://2001-2009.state.gov/g/drl/about/index.htm>.

40. See FARR, *supra* note 16, at 195.

41. International Religious Freedom Act of 1998, Pub. L. No. 105-292, §§ 101(c)(2), 112 Stat. 2787, 2972.

42. FARR, *supra* note 16, at 194.

participant in regular senior staff meetings.⁴³ This bureaucratic isolation of the IRF Ambassador and the IRF function communicated to officials inside the Department, in Washington, and in foreign capitals that the issue of religious freedom—although personally important to the President—remained unconnected to the broader imperatives of U.S. foreign policy.

The way in which the Secretary of State employed the CPC methodology conveyed a similar message. In most cases, no action was taken with respect to designated countries, either positive or punitive. Only Eritrea received economic sanctions, but these sanctions ultimately failed to improve the situation.⁴⁴ Most other countries appearing on the CPC list previously faced U.S. sanctions for other human rights violations. In such cases, the IRF Act permitted the Administration to “double hat” the existing sanction, that is, to cite it as satisfying the legal requirement for action.⁴⁵ This provision and the rather liberal standards for waiver were two key concessions in statutory language the Clinton Administration won in the final stages of negotiations over the IRF Act.

Notwithstanding these problems, Ambassador Hanford made significant contributions to U.S. foreign policy in at least four areas. First, he employed the IRF Act creatively in Vietnam and Saudi Arabia.⁴⁶ For several years the East Asian Bureau and U.S. embassy in Hanoi prevented the designation of Vietnam as a CPC, even though the facts favoring the designation were reasonably clear.⁴⁷ Modeled to an extent on the Chinese approach to controlling religion, Vietnam’s system was more flexible but still repressive.⁴⁸ Indigenous Buddhists and Hoa Hao were at constant risk of arrest or worse, and Protestant Christians in the Highlands were subject to forced renunciations, displacement, and church destruction.⁴⁹ Catholics faced lesser, but still serious, disabilities.⁵⁰

43. *Id.* at 141–42.

44. Sanctions were applied after designation in 2005. Two years later, however, conditions had “further deteriorated.” 2007 IRF REPORT, *supra* note 36, at 32.

45. See FARR, *supra* note 16, at 196–97.

46. See *id.* at 203–07.

47. See *id.* at 203–04.

48. *Id.*

49. *Id.* at 203.

50. *Id.*

Ambassador Hanford decided to focus on Vietnam at the beginning of his tenure at the State Department.⁵¹ During his first two years, he slowly and methodically built a case based on the facts of persecution until he convinced Secretary Powell to list Vietnam as a CPC in 2004.⁵² Ambassador Hanford then negotiated a binding agreement with Hanoi, one of the options from the menu of actions in the IRF Act.⁵³ Ultimately, the agreement led Hanoi to pass a law that has reduced persecution, and, in 2006, the State Department removed Vietnam from the CPC list.⁵⁴ It remains to be seen whether these actions will result in permanent improvements in religious freedom in Vietnam, but the case serves as the most promising example of successful U.S. IRF policy to date.

A more tentative, albeit equally hopeful, example of progress is Saudi Arabia, a country where the utter absence of religious freedom has directly impacted U.S. security. Indeed, it is Saudi Arabia in which Osama bin Laden and other al Qaeda terrorists imbibed the Wahhabism that provided much of the theological oxygen for their movement against the United States.⁵⁵ Preeminent among Wahhabism's destructive theological premises is the belief that non-Wahhabis, Muslim and non-Muslim alike, are infidels deserving of harsh repression and even death.⁵⁶

As U.S. attitudes about Saudi Arabia shifted after 9/11, Ambassador Hanford and other senior Bush Administration officials secured designation of Saudi Arabia as a CPC in 2004.⁵⁷ By 2006, they had negotiated an informal, nonbinding Saudi agreement to a series of positive steps, including cessation of official funding for Wahhabi imams and literature overseas and revision of bigoted Wahhabi language in Saudi textbooks.⁵⁸ By 2008, neither pledge had been fully implemented; rather, there was some evidence of Saudi resistance.⁵⁹ But the agreement serves as an im-

51. *Id.* at 204.

52. *Id.*

53. *Id.*

54. *Id.* at 204–05.

55. *Id.* at 220–23.

56. *Id.* at 231–32.

57. 2004 IRF REPORT, *supra* note 35, at xxxiii.

58. 2007 IRF REPORT, *supra* note 36, at 596.

59. *See, e.g.*, 2008 UPDATE: SAUDI ARABIA'S CURRICULUM OF INTOLERANCE (2008), available at http://www.hudson.org/files/documents/saudi_textbooks_final.pdf.

portant example of an IRF policy action with an impact on U.S. national security.

Second, Ambassador Hanford brought the annual IRF Report under the management and control of his office.⁶⁰ Until 2005, it had been edited and compiled under the operational control of the DRL Assistant Secretary, not under Ambassador Hanford.⁶¹ This arrangement provided yet another signal that the State Department wanted to reduce the independent status of the IRF issue and return it to the less elevated position it occupied prior to 1998. Indeed, before Ambassador Hanford gained control of the IRF Report, the DRL Assistant Secretary made a failed attempt to reabsorb it into the country reports on human rights.⁶² Once the ambassador and his office came to manage the IRF Report, however, the chances of its becoming a significant policy tool, rather than a mere catalogue of persecutory data, increased.

Third, with assistance from members of Congress, including Representatives Frank Wolf (R-Va.) and Chris Smith (R-N.J.), and often against the resistance of State Department officials, the staff of the IRF office grew from a handful of officials to approximately twenty-five persons during Hanford's tenure.⁶³ Most of these men and women are highly accomplished and dedicated to the causes of opposing religious persecution and advancing religious freedom. As Ambassador Hanford once put it, "We have almost more Ph.D.s per capita than any other office, more lawyers than any office but the legal office, and probably more seminary grads. I like to say we can out-think, out-sue and out-pray any other office at the State Department."⁶⁴ Even so, he added quite sensibly, "We're still a tiny office taking on the whole world's religious freedom problems."⁶⁵ That being said, it remains true that the growth of this office will be critical to the future success of U.S. IRF policy.

60. FARR, *supra* note 16, at 172.

61. *Id.* at 171.

62. *Id.* at 172.

63. *Id.* at 211.

64. John V. Hanford III, Speech at the International Religious Freedom: Religion and International Diplomacy Conference, Pew Forum, Washington, D.C. (May 8, 2007) (transcript available at <http://pewforum.org/events/?EventID=139>).

65. *Id.*

Finally, Ambassador Hanford and his office, working with American diplomats in various countries, were responsible for freeing religious prisoners and safeguarding individuals and families in flight from persecuting governments or private actors.⁶⁶ There are hundreds of people today, perhaps more, living in safety and freedom because of the actions of America's IRF diplomacy. This is a significant contribution in itself, because it can give hope to millions more who either remain in prison or are subject to the cruel whims of those in power. Those millions, however, remain highly vulnerable. U.S. IRF policy has had very little impact on overall levels of religious persecution around the world.

On balance, President Bush and his IRF Ambassador at Large, John Hanford, made important contributions to the policy initiated by the 1998 IRF Act. They failed, however, to overcome the indifference and, in some cases, the hostility of American diplomacy to the new religious freedom policy.

III. ASSESSING THE BUSH YEARS

What were the failures of U.S. IRF policy and what accounts for those failures? Four areas in particular bear further scrutiny: the willingness of the Bush White House, at the outset of the Administration, to permit the Ambassador's position to remain unfilled for a full year after other senior State Department officials were in place; the bureaucratic and functional isolation of the issue within Foggy Bottom and the implications for broader American interests in the world; the secularistic culture of the American foreign service; and that culture's intellectual underpinnings.

Exploring in any detail why the Bush Administration permitted the Ambassador's position to remain vacant for so long would take the discussion too far afield.⁶⁷ We merely note here that there were serious differences among Bush supporters over who should get the job. But such disputes are a staple of Washington politics. Had the Bush White House considered the Ambassador's function of any policy significance, it would have acted quickly to fill it. Instead, the Bush Administration

66. FARR, *supra* note 16, at 210.

67. For a discussion of this issue, see FARR, *supra* note 16, at 187-96.

began establishing State Department priorities and lines of authority, and simply allowed the Ambassador position to remain unfilled while IRF supporters squabbled.⁶⁸ The White House also did not object when the State Department considered absorbing the Ambassador's mission into the portfolio of the Assistant Secretary for DRL, a move which would have eliminated the position as an independent entity.⁶⁹ It is difficult to avoid the conclusion that the Bush team saw the IRF ambassadorship as, at best, a second-order personnel issue. The ambassadorship was likely viewed more as a reward for domestic supporters than as an appointment with significant foreign policy implications.

The Department's decision to keep the IRF function housed under DRL, which is itself outside mainstream foreign policy making, as well as its refusal to permit the IRF Ambassador into senior staff meetings or senior policy discussions, seems to confirm this judgment. Notwithstanding his title and his confirmation by the Senate, this Ambassador was to be treated as a "special interest" appointment rather than a senior member of the Department.⁷⁰ It was made immediately clear to all that Ambassador Hanford would not in fact be a "principal adviser to the President and Secretary of State," despite the mandate from the IRF Act.⁷¹ Unfortunately, the marginalization of the IRF office continued under Secretary Condoleezza Rice.⁷²

The bureaucratic and functional isolation of the IRF issue at Foggy Bottom exacerbated an existing problem: the hesitation of FSOs to work in the office. The proportion of FSOs in the IRF staff at the time of Ambassador Hanford's appointment was, and remains, quite low.⁷³ While brilliant and creative minds from outside the diplomatic service are attracted to this issue of growing international importance, few FSOs see it that way. Most of them, even those interested in religion as a policy issue, perceive working on the IRF staff to be a dead-end for their careers. It would be difficult to prove them wrong.⁷⁴

68. *Id.* at 190.

69. *Id.* at 167–68.

70. *Id.* at 194.

71. International Religious Freedom Act of 1998, Pub. L. No. 105-292, §§ 101(c)(2), 112 Stat. 2787, 2972; *see also* FARR, *supra* note 16, at 194.

72. FARR, *supra* note 16, at 195.

73. *Id.* at 211.

74. *Id.*

As problematic as all these issues were, however, the placement of the IRF Ambassador and his office at the State Department reflected an even deeper deficiency: The policy of advancing international religious freedom was not considered relevant to broader American national interests.⁷⁵ When inter-agency meetings were held on U.S. policy in such countries as China, India, or Saudi Arabia—or even on engaging Islam more broadly—the mandates of the IRF Act were not considered pertinent.⁷⁶ Religious freedom also played a very minor part in the development of public diplomacy, the vehicle by which the United States conveys its identity and what it stands for in the world.⁷⁷ This neglect of religious liberty is astounding given its importance in American history.

As early as 2003, the State Department's Inspector General (IG) concluded that America's IRF policy was not working: "The current structure that places the congressionally mandated office of the Ambassador-at-Large for International Religious Freedom within DRL is at odds with the Department's organizational guidelines and has proved to be unworkable."⁷⁸ This was a reference to the problem, noted above, that ambassadors at large are senior to assistant secretaries, but that the IRF Ambassador had, since the inception of the position, been subordinate to an assistant secretary.⁷⁹ "As a consequence, *the purposes for which the religious freedom function was created are not being adequately served.*"⁸⁰ Unfortunately, the IG report was ignored by the Congress, the White House, and the State Department.⁸¹

Perhaps most troubling of all, the Bush Administration decided not to integrate religious freedom into its "forward strategy of freedom," the initiative to facilitate the growth of democracy in the greater Middle East as a means of draining the swamps of religious extremism and terrorism.⁸² Democracy programs funded by the United States, such as those of the National Endowment

75. *See id.* at 44.

76. *See id.*

77. *Id.*

78. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF STATE, MONTHLY REPORT OF ACTIVITIES, SEPTEMBER 2003, at 13 (2003), available at <http://oig.state.gov/documents/organization/28328.pdf> [hereinafter MONTHLY REPORT].

79. FARR, *supra* note 16, at 195.

80. MONTHLY REPORT, *supra* note 78, at 13 (emphasis added).

81. FARR, *supra* note 16, at 195.

82. *Id.* at 223.

for Democracy, began to engage Islamic groups, but they did so with great hesitation and not in a comprehensive fashion, despite Islam's influence over political culture.⁸³ Religious freedom was manifestly not a major part of the democracy promotion effort.⁸⁴

These deficiencies were, and remain, embedded in U.S. diplomatic culture, but they were exacerbated by what the IRF Act required and what it did not. As noted, the central policy instrument prescribed by the IRF Act was the annual designation of the CPCs—those nations whose governments were guilty of particularly severe violations of religious freedom. Other than Ambassador Hanford's creative use of the CPC process with Vietnam, the CPC designation process was largely ineffective. It did shine a spotlight on the persecutors, but, apart from Vietnam, it failed to alter their behavior in any fundamental way.

For example, China was listed as a CPC in 1999.⁸⁵ By 2002, however, it was reasonably clear that the designation was having little if any effect on the Chinese. For one thing, it had proven to be a toothless, rhetorical denunciation.⁸⁶ As permitted under the IRF Act, the Clinton and Bush Administrations followed the designation with the "action" of reaffirming an existing human rights sanction, in this case, the action imposed in the wake of the 1989 Tiananmen Square massacres.⁸⁷ That restriction forbade the export of U.S. crime control and detection equipment to the Chinese.⁸⁸ Even among those who supported punitive sanctions as a policy instrument, this double use of an empty punishment seemed a cynical ploy. "All this has done," as one skeptic put it, "is force the Chinese to buy their barbed wire and tear gas from the French."⁸⁹

83. *Id.* at 260.

84. *Id.* at 7–8; see also Thomas F. Farr, *Diplomacy in an Age of Faith*, FOREIGN AFF., Mar.–Apr. 2008, at 110. On the general reluctance of American diplomats to engage religion, see LIORA DANAN & ALICE HUNT, MIXED BLESSINGS: U.S. GOVERNMENT ENGAGEMENT WITH RELIGION IN CONFLICT-PRONE SETTINGS 10–28 (2007).

85. Designation of Countries of Particular Concern Under The International Religious Freedom Act, 64 Fed. Reg. 59,821, 59,821 (listing Burma, China, Iran, Iraq, Sudan); FARR, *supra* note 16, at 196.

86. FARR, *supra* note 16, at 196.

87. *Id.*

88. *Id.*

89. David Jones, *The Joy of Sects: Religious Freedom Reporting*, FOREIGN SERVICE J., Jan. 2001, at 26, available at <http://www.afsa.org/fsj/jan01/jonesjan01.cfm>.

Initially, the Chinese, although untouched by this "sanction," were quite irritated by the CPC designation itself.⁹⁰ China is famously sensitive to the issue of "face" in the international community. But, as the CPC designations recurred year after year, duly accompanied by a reaffirmation of the ban on crime control equipment, even the Chinese began to yawn.⁹¹ Any hope that the CPC "stick" might change that government's behavior, a dubious proposition in any case, dissipated when it became clear that neither the Clinton nor Bush Administrations were serious about employing pressure. Indeed, one could argue that repeated CPC designations have set back the cause of religious freedom in China by debasing the CPC coinage.⁹²

Despite the failure of the CPC methodology, the CPC designation itself constituted the primary content of U.S. IRF diplomacy. This essentially punitive approach deepened the existing perception abroad that American policy was simply an example of cultural imperialism, designed to undermine majority religious communities and pave the way for American missionaries. It also did nothing to counter the view that, for U.S. diplomats, "religious freedom" meant the separation of religion from public policy and political life. Such perceptions seriously reduced the potential effectiveness of U.S. policy and ensured that it played no role in the forward strategy of freedom.

IV. THE PROBLEM OF RELIGION AND ISLAMIST TERRORISM

American diplomacy's reticence about engaging religion has harmed our national security as well. For the most part, we have failed to understand the religious dimensions of Islamist

90. FARR, *supra* note 16, at 196.

91. *Id.*

92. *Id.* at 197 ("To give credit where it is due, both presidents Clinton and Bush pressed their Chinese counterparts on religious persecution. Both presidents spoke privately with President Jiang Zemin about their own faith. Their overt religious views very likely stimulated Jiang's policy interest in religion and contributed to the intensity of his involvement in a Chinese National Work Conference on Religion later in late 2001. The following year, Bush devoted fully one-third of a major Beijing speech to the issue. As valuable as this and other presidential efforts are with the Chinese, significant policy shifts by a Chinese government are usually slow in coming. Any outside government, even the United States, seeking to influence those shifts must devote time, resources, and policy planning to the effort. Consistency in addressing any internal issue, let alone the internal issue of religion, is an utter necessity.").

terrorism, and failed to incorporate religion into counterterrorist strategies, especially democracy promotion. A host of factors have converged to keep religion off the policy table, including a kind of religion-avoidance syndrome, an inordinate fear of political Islam, a default "realism" that refuses to incorporate religion into strategy, and a tendency to project Western secularist preferences into the minds of Muslim reformers. U.S. policies have often been grounded in the belief that the only effective antidotes to Islamist extremism are either democracies that relegate Islam to the private sphere or authoritarian governments that control religion, such as Egypt and Saudi Arabia. Such policies have proven at best ineffective.⁹³ At worst, they have nourished the very forces they were intended to destroy: Islamist extremism and terrorism.

Consider Afghanistan. After the United States deposed the Taliban in 2001, the Afghans elected a democratic government and ratified a democratic constitution. The terrible religious persecution of Afghan women and minority Shiites slowed dramatically. But these developments did not bring about religious freedom. The Afghan government no longer tortures people on the basis of religion, but it continues to bring charges against apostates and blasphemers, including officials and journalists seeking to debate the teachings of Islam. Instead of seeing such cases as serious obstacles to the consolidation of Afghan democracy, the State Department has treated them as humanitarian problems. It declared victory when U.S. pressure sprang the Christian convert Abdul Rahman from an apostasy trial (and certain execution), permitting him to flee the country in fear of his life.⁹⁴

While this was a praiseworthy success regarding the life of one individual, the Rahman case was actually a defeat for U.S. international religious freedom *policy* because it ignored the real problem: Afghanistan's democracy is unlikely to endure unless it defends the right of all Afghan citizens to full religious liberty, especially the right of Muslims to debate the meaning of freedom and the public good, the role of sharia, and the religion-state nexus.⁹⁵ This kind of sustained discourse is vital to the

93. *Id.* at 247.

94. *See id.* at 210.

95. The new constitutions of Iraq and Afghanistan, produced with U.S. assistance, fail adequately to provide for religious freedom. Neither the Iraqi nor the

success of any Islamic democracy and to overcoming Islamist radicalism. U.S. IRF policy should confront this problem in Afghanistan and elsewhere, but it lacks the resources, the bureaucratic clout, and the policy mandate to do so.

V. WHAT ACCOUNTS FOR THE ADMINISTRATION'S RETICENCE?

Given the high expectations that attended the Bush Administration's commitment to international religious freedom, what accounts for its shortcomings? Much of the answer has to do with the entrenched worldviews of American diplomats and the inability of the Administration to alter them. One key element of that worldview is a perception among many foreign policy officials that the Establishment Clause of the U.S. Constitution prohibits any government activity dealing with religion.⁹⁶ While there is no reason U.S. domestic constitutional provisions should dictate the content of U.S. promotion of democracy abroad, it is still true that this "strict separationist" understanding of our First Amendment shapes U.S. diplomatic views on the meaning of religious freedom. This is particularly ironic because it is clear that the Constitution neither mandates ignorance about religion nor proscribes its public practice. The Constitution, however, manifestly requires the defense of religious liberty.⁹⁷

Afghan constitution mentions Sharia. Both, however, have repugnancy clauses that prohibit any law from being contrary to Islam. IRAQ CONST. art. 2 ("No law may be enacted that contradicts the established provisions of Islam."); CONST. OF AFG. art. 3 ("No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan."). Afghanistan's constitution is particularly restrictive, guaranteeing only that "[f]ollowers of other faiths [than Islam] shall be free within the bounds of law in the exercise and performance of their religious rituals." CONST. OF AFG. art. 2. It appears that members of high judicial courts may be selected who lack training in civil law. CONST. OF AFG. art. 118. If this is combined, as it is in these two constitutions, with broad clauses guaranteeing that laws may not be repugnant to Islam, as discussed above, it opens the possibility of an interpretation of constitutional provisions at variance with basic human rights and contrary to the good of persons and communities. It opens a way for coercion to be exercised upon religious minorities and even upon Muslims who do not subscribe to every tenet of Islam, as happened in Afghanistan in 2002 when the new women's affairs minister, Sima Samar, was formally charged with the crime of blasphemy. FARR, *supra* note 16, 5-6.

96. DANAN & HUNT, *supra* note 84, at 39.

97. U.S. CONST. amend. I.

Confusion about religion's place in foreign policy also stems from prevailing assumptions in the foreign policy community about the direction of history and the meaning of modernity. Specifically, the so-called "secularization theory" holds that societies will inevitably become less religious over time as scientific knowledge displaces faith.⁹⁸ In this view, religion is inherently emotive and irrational, and thus opposed to modernity and an obstacle to political and economic progress.⁹⁹ As modernity advances, religion will shrink to the irrelevant margins of human behavior and ultimately will disappear. Data on religious belief and practice in the United States,¹⁰⁰ as well as evidence from around the world, however, suggest that the secularization theory is obsolete.¹⁰¹

Disarray over the public role of religion has heavily influenced U.S. diplomacy. A recent study by the Center for Strategic and International Studies concludes that

U.S. government officials are often reluctant to address the issue of religion, whether in response to a secular U.S. legal and political tradition . . . or simply because religion is perceived as too complicated or sensitive.

Current U.S. government frameworks for approaching religion are narrow, often approaching religions as problematic or monolithic forces, overemphasizing a terrorism-focused analysis of Islam and sometimes marginalizing religion as a peripheral humanitarian or cultural issue.¹⁰²

And yet, the reality is that the world is overflowing with religious ideas, actors, communities, and movements, all of

98. See FARR, *supra* note 16, 47–48.

99. See *id.*

100. *E.g.*, BAYLOR INST. FOR STUDIES OF RELIGION, AMERICAN PIETY IN THE 21ST CENTURY: NEW INSIGHTS TO THE DEPTH AND COMPLEXITY OF RELIGION IN THE US 7–8, 11–12 (2006).

101. See, *e.g.*, JOSE CASANOVA, PUBLIC RELIGIONS IN THE MODERN WORLD (1994); DAVID MARTIN, A GENERAL THEORY OF SECULARIZATION (1978); DAVID MARTIN, ON SECULARIZATION: TOWARDS A REVISED GENERAL THEORY (2005); GEORGE WEIGEL ET AL., THE DESECULARIZATION OF THE WORLD: RESURGENT RELIGION AND WORLD POLITICS (Peter L. Berger ed., 1999). For an early theological perspective on desecularization, see HARVEY COX, THE SECULAR CITY: SECULARIZATION AND URBANIZATION IN THEOLOGICAL PERSPECTIVE (1965). On secularization in American culture, see THE SECULAR REVOLUTION: POWER, INTERESTS, AND CONFLICT IN THE SECULARIZATION OF AMERICAN PUBLIC LIFE (Christian Smith ed., 2003).

102. DANAN & HUNT, *supra* note 84, at 3.

which can have very public consequences. There is little reason to believe that this state of affairs will change anytime soon. Polls from across the Muslim world, for example, show a growth in religious affiliation and the desire for religious leaders to be more involved in politics.¹⁰³ Two demographers of religion, Todd Johnson and David Barrett, have concluded, "Demographic trends coupled with conservative estimates of conversions and defections envision over 80% of the world's population will continue to be affiliated to religions 200 years into the future."¹⁰⁴

How to respond to the resurgence of religion around the globe is a vital question for U.S. foreign policy. Islamist radicalism draws the most attention, but the issue is hardly confined to Muslim majority countries or the Muslim diaspora. An explosion of religious devotion among Chinese citizens increasingly worries communist officials; just such a phenomenon was on public display during the 2008 Summer Olympics in Beijing. Religious ideas and actors affect the fate of democracy and public policy in Russia, relations between nuclear powers India and Pakistan, and the consolidation of democracy in Latin America. In sub-Saharan Africa, religion plays an important role in issues from economic growth to political stability and public policies on HIV-AIDS. To meet the challenges these developments pose for our national security, the United States cannot continue to treat religious liberty as taboo in the formulation and execution of foreign policy.

CONCLUSION

If there was a central fault line in the Bush international religious freedom policy, it was a failure to overcome State Department inertia on engaging the issue of religion. IRF diplomacy focused heavily on the goal of reducing persecution. In the abstract, this seems a reasonable choice, but in fact this decision yielded an ad hoc, reac-

103. See, e.g., Robert Inglehart & Pippa Norris, *The True Clash of Civilizations*, FOREIGN POL'Y (Mar.-Apr. 2003), at 63, 64-65; THE PEW GLOBAL ATTITUDES PROJECT, 17-NATION PEW GLOBAL ATTITUDES SURVEY 22 (2005), available at <http://pewglobal.org/reports/pdf/248.pdf>; 1 WORLD CHRISTIAN ENCYCLOPEDIA: A COMPREHENSIVE SURVEY OF CHURCHES AND RELIGIONS IN THE MODERN WORLD 4 (David B. Barrett et al. eds., 2d ed. 2001).

104. Todd M. Johnson & David B. Barrett, *Quantifying alternative futures of religion and religions*, 36 FUTURES 947, 947 (2004).

tive approach which had modest short-term successes but no systemic effect on the structures of persecution. At Foggy Bottom, however, the anti-persecution approach permitted the Department to compartmentalize IRF and isolate it from broader U.S. foreign policy concerns. At the same time, virtually no attempts were made to advance religious freedom in any political or cultural sense as part of the Bush Administration's "democracy agenda."

The two goals—reducing persecution and advancing religious freedom—overlap, but they are not the same. Religious freedom certainly means freedom from persecution, but it is much more. For instance, under international law, "religious freedom" means the right to believe or not, the right to enter and exit religious communities, and the right of individuals and communities to act publicly, within due limits.¹⁰⁵ Such acts include building houses of worship, training clergy, founding and running religious schools, convincing others that one's religious claims are true, inviting others to join one's community, and bringing one's religiously informed moral arguments to bear on public policy, laws, and norms. Reducing or even eliminating religious persecution is the beginning, not the end, of religious freedom.

The Bush Administration took important steps toward reducing persecution. The United States consistently and forthrightly condemned governments that conducted or tolerated persecution. U.S. diplomats made laudable strides in relieving the suffering of particular individuals. As for structural advances in religious freedom, IRF policy initiated legal changes in at least one country, Vietnam, that might have positive long-term effects, although it is too soon to judge. In another country, Saudi Arabia, U.S. diplomats won important commitments from the government that could also have long-term effects, although there remain significant reasons for skepticism.

As important and potentially fruitful as these achievements appear, however, they are nonetheless disappointing. The United States has many compelling reasons to encourage the political institutions and cultural dispositions that advance religious freedom. Those reasons include simple justice, the desire to reduce persecution, and the need to defend human

105. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 18, U.N. Doc. A/6316 (Mar. 23, 1976).

dignity, to which religious liberty is so closely bound. If our public diplomacy is to convey our identity and values, it must be informed by our own history, including our struggles to win religious freedom for all Americans. And if we are to defeat Islamist terrorism, especially by means of the diplomatic promotion of stable democracy, our diplomacy must have the capacity and the will to engage religious ideas, actors, and movements. It is ironic that, under one of the most religious Presidents in recent history, so few of these objectives were considered worthy of adoption.

UNFINISHED BUSINESS: THE BUSH ADMINISTRATION AND RACIAL PREFERENCES

ROGER CLEGG*

INTRODUCTION

To evaluate the Bush Administration's record in opposing preferential treatment on the basis of race, ethnicity, or sex—"affirmative action"¹—we have to look not only at what it did, but also at what it *needed* to do. That is, we must first look at how current law requires, encourages, or allows such affirmative discrimination and what steps, ideally, need to be taken to change this situation. After establishing that baseline, we can then measure how close the Bush Administration came to fulfilling this ideal. We cannot judge how far the Administration advanced the ball, particularly in the courts, without knowing where the ball was in the first place.

Unfortunately, the Administration's record is, in short, decidedly mixed. As a general matter, the Bush Administration's record in this area improved on the Clinton Administration's. The latter aggressively encouraged the use of racial preferences; the former's improvement was not so much that it discouraged such use, but that it did nothing. There were some exceptions: Sometimes the Bush Administration continued to accept preferences, and sometimes it actively opposed them. But its savings and sins were principally of omission, not commission.

The Administration said very little about this subject, and when it did say anything, it was because its hand had been forced, such as when the University of Michigan cases, *Gratz v.*

* President and General Counsel, Center for Equal Opportunity; J.D., Yale Law School, 1981; B.A., Rice University, 1977. The Author thanks George La Noue for reviewing a draft of this Essay and his helpful suggestions on it.

1. This Essay will refer only to "racial preferences" with the understanding that ethnic and gender preferences are generally included as well.

*Bollinger*² and *Grutter v. Bollinger*,³ were before the Supreme Court and the topic was unavoidable. It took no position on the Michigan Civil Rights Initiative⁴ (which proposed to overturn the Court's decision in *Grutter*), and it managed to avoid revising the Department of Education's guidelines and regulations in this area, even after the Court had decided *Grutter* and *Gratz*. Occasionally the Administration would comment that a pending bill containing a racial preference raised constitutional problems,⁵ but it never proposed legislation that would have cut back on such preferences.

Indeed, if the Administration could have avoided saying anything at all about the subject of racial preferences—if it could have simply made the issue go away—it would have done so eagerly. This is probably because, on the one hand, its lawyers and policy advisers thought such discrimination difficult or impossible to defend, but its political experts were reluctant to court attacks from race-baiting Democrats and the civil rights establishment.

The use of racial preferences is concentrated in four areas: voting, government contracting, education, and employment. There are some exceptions (for example, the use of such preferences in appointments to state boards and some aspects of health care), but they are relatively minor.

Voting is a special case. The Voting Rights Act, which is used to require racially gerrymandered districts,⁶ has federalized the issue. As a result, there is nothing that the States can do about it. Realistically there was and is nothing to be done through the political branches either. Congress overwhelmingly reauthorized these provisions in 2006,⁷ and President Bush signed the

2. 539 U.S. 244 (2003) (concerning undergraduate admissions).

3. 539 U.S. 306 (2003) (concerning law school admissions).

4. MICH. CONST. art. I, § 26.

5. See, e.g., Letter from Brian A. Benczkowski, Principal Deputy Assistant Att'y Gen., Office of Legislative Affairs, U.S. Dep't of Justice, to U.S. Rep. Henry A. Waxman, Chairman, Comm. on Oversight & Gov't Reform (Apr. 30, 2008) (on file with Author) (discussing the Senior Executive Service Diversity Assurance Act, H.R. 3774, 110th Cong. (2007)).

6. See Voting Rights Act of 1965, 42 U.S.C. § 1973c (2006).

7. See 152 CONG. REC. H5207 (daily ed. July 13, 2006) (390-33 House vote); 152 CONG. REC. S8012 (daily ed. July 20, 2006) (98-0 Senate vote). Note that many Republicans *like* racial gerrymandering. After cramming lots of black voters into a relatively few districts, the "bleached" neighboring districts tend to vote Republi-

bill.⁸ Thus, all that can be done for now is to challenge the Act's constitutionality.⁹

The rest of this Essay proceeds seriatim through the other three areas. For each, the status of the law varies, and so do the roles of the federal government, state and local governments, and the private sector. In what follows, the Essay will interweave commentary on what the Bush Administration did along with discussion of what needed to be done (and, alas, still needs to be done).

I. GOVERNMENT CONTRACTING

The case law regarding government contracting is very favorable to those challenging state and local racial preferences.¹⁰ In 2004, for example, the U.S. District Court for the Southern District of Florida not only struck down a program in Miami, but also held the officials who applied it *personally liable*.¹¹ Companies that have lost out on contracts have served as will-

can. See ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 234 (1987).

8. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.

9. As it happens, such a lawsuit is currently before the Supreme Court. See *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221 (D.D.C. 2008), *prob. juris. noted*, 129 S. Ct. 894 (2009) (mem.). My colleague Linda Chavez and I testified against the constitutionality of the relevant sections of the Voting Rights Act when it was up for reauthorization in 2006, later publishing a law review article based on that testimony. Roger Clegg & Linda Chavez, *An Analysis of the Reauthorized Sections 5 and 203 of the Voting Rights Act of 1965: Bad Policy and Unconstitutional*, 5 GEO. J.L. & PUB. POL'Y 561 (2007). The Bush Administration defended the constitutionality of section 5 in *Northwest Austin*, but I do not hold this against it. Generally, the executive branch feels compelled to defend the constitutionality of federal statutes unless there is no colorable argument for doing so or the law in question undermines the executive branch's own authority. And I give the Administration credit for filing a decent amicus brief in *Bartlett v. Strickland*, No. 07-689, slip op. (U.S. Mar. 9, 2009). That brief urges a reading of the Voting Rights Act that will limit the amount of racial gerrymandering required under section 2, 42 U.S.C. § 1973 (2006). See Brief for the United States as Amicus Curiae Supporting Affirmance, *Bartlett* (No. 07-689). The Administration also deserves credit for its willingness to enforce the Voting Rights Act to protect white voters from discrimination. See *United States v. Brown*, No. 07-60588, 2009 WL 485709 (5th Cir. Feb. 27, 2009).

10. See, e.g., *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999); *Webster v. Fulton County*, 51 F. Supp. 2d 1354 (N.D. Ga. 1999), *aff'd*, 218 F.3d 1267 (11th Cir. 2000); see George R. La Noue, *A New Era in Federal Preferential Contracting?* *Rothe Development Corporation v. U.S. Department of Defense and Department of the Air Force*, ENGAGE, Feb. 2009, at 13, 13.

11. See *Hershell Gill Consulting Eng'rs, Inc. v. Miami-Dade County*, 333 F. Supp. 2d 1305, 1335-38 (S.D. Fla. 2004).

ing plaintiffs, and anti-preference public interest groups, such as the Pacific Legal Foundation and the Mountain States Legal Foundation, among others, have brought many of their cases.¹² Note that in the event of a legal challenge, the state or local government will have to pay its lawyers and expert witnesses; moreover, if it loses (and it will), it will also have to pay the *other side's* lawyers and expert witnesses. On the other hand, many of these state and local programs still exist, and the Bush Administration did nothing to challenge them.

The case law is not as favorable with regard to federal contracting preferences, although plaintiffs have also won some cases there. The most important victory was the 1995 decision in *Adarand Constructors, Inc. v. Peña*, which established that racial preferences in federal contracting would be subject to strict constitutional scrutiny, just as state and local preferences are.¹³ In addition, this past November, the Federal Circuit in *Rothe Development Corp. v. U.S. Department of Defense* struck down an important program setting aside a certain percentage of Department of Defense contracts for minority-owned businesses because it failed the strict scrutiny demanded in *Adarand*.¹⁴

Yet the Bush Administration's record with respect to such federal set-asides was mediocre. It made some marginal improvements in these programs, most importantly with regard to gender (but not racial) preferences in the Small Business Administration's programs, where it required specific showings that discrimination was the cause of any disparities.¹⁵ But it failed to make any kind of principled or systematic revisions.

In court, the Administration defended those programs when challenged. As noted above,¹⁶ this is to be expected; the executive branch generally feels obliged to defend even programs that it dislikes so long as there are colorable arguments in their

12. See Roger Clegg, *Equality Under the Law*, in BRINGING JUSTICE TO THE PEOPLE: THE STORY OF THE FREEDOM-BASED PUBLIC INTEREST LAW MOVEMENT 97-125 (Lee Edwards ed., 2004); see also Pac. Legal Found., Issues & Cases: Race and gender-based preferences, <http://community.pacificlegal.org/page.aspx?pid=272> (last visited Mar. 18, 2009).

13. 515 U.S. 200, 227 (1995).

14. 545 F.3d 1023, 1035-36, 1050 (Fed. Cir. 2008).

15. See Women-Owned Small Business Federal Contract Assistance Procedures, 72 Fed. Reg. 73,285 (proposed Dec. 27, 2007) (to be codified at 13 C.F.R. pts. 121, 125, 127, 134).

16. See *supra* note 9.

favor and so long as they do not compromise the executive branch's own authority. But to the Administration's credit, in at least one case—*Western States Paving Co. v. Washington State Department of Transportation*—its defense conceded that localized findings of discrimination must be made to satisfy the remedial predicate required by the “compelling interest” prong of strict scrutiny.¹⁷ And in a brief filed in the first year of the Bush Administration, the Department of Justice defended the Department of Transportation's Disadvantaged Business Enterprise program with the concession that state actors “may use race-conscious remedies only as a last resort,” that is, “where the effects of discrimination are stubborn, persistent, and incapable of eradication through race-neutral measures.”¹⁸

Any program that uses classifications and preferences based on race, ethnicity, or sex raises serious constitutional issues. Using racial classifications and setting goals of particular racial percentages inevitably encourage discrimination as a means to meet them, and so these practices should and do trigger strict constitutional scrutiny.¹⁹ Legal issues aside, programs that discriminate on these bases are divisive and unfair, and any system that awards contracts to anyone other than the lowest qualified bidder will cost the government and its taxpayers money.

So what is needed now is not much different from what was needed when the Bush Administration began and Adarand was, once again, before the Supreme Court:²⁰ namely, a decision holding that, although remedying discrimination (the only governmental interest advanced for preferences in contracting) is a compelling interest, it is now basically impossible for the use of preferences to be narrowly tailored. Instead, federal programs should be race-blind and race-neutral. To the extent that the government is concerned that racial groups face discrimination in its contracting programs, there are effective responses that do not require racial classifications or preferences.

17. See 407 F.3d 983, 996 (9th Cir. 2005); George R. La Noue, *Narrow Tailoring the Federal Transportation DBE Program*, ENGAGE, Mar. 2006, at 20, 21.

18. Brief for the Respondents at 19, 38–39, *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001) (No. 00-730).

19. See, e.g., *Lutheran Church-Mo. Synod v. FCC*, 154 F.3d 487 (D.C. Cir. 1998).

20. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103 (2001) (dismissing certiorari as improvidently granted).

To defend their use of racial preferences, governments frequently point to evidence of racial disparities in their contracting. A disparity is not necessarily evidence of discrimination, however, let alone proof. Likewise, much anecdotal evidence is dubious, particularly when those presenting it stand to gain monetarily if the government uses contracting preferences. And most importantly, even if statistical or anecdotal evidence establishes a pattern of recent discrimination, there are better ways to end such discrimination than racial classifications and targets.

As I testified before the U.S. Commission on Civil Rights on behalf of the Center for Equal Opportunity,

At every step of the [contracting] process, it is clear that there are more narrowly tailored remedies than using racial preferences. If companies are being excluded from bidding because of unrealistic or irrational bonding or bundling requirements, then those requirements should be changed for *all* companies, regardless of the skin color of the owner. If companies who could submit bids are not doing so, then the publication and other procedures used in soliciting bids should be opened up—but, again, to all potential bidders, not just some. And, finally, if it can be shown that government bids are being denied to the lowest bidder because of that bidder's race, then there should be put in place safeguards to detect discrimination and sanctions to punish it—but, again, those safeguards and sanctions should protect all companies from racial discrimination, not just some.

Contracts are not like hiring, promoting, or even university admissions, where there is an irreducible and significant amount of subjectivity in the decisionmaking. Contracting is an area that can be made very transparent and where this transparency should make it relatively easy to detect and correct discrimination.

Even if there could still, in theory, be a few cases of discrimination that go unremedied in the absence of racial classifications, there will be many more cases of discrimination that will result from the institutionalization of racial and ethnic preferences.²¹

21. See Roger Clegg, *The Use of Disparity Studies to Justify Racial and Ethnic Preferences in Government Contracting*, Prepared Statement of Roger Clegg, Vice President and Gen. Counsel, Ctr. for Equal Opportunity (Dec. 16, 2005), in U.S. COMM'N ON CIVIL RIGHTS, *DISPARITY STUDIES AS EVIDENCE OF DISCRIMINATION IN*

In 2005, the U.S. Commission on Civil Rights published an excellent report collecting and discussing these race-neutral alternatives to racial classifications and quotas.²² The only shortcoming of the Commission's report is that it does not make clear that the aim of these alternatives is to correct and end discrimination, not to achieve diversity for its own sake. But that should be obvious in light of the case law in this area. The judicial decisions make very clear that the desire to achieve a particular politically correct mix is not itself a compelling interest; that would be "discrimination for its own sake. This the Constitution forbids."²³ Rather, the use of preferences can be justified only if there is an interest beyond such bean-counting—in the case of government contracting, ending racial discrimination.

But, again, if the federal government believes that racial discrimination is occurring in its contracting, there are many race-neutral steps it can take to fight it. It is very unlikely that, in 2009, the only way to end race discrimination in contracting is through race discrimination in contracting. As Chief Justice Roberts wrote recently, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."²⁴

II. EDUCATION

With respect to K–12 education, the most prominent use of racial preferences has been the consideration of race in assigning students to public schools. The Supreme Court in 2007 struck down such preferences,²⁵ but how much more work needs to be done here will depend on how school boards react

FEDERAL CONTRACTING: A BRIEFING BEFORE THE UNITED STATES COMMISSION ON CIVIL RIGHTS HELD IN WASHINGTON, D.C., DECEMBER 16, 2005, at 71, 73 (2006), available at <http://www.usccr.gov/pubs/DisparityStudies5-2006.pdf>. The same approach should be used with respect to subcontracting: Rather than requiring prime contractors to use racial preferences in subcontracting, we should require them to publish subcontracting opportunities broadly, to keep records (which could later be audited) of the responses and bids they receive, and to explain and justify any decision not to accept the lowest bid. Racial discrimination should be forbidden and punished.

22. See U.S. COMM'N ON CIVIL RIGHTS, FEDERAL PROCUREMENT AFTER ADARAND (2005), available at http://www.usccr.gov/pubs/080505_fedprocandarand.pdf.

23. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.).

24. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2768 (2007).

25. *Parents Involved*, 127 S. Ct. 2738.

to the decision;²⁶ the jury is still out on that. In its amicus briefs, the Bush Administration opposed the race-based student assignments, but I am not aware of any evidence that it aggressively followed up on the decision by, for instance, moving against an individual school district or issuing strict guidance (although, with regard to the former, I am also not aware whether the Administration had evidence of noncompliance).

The use of preferences with regard to university students is, of course, both widespread and controversial.²⁷ With regard to admissions preferences, there is little political accountability (unlike at the K–12 level), and, moreover, the political branches at every level seem unwilling to intervene. The Center for Equal Opportunity has pushed for “sunshine” legislation at both the federal and state level,²⁸ but this is an uphill battle. The federal Department of Education could aggressively monitor admissions preferences, and the Center for Equal Opportunity has filed some complaints with it (some based on admissions data obtained through freedom-of-information requests filed by the Center for Equal Opportunity and the National Association of Scholars). But as useful as pressure from the Department of Education might be (even assuming that the current Administration is willing to bring such pressure, as the Bush Administration was not), it can only limit the use of preferences; it cannot end them. For that, there has to be a ballot initiative in the relevant state²⁹ or a Supreme Court ruling.

26. See Roger Clegg, *A Good—If Mixed Bag...with a puzzle inside*, NAT'L REV. ONLINE, July 5, 2007, <http://article.nationalreview.com/?q=ZDFjODM4NDM4Njk1ZmJiZDY2NWNkMmEyYjgyOTRkYzk=>.

27. The Center for Equal Opportunity, for instance, has documented the use of racial and ethnic preferences in undergraduate, medical school, and law school admissions all over the country. The studies are available at Center for Equal Opportunity, Preferences in College Admission, <http://www.ceousa.org/content/blogcategory/78/100/> (last visited Mar. 18, 2009).

28. See Press Release, Ctr. for Equal Opportunity, CEO Proposes “Racial Preference Disclosure Legislation” (Feb. 16, 2004), available at <http://www.ceousa.org/content/view/453/119/>. The U.S. Commission on Civil Rights endorsed such legislation in its briefing report *Affirmative Action in American Law Schools*. U.S. COMM’N CIVIL RIGHTS, AFFIRMATIVE ACTION IN AMERICAN LAW SCHOOLS 6, 143 (2007), available at <http://www.usccr.gov/pubs/AALSreport.pdf>.

29. Such initiatives have passed in California, Michigan, Nebraska, and Washington. See CAL. CONST. art. I, § 31; MICH. CONST. art. I, § 26; NEB. CONST. art. I, § 30; WASH. REV. CODE § 49.60.400. See generally CAROL M. ALLEN, ENDING RACIAL PREFERENCES: THE MICHIGAN STORY 11–20, 26–34 (2008) (discussing the California and Washington initiatives); *id.* at 47–154 (discussing the Michigan initiative). The

When admissions preferences were last before the Court, the Bush Administration's amicus briefs reached the right bottom line—namely, that the preferences there were illegal.³⁰ But the briefs argued only that the university's use of preferences was not narrowly tailored; they carefully avoided taking a position on whether educational benefits from student body diversity constitute a compelling governmental interest. The Justice Department's draft briefs had said there was no such interest, but the White House insisted on removing that part of the brief.³¹ We will never know if Justice O'Connor might have been persuaded to vote the other way in *Grutter* if the original briefs had been filed.

Universities also use *non-admissions* preferences (for example, for summer programs, internships, and scholarships). But the Center for Equal Opportunity and others have been quite successful in ending the racial exclusivity of these programs (occasionally by filing complaints with the Department of Education, which sometimes played a helpful role during the Bush Administration, although slowly and unsystematically).³² For example, a lawsuit by the Center for Individual Rights against Virginia Commonwealth University, the Dow Jones Foundation, and the *Richmond Times-Dispatch* recently ended the use of preferences in a summer journalism program jointly run by these three entities that had

threat of such an initiative also led Florida's governor to end preferences in public university admissions by executive order. *See id.* at 35–39.

30. Brief for the United States as Amicus Curiae Supporting Petitioner, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241); Brief for the United States as Amicus Curiae Supporting Petitioners, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516).

31. *See* PETER SCHMIDT, COLOR AND MONEY: HOW RICH WHITE KIDS ARE WINNING THE WAR OVER COLLEGE AFFIRMATIVE ACTION 190–91 (2007); Roger Clegg, *Affirmative Opportunity*, NAT'L REV. ONLINE, Dec. 4, 2004, <http://article.nationalreview.com/?q=NmM2NzkwN2I0ZmE1MzQ1NTJkYzE5YzVhNDVkJZGU2OGE=>.

32. *See, e.g.*, Jonathan D. Glater, *Colleges Open Minority Aid to All Comers*, N.Y. TIMES, Mar. 14, 2006, at A1; Peter Schmidt, *Not Just for Minority Students Anymore*, CHRON. HIGHER EDUC. (Wash. D.C.), Mar. 19, 2004, at 17 [hereinafter Schmidt, *Not Just for Minority Students Anymore*]; Peter Schmidt, *The Education Department's Lawyers Appear to be Taking a Dim View of Minority Scholarship Programs*, CHRON. HIGHER EDUC. (Wash. D.C.), Apr. 16, 2004, at A23; Peter Schmidt & Jeffrey R. Young, *MIT Opens 2 Programs to White and Asian Applicants in Response to Federal Inquiry*, CHRON. HIGHER EDUC., Feb. 11, 2003, at A31; *see also* Peter Schmidt, *Education Department Pressures Wisconsin to Open Scholarship Program to White Students*, CHRON. HIGHER EDUC. (Wash. D.C.), Dec. 3, 2004, <http://chronicle.com/daily/2004/12/2004120302n.htm>; Jeffrey R. Young, *Princeton Ends Minority-Students-Only Policy for Summer Institute*, CHRON. HIGHER EDUC. (Wash. D.C.), Feb. 7, 2003, <http://chronicle.com/daily/2003/02/2003020702n.htm>.

been racially exclusive.³³ The case law is quite clear that racial exclusivity is illegal, but some degree of preference is probably still allowed under *Grutter*. Here again, this is unlikely to change absent a ballot initiative or Supreme Court decision, and even then, these programs could probably remain if they are run at arm's length by outside, non-federally funded organizations.

Racially exclusive programs violate Title VI of the Civil Rights Act of 1964, which forbids any recipient of federal money from discriminating "on the basis of race, color, or national origin."³⁴ The Supreme Court's decision in *Gratz* clearly demonstrates that racially exclusive programs will not pass constitutional muster, and although *Grutter* acknowledged diversity as a compelling governmental interest, both *Grutter* and *Gratz* explained that to pass the "narrowly tailored" prong of strict scrutiny, a school must engage in "individualized consideration" of students.³⁵ Certainly, a program that categorically excludes students based upon their race or ethnicity does not provide "individualized consideration." *Grutter* explicitly warns that there should be "no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single 'soft' variable" such as "race or ethnicity,"³⁶ and *Gratz* states that any program must "not contemplate that any single characteristic [again, such as race or ethnicity] automatically ensure[s] a specific and identifiable contribution to a university's diversity."³⁷ Likewise, the Supreme Court struck down the programs in *Parents Involved in Community Schools v. Seattle School District No. 1* because they "do not provide for meaningful individualized review of applicants but instead rely on racial classifications in a nonindividualized, mechanical way."³⁸

33. See Scott Jaschik, *Defeat for Affirmative Action*, INSIDE HIGHER ED, Feb. 15, 2007, <http://www.insidehighered.com/news/2007/02/15/dow>; Press Release, Pamela DiSalvo Lepley, Va. Commonwealth Univ. Commc'ns & Pub. Affairs, Public Statement: Settlement Reached in Urban Journalism Workshop Lawsuit (Feb. 14, 2007), available at <http://www.news.vcu.edu/news.aspx?v=detail&nid=1944>.

34. 42 U.S.C. § 2000d (2006).

35. *Grutter v. Bollinger*, 539 U.S. 306, 334 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 270-71 (2003).

36. *Grutter*, 539 U.S. at 337.

37. *Gratz*, 539 U.S. at 271.

38. 127 S. Ct. 2738, 2753-54 (2007) (citations omitted) (internal quotation marks omitted).

Accordingly, in recent years Princeton University, the Massachusetts Institute of Technology, the Harvard Business School, and many others have concluded that similar programs at their schools were indeed illegal and therefore ended the programs' racial exclusivity.³⁹ The Ford Foundation apparently had made the same determination some years ago and declined to continue funding Princeton's program.⁴⁰ And in the Bush Administration, the Office for Civil Rights at the U.S. Department of Education issued a statement that racially exclusive programs "are extremely difficult to defend" under the applicable law.⁴¹ Even more recently, in February 2006, the U.S. Department of Justice forced Southern Illinois University to end the racial exclusivity of several graduate programs after the Center for Equal Opportunity brought these programs to the Department's attention.⁴²

Progress against racial preferences in higher education will, accordingly, require chipping away at *Grutter*, limiting the circumstances in which a university's interest in preferences can be deemed "compelling" and "narrowly tailored," in both the admissions and non-admissions contexts.⁴³ Ultimately, of course, *Grutter delenda est*.

III. EMPLOYMENT

The remaining area in which racial preferences are frequently used is employment. Here it is useful to divide public sector preferences from private sector preferences. Public sector preferences are more vulnerable because they are often more overt, and they are subject to attack under both Title VII of the 1964 Civil Rights Act⁴⁴ and the Fourteenth Amendment,⁴⁵ as well as ballot initiatives. But public sector employers provide a

39. See Kevin Rothstein, *Harvard opens biz program to whites*, BOSTON HERALD, Feb. 18, 2004, at 18; Schmidt & Young, *supra* note 32.

40. See Schmidt & Young, *supra* note 32.

41. Schmidt, *Not Just for Minority Students Anymore*, *supra* note 32.

42. Glater, *supra* note 32.

43. For a discussion of some steps in this direction, see Roger Clegg, *Attacking "Diversity": A Review of Peter Wood's Diversity: The Invention of a Concept*, 31 J.C. & U.L. 417, 424-36 (2005). See also George La Noue & Kenneth L. Marcus, "Serious Consideration" of Race-Neutral Alternatives in Higher Education, 57 CATH. U. L. REV. 991 (2008).

44. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

45. U.S. CONST. amend. XIV.

relatively small proportion of jobs in this country. Private sector preferences, on the other hand, are often more carefully disguised and harder to discover, and they cannot be challenged constitutionally. It is possible, however, that they will be held to the same constitutional standard as public sector preferences under 42 U.S.C. § 1981.

The Justice Department has enforcement responsibility over public sector employment discrimination, and the Equal Employment Opportunity Commission over the private sector. During the Bush Administration, the former attacked racial preferences more aggressively than the latter. The Justice Department's record in this area is the subject of the Appendix to this Essay.⁴⁶ I testified before the EEOC and urged them to challenge racial preferences,⁴⁷ but it is extremely unlikely that my testimony persuaded a majority of the commissioners.

The rest of this Part is divided into two subparts. Part III.A discusses current law regarding racial preferences in employment, particularly under Title VII. The bad news is that the law did not advance much during the Bush Administration, but the good news is that the law is already quite hostile to the use of racial preferences and could be used much more aggressively to challenge such preferences than it has been. Part III.B discusses a discrete but important subtopic here, namely the

46. I previously delivered a paper, available as an Appendix to this Essay, comparing the employment discrimination lawsuits brought by the Justice Department's Civil Rights Division in the Clinton and George W. Bush Administrations and focusing specifically on "affirmative discrimination" and "disparate impact" race, ethnicity, and sex discrimination cases. Roger Clegg, *Employment Antidiscrimination Policies in the Clinton and Bush Administration* (June 2006) (unpublished paper), available at <http://www.harvard-jlpp.com/wp-content/uploads/2009/04/clegg-appendix.pdf>. It concluded that "the Clinton administration did not like to bring reverse discrimination cases, which the Bush administration was sometimes willing to bring; and the Clinton administration appeared to be more willing to bring disparate impact cases than the Bush administration has been." Clegg, *supra*, at 3. Although I presented the paper in June 2006, there were no dramatic reversals in policy during the last part of the Bush Administration. Disparate impact lawsuits were relatively rare, and there was the occasional challenge to racial preferences, right up to January 2009. See Press Release, Dep't of Justice, *Justice Department Files Lawsuit Alleging Race Discrimination Against Job Applicants by City of Gary, Ind.* (Jan. 12, 2009), available at <http://www.usdoj.gov/opa/pr/2009/January/09-crt-026.html>.

47. Roger Clegg, President & Gen. Counsel, Ctr. for Equal Opportunity, *Testimony before the Equal Employment Opportunity Commission* (Feb. 28, 2007), available at http://www.ceousa.org/index.php?option=com_docman&task=doc_view&gid=148&Itemid=54.

Department of Labor's regulations implementing Executive Order No. 11,246.⁴⁸ The failure of the Bush Administration to change these regulations, which unconstitutionally discriminate on the basis of race, ethnicity, and sex, and which force private employers to do so as well, was perhaps its single most disappointing shortcoming.

A. *Lack of Legal Justification for Racial Preferences in Employment*

If a business were caught awarding jobs or promotions on the basis of race, ethnicity, or sex today, its managers would likely defend the practice as a means of achieving "diversity." Companies may assume that the diversity rationale would shield them from legal challenge because the Supreme Court has accepted it for university admissions, but this is not true. In fact, the legal justifications for employment discrimination are much weaker. Current statutory and case law strongly oppose preferences in the employment context, and, for a number of reasons, employers that use such preferences are asking for legal trouble.

Unlike universities, companies face heightened vulnerability because hiring and promotion decisions are addressed by Title VII of the 1964 Civil Rights Act,⁴⁹ whereas racial and ethnic preferences in student admissions decisions are, for the most part, governed by Title VI.⁵⁰ The courts have interpreted the two statutes differently; thus, what is permissible under Title VI is not necessarily permissible under Title VII.

Title VI prohibits "discrimination" on the basis of "race, color, or national origin" in "any program or activity receiving Federal financial assistance."⁵¹ Although the statute's text admits of no exceptions, the Supreme Court has interpreted it as coextensive with the ban on discrimination under the less sharply worded Equal Protection Clause of the Fourteenth Amendment.⁵²

Title VII also contains a categorical ban, forbidding any employer to "discriminate" on the basis of "race, color, religion, sex, or national origin" in hiring, firing, or "otherwise . . . with respect

48. 3 C.F.R. 167 (1965 Supp.).

49. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

50. 42 U.S.C. §§ 2000d to 2000d-4a (2006).

51. 42 U.S.C. § 2000d (2006).

52. U.S. CONST. amend. XIV, § 1.

to [an employee's] compensation, terms, conditions, or privileges of employment."⁵³ But the Court has not conflated Title VII with the Equal Protection Clause, and accordingly the Court's recent ruling in *Grutter* that the Equal Protection Clause permits discrimination in the name of "diversity" is inapplicable.

Will the courts nonetheless create a "diversity" exception to Title VII's prohibition of racial and ethnic discrimination? That is very unlikely. To be sure, the Court did allow racial preferences in *United Steelworkers of America v. Weber*,⁵⁴ handed down in 1979, and preferences on the basis of sex in *Johnson v. Transportation Agency*,⁵⁵ a 1987 decision. But the rationale the Court approved in these two cases was based not on diversity, but on remedying "manifest . . . imbalances" with regard to the discriminated-against groups "in traditionally segregated job categories."⁵⁶ In 2009, with every tick of the clock, it is becoming less and less likely that a company could plausibly assert that any imbalance, manifest or not, is traceable to traditional segregation.

Moreover, it is one thing to say that an antidiscrimination statute allows preferences in order to remedy discrimination, but quite another to say that such a statute allows discrimination so long as the employer and the courts think that there is a good reason for it. There is simply no way to reconcile the latter "interpretation" with the text of the statute.⁵⁷

Note also that the Court in *Johnson* stressed that preferences could be used only to "attain," and not to "maintain," greater balance,⁵⁸ but diversity, unlike simple remediation, would require just such impermissible maintenance. Furthermore, the diversity rationale is premised on a belief in racial, ethnic, and gender dif-

53. 42 U.S.C. § 2000e-2(a)(1) (2006).

54. 443 U.S. 193 (1979).

55. 480 U.S. 616 (1987).

56. *Weber*, 443 U.S. at 197.

57. This point—and others regarding why there is no "diversity" exception to Title VII—are made by Professor Kingsley R. Browne in his article *Nonremedial Justifications for Affirmative Action in Employment: A Critique of the Justice Department Position*, 21 LAB. LAW. 451, 461–72 (1997). In addition, Professor Nelson Lund has argued that Congress, in enacting the Civil Rights Act of 1991, implicitly rejected even the remedial justification for an exception to Title VII. Nelson Lund, *The Law of Affirmative Action in and after the Civil Rights Act of 1991: Congress Invites Judicial Reform*, 6 GEO. MASON L. REV. 87 (1997).

58. *Johnson*, 480 U.S. at 639.

ferences that is quite at odds with the insistence in Title VII that people be judged individually and without regard to stereotypes.

If a diversity exception is created, it is hard to see why other exceptions should not also be put forward. Yet Congress explicitly declined to create even a "bona fide occupational qualification" exception to the statute for race, even as it did so for sex, religion, and national origin.⁵⁹ Furthermore, the diversity rationale could be—and frequently is—used to support discrimination *against* members of racial, religious, and ethnic minority groups and women. If a company's aim is greater "diversity" and less "underrepresentation" in its workforce, then any group that is "overrepresented" will be on the short end of any preferential hiring or promotion; depending on the company, racial and ethnic minorities and women could all lose out. It seems very unlikely that Congress wrote Title VII to allow such anti-minority and anti-female discrimination so long as an employer could adduce a business reason for it.

These concerns are not hypothetical. For instance, Xerox not long ago lost an employment discrimination case before the Fifth Circuit.⁶⁰ At issue was the company's "Balanced Workforce Initiative," begun "in the 1990's for the stated purpose of insuring that all racial and gender groups were proportionately represented at all levels of the company."⁶¹ The Houston office detected a racial imbalance, and so its general manager took steps "to remedy the disproportionate racial representation" there, "set[ting] specific racial goals for each job and grade level."⁶² The Fifth Circuit found that "the existence of the [Balanced Workforce Initiative] is sufficient to constitute direct evidence of a form or practice of discrimination."⁶³ After all, "Xerox candidly identified explicit racial goals for each job and grade level,"⁶⁴ and the evidence "indicate[d] that managers were evaluated on how well they complied with" the initiative's objectives.⁶⁵

59. See 42 U.S.C. § 2000e-2(e) (2006).

60. *Frank v. Xerox Corp.*, 347 F.3d 130 (5th Cir. 2003).

61. *Id.* at 133.

62. *Id.*

63. *Id.* at 137.

64. *Id.*

65. *Id.*

This is an appalling company policy and an excellent judicial decision under any circumstances. But here is the kicker: The plaintiffs were African-Americans and the company had concluded that "blacks were over-represented and whites were under-represented."⁶⁶

Thus, it is not surprising that the two federal courts of appeals presented with the diversity rationale in Title VII cases have refused to accept it. In *Taxman v. Board of Education*, the Third Circuit, sitting en banc, ruled in favor of a white school-teacher who had been laid off because her school desired a more "diverse" business-education department.⁶⁷ In *Messer v. Meno*, the Fifth Circuit ruled against the Texas Education Agency, which had "aspired to 'balance' its workforce according to the gender and racial balance of the state."⁶⁸ The court stated that "[d]iversity programs, no matter how well-meaning," are not permissible "absent a specific showing of prior discrimination."⁶⁹

The Supreme Court itself has not yet ruled on the issue, but it is unlikely to carve out a "diversity" exception to Title VII. Such an exception would be inconsistent with the approach and language in the Court's *Weber* and *Johnson* decisions, as Professor Kingsley Browne discussed in a 1997 article in *Labor Lawyer*.⁷⁰ A majority of the Court takes statutory text very seriously, and that same majority remains very wary of racial and ethnic preferences. Conservatives are not alone in making this prediction. In 1997, when the Court granted review in *Taxman*, the civil rights establishment so feared losing on this issue that it raised enough money to pay off the plaintiff's claims and lawyer's fees.⁷¹

Finally, the D.C. Circuit has rejected the diversity justification, as an insufficiently compelling interest under the Equal

66. *Id.* To its credit, the Equal Employment Opportunity Commission cited this case in the race-and-color section of its *Compliance Manual*. TITLE VII/AEDEA/EPA DIV., OFFICE OF LEGAL COUNSEL, EEOC COMPLIANCE MANUAL 15-34 (2006), available at <http://www.eeoc.gov/policy/docs/race-color.pdf>.

67. 91 F.3d 1547 (3d Cir. 1996), cert. granted sub nom. Piscataway Twp. Bd. of Educ. v. Taxman, 521 U.S. 1117 (1997), dismissed per stipulation, 522 U.S. 1010 (1997).

68. 130 F.3d 130, 133 (5th Cir. 1997).

69. *Id.* at 136.

70. See Browne, *supra* note 57.

71. See Abby Goodnough, *Financial Details Are Revealed In Affirmative Action Settlement*, N.Y. TIMES, Dec. 6, 1997, at B5.

Protection Clause in the employment context. This decision, *Lutheran Church-Missouri Synod v. FCC*, held that the FCC's Equal Employment Opportunity employment guidelines, which had "numerical norms based on proportional representation," triggered strict scrutiny under the Equal Protection Clause (the guidelines' ultimate goal was creating broadcast "programming diversity").⁷² Similarly, the United States District Court for the District of Columbia struck down portions of the Army's affirmative action promotion policy on equal protection grounds.⁷³ And recall that Justice Powell's opinion in *Bakke* recognizing diversity as a compelling interest hinged on the medical school's First Amendment claims to academic freedom, so it was asserting a "countervailing constitutional interest" of its own against the white applicant's interest;⁷⁴ that countervailing interest is unavailable in the private employment context. On the other hand, the Seventh Circuit did apply *Gratz* and *Grutter* to recognize diversity as a compelling interest in an employment case involving police hires—but this decision involved only an Equal Protection Clause claim, not a Title VII claim.⁷⁵

In sum, the case law for both public and private employment preferences is complicated and ambiguous, but the law is most fairly read as allowing preferences only in increasingly rare situations.⁷⁶ Nonetheless, conservatives could use a good Supreme Court decision or two here, too—specifically, a Title VII decision that, although it may leave *Weber* and *Johnson* intact, nonetheless rejects the diversity rationale and makes clear that even remedying "manifest racial imbalances in a traditionally segregated job category"⁷⁷ through preferences requires some showing of relatively recent discrimination that cannot otherwise be remedied. Barring that, it would be useful to limit at least public employers' discrimination by getting a decision

72. 154 F.3d 487, 492–93 (D.C. Cir. 1998).

73. See *Saunders v. White*, 191 F. Supp. 2d 95, 123–34 (D.D.C. 2002).

74. See *Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265, 313 (1978) (opinion of Powell, J.).

75. *Petit v. City of Chicago*, 352 F.3d 1111 (7th Cir. 2003).

76. See Roger Clegg, *Someone Should Sue*, ENGAGE, Oct. 2007, at 25.

77. *Weber v. United Steelworkers of Am.*, 443 U.S. 193, 197 (1979).

that rejects a "diversity" rationale for employment discrimination as compelling in the constitutional context.⁷⁸

B. *The Bush Administration, Executive Order No. 11,246's Regulations, and the Law*

Perhaps the most disappointing failure of the Bush Administration with regard to racial preferences involved the regulations⁷⁹ that have been promulgated under Executive Order No. 11,246.⁸⁰ These regulations, which apply to companies that do a certain level of contracting work for the federal government, flesh out the executive order's requirement that such companies have an "affirmative action" plan. The Center for Equal Opportunity repeatedly met with, wrote to, and cajoled Bush Administration officials at the Department of Labor, the Department of Justice, and the White House to change these regulations, explaining that they were (and are) unconstitutional and bad policy, but nothing was ever done.

It is wrong as a matter of law and policy for the Office of Federal Contracting Compliance Programs (OFCCP) to require covered federal contractors to set goals and timetables whenever they have a certain degree of "underrepresentation" among minorities and women.⁸¹ The regulations' present approach is at odds with the current case law. It is quite clear that this use of classifications based on race, ethnicity, and sex will trigger strict scrutiny.⁸² Mere statistical disparities are not sufficient to justify the use of racial classifications; even if they were, there is no justification for goals and timetables to be triggered when women and minorities are "underrepresented," but not when men and non-minorities are.

78. This Term the Supreme Court will decide *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008), cert. granted, 129 S. Ct. 894 (Jan. 9, 2009) (No. 08-328), a case that may shed important light on the limits of politically correct disparate treatment. The Bush Administration did not participate in the case while it was in the lower courts, but it should have.

79. 41 C.F.R. §§ 60-1.1 to 60-999.2 (2008).

80. 3 C.F.R. 167 (1965 Supp.).

81. 41 C.F.R. §§ 60-2.1 to 60-2.35, 60-4.1 to 60-4.9 (2008).

82. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."); *Lutheran Church-Mo. Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998) ("[W]e do not think it matters whether a government hiring program imposes hard quotas, soft quotas, or goals. . . . Strict scrutiny applies . . .").

Specifically, there is no plausible remedial basis for the government's use of statistical underrepresentation to trigger mandatory goals, timetables, and additional regulatory burdens, let alone for the regulations' treatment of underrepresentation of some groups differently from the underrepresentation of others. The federal government has no recent history of systemic discrimination and has banned discrimination by its contractors since at least 1961,⁸³ and the private sector as a whole has been prohibited from engaging in such discrimination since the passage of the Civil Rights Act of 1964.⁸⁴ Finally, even if there were a remedial basis, the across-the-board approach taken by the regulations would not be narrowly tailored. Statistical disparities can result from nondiscriminatory reasons, and they can almost always be addressed through race- and gender-neutral means.

The current regulations are not only illegal, but as a practical matter result in more, not less, discrimination. The regulations inevitably pressure companies to "get their numbers right" by using surreptitious quotas and other hiring and promotion preferences based on race, ethnicity, and sex. This has been widely remarked upon and is generally accepted⁸⁵ (and is the reason that pro-preference groups are so enamored of the current approach). The Center for Equal Opportunity's experience in dealing with companies also leaves no doubt about it; companies we have asked to make a commitment to rejecting preferences regularly cite the regulations as a constraint in this regard. Obviously, the intent and result of the regulations are to push companies to keep an eye on skin color, national origin, and sex in making employment decisions. Even if this were legally defensible, it is bad policy because it is unfair and divisive, and it discourages employers from hiring and promoting simply on the basis of productivity.

Accordingly, the Center for Equal Opportunity provided the Department of Labor with a marked-up version of the regulations to show how they could be made to conform to sound

83. Exec. Order No. 10,925, 3 C.F.R. 1977 (1961).

84. See Civil Rights Act of 1964, Pub. L. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2006)).

85. See, e.g., NATHAN GLAZER, *Affirmative Discrimination: For and Against*, in ETHNIC DILEMMAS, 1964-1982, at 159 (1983); STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE 428-29 (1997).

law and policy. We sent the following comments along with the suggested changes:

First, it does not appear that there is any discrimination problem with the Executive Order itself, which would not have to be changed; indeed, the changes we recommend bring the regulations more into line with the Executive Order. The regulations as now written are internally inconsistent, because they purport to ban or at least not require preferential treatment when in fact they push employers in precisely that direction.

Second, we have focused on 41 C.F.R. 60-2 and 60-4, which are the most relevant parts of chapter 60 (there are probably other places where conforming changes would need to be made).

Third, we have kept the changes to a minimum and have aimed only at making the regulations nondiscriminatory. There may be other improvements that could also be made to the regulations, but we kept our focus narrow.⁸⁶

We noted that “the main problem in the current regulations is the required use of ‘goals and timetables’ when the ‘incumbent’ percentage of ‘minorities or women’ is less than ‘their availability percentage.’”⁸⁷ We removed references to goals and timetables and the special focus on minorities and women, and replaced them instead with straightforward requirements that discrimination against anyone on the basis of race, national origin, or sex be identified, rooted out, and eliminated. We left in the requirements that demographic data be collected, but we clarified that it should be used only as a tool for uncovering actual, illegal discrimination. The only substantial revision was of the four short paragraphs at 41 C.F.R. § 60-2.16(a)–(d).

In a nutshell, we changed the centerpiece of OFCCP-mandated affirmative action plans from goals and timetables to a three-pronged commitment to nondiscrimination, inclusive recruitment, and addressing evidence of discrimination and correcting discriminatory practices when they are found. We thought the approach we took fit in well with the President’s

86. Memorandum from Ctr. for Equal Opportunity to U.S. Dep’t of Labor (July 13, 2005) (on file with Author).

87. *Id.*

support of “affirmative access”⁸⁸ and his repeatedly stated opposition to preferences.⁸⁹

We explained all this again and again, in a series of meetings, letters, e-mails, and phone calls with officials at the Labor Department, the Justice Department, and the White House that began the first year of the Bush Administration and continued until the last. But nothing happened.⁹⁰ Now maybe someone will sue, challenging the regulations as unconstitutional because they clearly are.

CONCLUSION

At the beginning of the Bush Administration, I drafted a speech that I thought the President ought to give on the topic of affirmative action. Here it is:

My fellow Americans, I want to speak with you tonight about what sort of nation America is, and has been, and will become.

The American Dream has always been that any American can work toward the life he or she wants, and will have the opportunity and the freedom to achieve and accomplish what he or she wants in life. There will be hurdles to overcome, but one barrier that should not be there is the color of an American’s skin or where an American’s ancestors came from.

We all know that for many years—for centuries—that dream was not allowed to many Americans. Too often discrimination because of race or ethnicity denied Americans the equality of opportunity they should have had.

88. Comm’n on Presidential Debates, *Debate Transcript: The Third Gore-Bush Presidential Debate* (Oct. 17, 2000), available at <http://www.debates.org/pages/trans2000c.html>.

89. See Press Release, Ctr. for Equal Opportunity, *Bush Is On Record as Opposing Racial and Ethnic Preferences* (Jan. 2, 2003), available at <http://www.ceousa.org/content/view/460/119>.

90. The discussion in this Part is not meant to suggest that the Bush Administration did not administer and enforce the Executive Order and its regulations in a way less likely to drive employers toward preferential treatment than the Clinton Administration had. See, e.g., Dennis Welch, *U.S. Penalizes Pro-Hispanic Hiring*, ARIZ. DAILY STAR, Feb. 2, 2007, available at <http://www.azstarnet.com/sn/printDS/170664>. But the overarching pro-preference framework was left in place.

We have made enormous strides in the last generation, however, to make that dream—the dream that Martin Luther King, Jr., had—a reality: to make real the words in the Declaration of Independence that all men are created equal, and the freedom that thousands of Americans fought and died for in our Civil War.

In the 1960s, one tool that was created for ending discrimination was affirmative action. Its original meaning was to require positive steps—affirmative action—to get rid of the unfairness that had come to permeate many businesses, governments, and other institutions. It had another early meaning, too: making sure that everyone was reached out to, not just a few. Those kinds of affirmative action were and are good, and should be continued.

But somehow another kind of affirmative action began, too—one that twisted and distorted the original ideal of the civil rights movement into its exact opposite. That kind of affirmative action was not ending discrimination but requiring it, the only difference being that there would be a new set of new victims.

This kind of affirmative action was well intentioned and maybe even necessary at the time. But the time has come to end it.

I think that all Americans would agree that our goal should be to have a society where no one—white or black, Asian or Hispanic, American Indian or Arab American—should be favored or penalized because of race or ethnicity. The only question is, do we follow that principle now, or wait until some unknown, uncertain future day?

I say the time is now. A 17-year-old applying to college today is not a former slave and did not live during the Jim Crow era. He or she was born in 1984, twenty years after the Civil Rights Act of 1964 was passed. An 18-year-old who joined the workforce when that statute became law would be 55 years old today.

I know that discrimination still exists. But, unfortunately, there will always be some discrimination. And I do not think that the best way to fight bias is with more bias. We have laws on the books that prohibit discrimination, and I pledge to you that I will aggressively enforce them and, where necessary, strengthen them.

Nor do I deny that too many Americans have limited opportunities because of the circumstances into which they are born. Some are members of minority groups and some are not, just as some well-to-do people are members of minority groups and some are not. Some disadvantaged children may be able to trace their circumstances to discrimination, others might not, but, really, what difference does it make whether the unfairness is of one kind or another? No child deserves to be denied an opportunity by any accident of birth, and no child should be left behind.

We will not make race relations better by picking winners and losers based on race. If the government creates double standards, or triple or quadruple standards, by ranking blacks ahead of Hispanics ahead of Asians ahead of whites, it will create only resentment and stigmatization.

And besides, the use of racial and ethnic preferences is just plain unfair. It is unfair when a school or college asks a student who wants to go there, what color are you? It is unfair when an employer asks an applicant, where did your ancestors come from? It is unfair when the government asks a contractor, or a prime contractor asks a subcontractor, what is your race?

It is unfair to those who are denied a spot in school, or a job, or a contract. And it is insulting to those who are supposedly benefited. African Americans have made enormous contributions to our national life and culture for hundreds of years in the teeth of slavery and Jim Crow—the worst discrimination you can imagine. And now we are telling them: You cannot be expected to succeed unless we lower the bar for you.

I don't buy it. I reject the soft bigotry of low expectations. No child should be left behind, but every child and every American will be held to the same standards as every other one of his countrymen.

There is another reason why racial and ethnic preferences are wrong. It requires the government to pigeonhole people as if everyone were either pure black or white, Hispanic or non-Hispanic, just one or the other. The truth is, as we learned in the latest census, not only is the American population increasingly multiracial and multiethnic, but so are Americans as individuals.

This is true of my own family, it is true of Tiger Woods, and it is true of millions of Americans. Few of us are just black, or just Hispanic, or just Native American. And so how can it make sense for the government to grant preferences as if we were? And how is the government supposed to rank who is the most deserving when there is an infinite number of racial and ethnic combinations, and that variety keeps growing as America does?

Most Americans believe as I do that it was always wrong to penalize people for their skin color or ancestry, and most Americans also believe that it is wrong to do so now. We can end the newer discrimination and still remain vigilant that discrimination of the old kind is punished, too. Racial profiling is wrong whether it is police stopping a black teenager or colleges telling an Asian teenager that they have "too many" of them already.

We should continue to have the kind of affirmative action that means taking special steps to root out prejudice and reaching out to everyone. But we should end the affirmative action that gives preferences to some over others because of race or ethnicity.

When Thurgood Marshall was the lead attorney in *Brown v. Board of Education*, he wrote: "Distinctions by race are so evil, so arbitrary and insidious that a state bound to defend the equal protection of the laws must not allow them in any public sphere." In that landmark case he insisted that "classifications and distinctions based upon race or color have no moral or legal validity in our society." He was right.

We are all Americans. God loves us all, and wants us to love one another no matter what our outward appearance. There is no room for bigotry in the heart of a patriotic American, and our government should likewise be color-blind. From now on, I pledge to you that it will be.

Thank you, and God bless America.⁹¹

Well, needless to say, the speech was never given. But hope springs eternal: Perhaps President Obama will deliver it. He has, after all, stated his misgivings about racial preferences, ac-

91. A slightly edited version of this speech was later published as Roger Clegg, *Words of Advice*, NAT'L REV. ONLINE, Jan. 10, 2003, <http://www.nationalreview.com/clegg/clegg011003.asp>.

knowledging, for instance, that his daughters probably should not enjoy a preference in university admissions over disadvantaged students who happen to be white.⁹²

As we await that speech, though, the struggle against racial preferences remains a multi-front battle. State ballot initiatives and even state legislation ought to be pursued, and the issue must be kept before the court of public opinion.

The issue should especially be kept before the courts. In the short term, significant progress will require good judicial decisions. The good news is that there are strong legal arguments to be made against racial preferences in all the major areas where they are found. The bad news is that we must get these issues before the courts quickly because their composition is likely to get worse in a hurry. In short, let's sue!

92. Interview by George Stephanopoulos with Senator Barack Obama on *This Week with George Stephanopoulos* (ABC television broadcast May 13, 2007).

A MEASURED APPROACH: EMPLOYMENT AND LABOR LAW DURING THE GEORGE W. BUSH YEARS

WILLIAM J. KILBERG,* JASON SCHWARTZ** & JOSHUA CHADWICK***

On the whole, the Bush Administration took a thoughtful and measured approach to labor and employment law issues. Two principal themes emerged from the Administration's approach: first, that government should provide clarity in the law to the greatest extent possible, and, second, that enforcement and other discretionary efforts should channel limited resources toward the most pressing problems. This Essay will consider examples of these themes from four labor and employment statutes that featured prominently in debates during the Bush years: the Fair Labor Standards Act (FLSA), the Sarbanes-Oxley Act's (SOX) whistleblower provisions, the Employee Retirement Income Security Act (ERISA), and the National Labor Relations Act (NLRA).

The Essay will also briefly address a response to the Administration's approach by its critics, who increasingly sought to expand the law through state and local government initiatives. Although such efforts achieved some modest successes, attempts at more sweeping change faced significant federal preemption obstacles and largely failed. Looking forward, with Democratic majorities in both houses of Congress and a sympathetic ear in the White House, efforts in the States may wane with the promise of more sweeping—and perhaps less measured—action at the federal level.

* Partner, Gibson, Dunn & Crutcher LLP, Washington, D.C. Mr. Kilberg is the senior-most member of the firm's Labor & Employment Law Practice Group and served as Solicitor for the United States Department of Labor from 1973 to 1977.

** Partner, Gibson, Dunn & Crutcher LLP, Washington, D.C. Mr. Schwartz is a member of the firm's Labor & Employment Law Practice Group and its Litigation Department.

*** Associate, Gibson, Dunn & Crutcher LLP, Washington, D.C. Mr. Chadwick is a member of the firm's Litigation Department.

I. FAIR LABOR STANDARDS ACT

In 2004, the Bush Labor Department revised the fifty-year-old regulations that define “white collar” employees exempt from the overtime requirements of the FLSA, a task that previous administrations had promised to do but failed to achieve.¹ Although the revisions were long overdue and did not dramatically shift the law, they faced a groundswell of opposition from entrenched interest groups. In the end, however, the revisions greatly increased the clarity and administrability of the law and facilitated future enforcement efforts targeted to assist those most in need of the FLSA’s protections.

The FLSA was enacted in 1938 to provide protection “to help those who toil in factory and on farm” to obtain “a fair day’s pay for a fair day’s work.”² To “raise the wages of the most poorly paid workers and to reduce the hours of those most overworked,”³ it set a nationwide minimum wage⁴ and required the payment of time-and-a-half for hours worked beyond forty per week.⁵ Consistent with the view that many workers, but not all, lack sufficient bargaining power to fend for themselves, the Act exempts from its overtime-pay requirements various categories of employees, including those “employed in a bona fide executive, administrative, or professional capacity.”⁶ The Act does not define these so-called white collar exemptions, instead leaving that task to the Secretary of Labor.⁷

The regulations defining the white collar exemptions had not been substantially revised since 1954.⁸ The relevance of the older version has waned over the last fifty years largely because the American economy had shifted predominantly from

1. See *infra* note 18 and accompanying text.

2. Franklin D. Roosevelt, Message to Congress (May 24, 1937). For a more detailed discussion of the FLSA reforms, from which this summary is adapted, see WILLIAM J. KILBERG & JASON C. SCHWARTZ, *SAGA OF REFORM: REGULATION OF WORKER OVERTIME* (2004) [hereinafter *FLSA MONOGRAPH*].

3. H.R. REP. NO. 75-1452, at 9 (1937).

4. 29 U.S.C. § 206 (2000).

5. 29 U.S.C. § 207 (2000).

6. 29 U.S.C. § 213(a)(1) (2000).

7. *Id.*

8. See U.S. GEN. ACCOUNTING OFFICE, *FAIR LABOR STANDARDS ACT: WHITE-COLLAR EXEMPTIONS IN THE MODERN WORK PLACE 3* (1999) [hereinafter *GAO REPORT*].

manufacturing to services,⁹ and because inflation had diminished the value of the threshold wage amounts used in the regulations. The old regulations, for example, established a \$250-per-week threshold for “high salaried” white collar employees eligible for a less rigorous analysis of their job duties in determining exempt status.¹⁰ Raises in the federal minimum wage for a forty-hour work week, however, made this level increasingly meaningless.¹¹ Moreover, references to such positions as “leg man”¹² and “strawbosses”¹³ in the illustrations provided by the old regulations were anachronistic and had become mostly useless to both employers and employees. As Secretary of Labor Elaine Chao recognized, the old rules

reflected the structure of the workplace, the type[s] of jobs, the education level of the workforce, and the workplace dynamics of an industrial economy that has long since changed. With each passing decade of inattention, the overtime regulations became increasingly out of step with the realities of the workplace and provided less and less guidance to workers and employers.¹⁴

For these reasons, there was widespread recognition that the old regulations needed to be reworked. The United States General Accounting Office had recommended to the Clinton Administration “that the Secretary of Labor comprehensively review current regulations and restructure white-collar exemptions to better accommodate today’s work place and to anticipate future work place trends.”¹⁵ Such a seemingly simple prescription for change was easier said than done given the widely divergent opinions concerning the form such changes should take.

The tension over the form of any revisions is reflected in the decades of delay and inaction that preceded the Bush Admini-

9. *Id.* at 1.

10. 29 C.F.R. §§ 541.119, 541.214, 541.315 (2004).

11. See 29 U.S.C. § 206 (2000) (setting a minimum wage of \$5.15 per hour, equivalent to \$206 per week). In 2007, the minimum wage was raised again, to reach \$7.25 per hour by July 2009. Fair Minimum Wage Act of 2007, Pub. L. No. 110-28, 121 Stat. 112, 188.

12. 29 C.F.R. § 541.302(f)(2) (2004).

13. 29 C.F.R. § 541.115(b) (2004).

14. *Assessing the Impact of the Labor Department’s Final Overtime Regulations on Workers and Employers: Hearing Before the Comm. On Educ. and the Workforce*, 108th Cong. 9 (2004) (statement of Elaine L. Chao, Secretary of Labor) (footnote omitted).

15. GAO REPORT, *supra* note 8, at 4.

stration's efforts. In 1981, the Labor Department "stayed indefinitely" its previous proposal to readjust the FLSA's salary thresholds in response to public comments urging a more comprehensive review,¹⁶ and, in 1985, it sought public comment on "all aspects of the regulations."¹⁷ From 1985 until the Bush Labor Department published its proposal in March 2003, the Department published statements of regulatory priority twice per year emphasizing reform of the regulations.¹⁸ Notwithstanding this professed emphasis from both Republican and Democratic administrations, little progress was made.

In addition to the infirmities occasioned by the age of the regulations, the old rules had been increasingly exploited over time by plaintiffs eager to collect outsized judgments premised on employers' technical non-compliance with the regulations. In *Reich v. Malcolm Pirnie, Inc.*,¹⁹ for example, the Department of Labor obtained a more than half-million dollar judgment on behalf of four hundred otherwise-exempt employees because twenty-four of them had been subject to a *total* of just \$3,269 in technically improper pay deductions (which had been reimbursed to employees) on the ground that all of the exempt employees were theoretically "subject to" the improper deductions.²⁰ In a California state law case, involving the exempt status of insurance adjusters (who had for many years been understood to be exempt), and purportedly, but improperly, applying federal regulatory concepts, a jury awarded more than \$90 million in damages plus prejudgment interest to plaintiffs who were held to have been misclassified.²¹ The rise of such "gotcha" litigation, confusion in the case law, and the staggering judgments which often resulted, created motivated stakeholder classes with employers (by and large) on one side, and the plaintiff's bar and labor unions on the other. Any

16. 46 Fed. Reg. 18,998, 18,998 (Mar. 27, 1981).

17. 50 Fed. Reg. 47,696, 47,696 (Nov. 19, 1985).

18. *See, e.g.*, 65 Fed. Reg. 23,014, 23,029 (Apr. 24, 2000); 65 Fed. Reg. 73,303, 73,408 (Nov. 30, 2000); 66 Fed. Reg. 25,679, 25,687 (May 14, 2001); 66 Fed. Reg. 61,125, 61,222 (Dec. 3, 2001); 67 Fed. Reg. 33,307, 33,314 (May 13, 2002); 67 Fed. Reg. 74,057, 74,170 (Dec. 9, 2002).

19. 821 F. Supp. 905 (S.D.N.Y. 1993).

20. *Id.* at 906-10.

21. *Bell v. Farmers Ins. Exch.*, 105 Cal. Rptr. 2d 59 (Ct. App. 2001); *Employer held to have broken law on overtime*, NAT'L L.J., Feb. 4, 2002, at C9.

changes that threatened to alter the status quo with respect to exempt and non-exempt workers sparked instant controversy.

After meeting with more than forty of these stakeholder groups, representing both employers and employees, the Bush Labor Department finally published a proposed rule in the *Federal Register* on March 31, 2003.²² The Department of Labor received an astounding 75,280 comments during the ninety-day regulatory comment period. Although only 600 of the comments were substantive (the rest were form letters), the comments reflected the intense public debate that was raging simultaneously in the media and in Congress. The AFL-CIO accused the Administration of robbing workers of overtime pay.²³ The Economic Policy Institute, which is funded by organized labor, issued a widely cited study contradicting the Labor Department's estimate that 644,000 employees would lose overtime with its own estimate of 8 million employees.²⁴ An author of that study wrote a Labor Day editorial arguing that "[t]he 8-hour day and 40-hour week that our great-grandparents fought for during a 50-year struggle and finally won in the New Deal will be nothing but a memory if the administration and its big business allies succeed in their stealth attack on this key labor protection."²⁵

Unfortunately, despite the rhetoric, the substance of the revised regulations received little attention. An examination of that substance reveals the sensible nature of the changes and their important public purpose: to protect the lowest paid workers and to provide clarity to employees and employers, thereby reducing litigation.

As an initial matter, the revised regulations make clear that the exemptions do not apply to those for whom the FLSA's protections were designed, stating that non-management "carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium

22. 68 Fed. Reg. 15,560 (Mar. 31, 2003).

23. See FLSA MONOGRAPH, *supra* note 2, at 18.

24. Jared Bernstein & Ross Eisenbrey, *Eliminating the right to overtime pay: Department of Labor proposal means lower pay, longer hours for millions of workers* (Econ. Pol'y Inst., Briefing Paper No. 139, 2003), available at http://www.epi.org/publications/entry/briefingpapers_flsa_jun03/.

25. Ross Eisenbrey, *Sad Labor Day for Working Americans*, MONTEREY HERALD, Aug. 31, 2003.

pay under the Fair Labor Standards Act, and are not exempt under the regulations in this part no matter how highly paid they might be."²⁶ The regulations also create reasonable and administrable salary thresholds, increasing the minimum salary required for exemption from \$155 per week (\$8,060 per year) to \$455 per week (\$23,660 per year)²⁷ and applying a streamlined test for those highly compensated employees making over \$100,000 per year.²⁸ This automatic protection for those making less than \$23,660 per year and the recognition that those making six-figure salaries are presumptively not in need of additional overtime pay (so long as they "customarily and regularly" perform exempt functions²⁹), are eminently reasonable and a certain improvement in the law.

In addition to revising the white collar regulations, the Administration took other steps to ensure that the FLSA's requirements be as clear as possible and enforced effectively. Notably, the Labor Department's Wage and Hour Division made great strides in providing well-reasoned opinion letters to those parties requesting them. These opinion letters are particularly important because they give crucial guidance in addressing difficult problems and may be relied upon under the 1947 Portal-to-Portal Act amendments to the FLSA.³⁰

Moreover, contrary to critics' claims that the Bush Labor Department catered only to business interests, the Department was an active supporter of FLSA plaintiffs. For example, the Department filed notable amicus briefs in support of the plaintiffs in the "donning and doffing" cases.³¹ The Department also focused its enforcement efforts by setting a compliance priority

26. 29 C.F.R. § 541.3(a) (2004); *see also* 29 C.F.R. § 541.3(b)(1) (2004) (expressly excluding from exemption "police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level").

27. 29 C.F.R. § 541.600 (2004).

28. 29 C.F.R. § 541.601 (2004).

29. *Id.*

30. *See* 29 U.S.C. § 259 (2000).

31. Brief for the Secretary of Labor as Amicus Curiae Supporting Petition for Panel Rehearing and Petition for Rehearing *En Banc*, *Tum v. Barber Foods, Inc.*, 360 F.3d 274, 281 (1st Cir. 2004) (Nos. 02-1679, 02-1739), available at <http://www.dol.gov/sol/media/briefs/main.htm>; Brief for the Secretary of Labor as Amicus Curiae, *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003) (Nos. 02-35042, 02-35110).

in low-wage industries with chronic violations, especially where large numbers of immigrant workers are employed. In the words of the Department:

These workers are more willing to accept low-wages and less likely to complain to the government when their rights have been violated. To meet this challenge, the Department employed directed *enforcement*, *aggressive compliance assistance* to both workers and employers, and *strategic partnerships* to ensure compliance problems in these industries do not go unabated.³²

The Administration's prioritization of enforcement in this regard—which resulted in the successful prosecution and recovery of back pay in a large number of cases³³—is suggestive of its general approach and undoubtedly was a good use of the limited resources available.³⁴

II. SARBANES-OXLEY WHISTLEBLOWER PROVISIONS

The expansion of federal whistleblower law was another significant labor and employment development of President Bush's tenure. In the wake of the collapse of energy giant Enron and other corporate scandals, whistleblowing assumed a new prominence in the public consciousness early in the Administration. Indeed, *Time* magazine's 2002 Persons of the Year were whistleblowers, including Sherron Watkins of Enron and Cynthia Cooper of WorldCom. According to the magazine, they "took huge professional and personal risks to blow the whistle . . . and in so doing helped remind us what American courage and American values are all about."³⁵ With the passage of the Sarbanes-Oxley Act of 2002,³⁶ a whole new universe of whistleblower litigation emerged.

32. Dep't of Labor, Fact Sheet: Creating Opportunities for the Asian Pacific American Community (July 23, 2008), <http://www.dol.gov/asp/programs/factsheet/apa2.htm>.

33. *Id.*

34. Earlier administrations were often less focused in their enforcement efforts. In *Reich v. John Alden Life Insurance Co.*, for example, the Clinton Labor Department pursued an FLSA enforcement case involving marketing representatives earning up to \$75,000 per year (and averaging \$50,000 per year). 126 F.3d 1, 5 (1st Cir. 1997). It is difficult to imagine that there were not more worthy cases meriting the Department's resources at the time.

35. Richard Lacayo & Amanda Ripley, *The Whistleblowers*, *TIME*, Dec. 30, 2002, at 5.

36. Pub. L. No. 107-204, 116 Stat. 802.

Sarbanes-Oxley enacted whistleblower protections for employees who provide information or investigatory assistance relating to their reasonable belief of a violation of Securities and Exchange Commission rules, federal laws relating to fraud against shareholders, or federal mail, wire, and bank fraud statutes.³⁷ Employees are protected against adverse employment action when they share such information with or provide assistance to federal agencies, Congress, or representatives of the employer with supervisory or investigatory authority.³⁸ Remedial provisions of the statute entitle prevailing employees "to all relief necessary to make the employee whole," including reinstatement and back pay, as well as litigation costs and attorneys' fees.³⁹

Although initial administrative law judge (ALJ) decisions under Sarbanes-Oxley led to substantial uncertainty in interpreting the new law, the Bush Department of Labor's Administrative Review Board (ARB), to which the Secretary delegates her decisional authority, demonstrated in its decisions a concerted effort to bring clarity to the law.

In *Platone v. FLYi, Inc.*,⁴⁰ for example, the ARB reversed the ALJ's decision, holding that the alleged misconduct did not fall within Sarbanes-Oxley's coverage. *Platone* involved an airline's labor relations manager who complained of billing irregularities between the union and the company regarding reimbursement when pilots were unable to fly because of union business. The decision was significant because the ARB made clear that the Act "does not provide whistleblower protection for all employee complaints about how a public company spends its money and pays its bills," but rather is limited to those communications that "definitively and specifically" relate to the listed categories of fraud or securities violations under the statute.⁴¹

In addition to clarifying the law, the Department has intervened in support of whistleblowers to bolster its enforcement powers in the field. In *Bechtel v. Competitive Technologies, Inc.*,⁴²

37. 18 U.S.C. § 1514A (2006).

38. 18 U.S.C. § 1514A(a)(1) (2006).

39. 18 U.S.C. § 1514A(c) (2006).

40. No. 04-154 (Sept. 29, 2006), *aff'd sub nom.* *Platone v. U.S. Dep't of Labor*, 548 F.3d 322 (4th Cir. 2008).

41. *Id.* at 17.

42. 448 F.3d 469 (2d Cir. 2006).

for example, the Secretary intervened in federal court on behalf of the plaintiff to enforce a preliminary order of reinstatement issued following the Department's initial investigation. The case arose when a corporate vice president alleged that he was terminated for making internal complaints about financial disclosures and brought an action to enforce a preliminary reinstatement order. The district court entered a preliminary injunction enforcing the order, and the employer appealed. Although the Second Circuit ultimately vacated the district court's injunction, the Department filed a brief supporting the plaintiff's argument that the district court had the authority to enforce the order of reinstatement.⁴³ Efforts like these suggest that the Bush Labor Department was willing to expend its limited resources in aggressive support of enforcement powers on behalf of whistleblowers, even in cases where the reviewing court disagreed.

III. ERISA

As in the whistleblower context, the Enron debacle had a substantial effect on litigation under ERISA. Although securities class actions have long followed the disclosure of accounting and other improprieties by public companies, a new category of cases often referred to as "ERISA stock drop cases" has become a fixture of the post-Enron legal landscape.⁴⁴

ERISA stock drop cases generally allege that material misstatements or omissions made by a company caused losses in employee investments in company stock through 401(k) or employee stock ownership plans (ESOPs). Although the cases routinely involve factual allegations similar to those in companion securities cases, there are notable differences. The ERISA cases often involve different defendants, different legal duties, and afford different relief. In addition to alleging the same material misrepresentations involved in the securities cases, the ERISA cases also generally add allegations that plan fiduciaries violated their duty of prudence by continuing to offer or hold (or both) company stock in the plan despite knowing that the stock was

43. Brief for the Secretary of Labor, *Bechtel v. Competitive Techs.*, 448 F.3d 469 (2d Cir. 2006) (No. 05-2404), 2005 WL 5289280.

44. See Craig C. Martin et al., *What's up on Stock-Drops? Moech Revisted*, 39 J. MARSHALL L. REV. 605, 605-06 (2006).

not a prudent investment.⁴⁵ Finally, the cases routinely involve important and specialized ERISA questions as well as occasional participation by the United States Department of Labor.

The ERISA stock drop cases provide a window through which one can see some of the recurrent challenges that faced the Bush Administration and shaped the development of labor and employment law during the period. The cases are a function of the rise of 401(k) plans and ESOPs, which are part and parcel of the increased employee mobility and demand for portability of retirement benefits reflective of the period. Additionally, the cases emerged in the wake of Enron and other corporate accounting scandals that plagued the Bush years (and which also led, of course, to the Sarbanes-Oxley Act and its whistleblower protections, discussed above). In its reaction to the ERISA cases, the Bush Administration characteristically provided active support to plaintiffs it perceived to have legitimate complaints, but also sought to provide clarifying guidance and to reduce unnecessary litigation. Two actions by the Administration are illustrative: the issuance of a Field Assistance Bulletin addressing the fiduciary responsibilities of directed trustees, and the Department's amicus brief in support of the plaintiffs in the Enron stock drop case.

With respect to the first issue, ERISA provides that a fiduciary (who exercises discretionary authority or control over a plan's assets) may appoint a directed trustee to manage the plan "in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and are not contrary to [ERISA]."⁴⁶ Directed trustees are typically third-party service providers that conduct transactions at the direction of a named fiduciary. They often provide their directed trustee services at a very low cost as a subsidiary to other financial services being provided to the employer; that low cost reflects, in part, the limited role (and presumed limited liability) of the directed trustee. The degree of fiduciary responsibility owed by directed trustees has been the subject of much litigation, however, because they are often

45. See 29 U.S.C. § 1104(a)(1)(B) (2006) (creating a duty to manage the plan assets "with the care, skill, prudence, and diligence under the circumstances then prevailing").

46. 29 U.S.C. § 1103(a)(1) (2006).

perceived to have deep pockets and are therefore attractive targets to plaintiffs.

In *Field Assistance Bulletin No. 2004-03*, the Department considered the following question in response to the uncertainty in the law: "In the context of publicly traded securities, what are the fiduciary responsibilities of a directed trustee?"⁴⁷ The Department recognized, of course, that "when a directed trustee knows or should know that a direction from a named fiduciary is not made in accordance with the terms of the plan or is contrary to ERISA, the directed trustee may not, consistent with its fiduciary responsibilities, follow the direction."⁴⁸ The Department adopted a sensible view of the limited scope of the directed trustee's responsibilities in a number of commonly litigated scenarios. The Department clarified, for example:

A directed trustee does not, in the view of the Department, have an independent obligation to determine the prudence of every transaction. The directed trustee does not have an obligation to duplicate or second-guess the work of the plan fiduciaries that have discretionary authority over the management of plan assets and does not have a direct obligation to determine the prudence of a transaction.⁴⁹

Recognizing the reality of today's financial services providers, the Department also took the position that material, non-public information possessed by one arm of a financial institution generally will not be imputed to those performing its directed trustee functions.⁵⁰ The Department's position on these issues has been granted substantial deference in the courts and has helped to provide valuable clarity in the law.⁵¹ It has apportioned responsibility for fiduciary decision making in a sensible manner—with primary responsibility resting on the employer fiduciaries—thereby facilitating the continued provision of directed trustee services at a reasonable cost without unrealistic liabilities.

It is worth noting, however, that the Bush Department of Labor filed an influential amicus brief in support of the plaintiffs

47. U.S. DEP'T OF LABOR, FIELD ASSISTANCE BULLETIN NO. 2004-03, at 1 (2004).

48. *Id.* at 2-3.

49. *Id.* at 4.

50. *Id.* at 5.

51. See, e.g., *In re WorldCom, Inc. ERISA Litig.*, 354 F. Supp. 2d 423, 425 (S.D.N.Y. 2005) (granting directed trustee's motion for summary judgment).

in the Enron stock drop case.⁵² This decision reflected the Administration's dedication of resources to important enforcement matters and aggrieved employees, despite charges by its critics of overzealous support of business interests and inadequate enforcement. In the brief, the Department argued that plaintiffs had adequately alleged that the compensation committee of Enron's board of directors, the company itself, and Chairman Ken Lay had breached the fiduciary duties they owed to employees participating in Enron's plans.⁵³ The Department also argued strongly against the defenses asserted by the defendants,⁵⁴ even though the Department's positions would have important implications for other, and perhaps less egregious, cases.

IV. NATIONAL LABOR RELATIONS BOARD

Like the Labor Department, the National Labor Relations Board (NLRB) under President Bush's Administration has been attacked as a partisan, pro-employer body. A careful examination of the decisions most frequently criticized by labor unions (and targeted for reversal), such as *Dana Corp.*⁵⁵ and *The Guard Publishing Co.*,⁵⁶ however, reveals a sensible and even-handed approach to the law.

The *Dana Corp.* decision has important implications for the current "card check" legislation and for the recent trend of "corporate campaigns" in which labor unions employ a variety of labor, public relations, and marketplace strategies to pressure employers into voluntary acceptance of a union at some or all of their facilities. In *Dana Corp.*, the Board responded reasonably to the practical realities of modern-day corporate campaigns, in which an employer may be pressured to recognize a union based upon employee authorization cards, which might not reflect the actual desire of employees. In such cases, the Board reversed its prior doctrine, which had foreclosed decertification elections in the period following voluntary recognition

52. Brief of the Secretary of Labor as Amicus Curiae Opposing the Motions to Dismiss, *Tittle v. Enron Corp.*, No. H-01-3913 (S.D. Tex. Aug. 30, 2002), available at <http://www.dol.gov/sol/media/briefs/enronbrief-8-30-02parti.htm>.

53. *Id.* at 3–28.

54. *Id.* at 29–37.

55. 351 N.L.R.B. 434 (2007).

56. 351 N.L.R.B. 1110 (2007).

of a union based on employee authorization cards (that is, card check).⁵⁷ The Board recognized that “the freedom of choice guaranteed employees . . . is better realized by a secret election than a card check.”⁵⁸ Therefore, the Board modified its prior doctrine to allow an employee or rival union to file a decertification petition (supported by signatures of at least 30% of eligible employees) within forty-five days of the employer’s voluntary recognition of a union.⁵⁹ The decertification petition would then trigger a secret ballot election to determine whether and by whom employees would like to be represented in collective bargaining.⁶⁰ This decision is targeted by unions for reversal, to protect their current gains from corporate campaigns and their expectation of future gains from the Employee Free Choice Act, or the so-called card check legislation, if passed.

In *The Guard Publishing Co.*, the Board again applied a common-sense approach to modern-day workplace realities, when it upheld the legality of employer prohibitions on union-related use of its e-mail system.⁶¹ The Board reasoned that e-mail is a form of company equipment that can legitimately be restricted by the employer, as distinguished from off-duty, in-person solicitation.⁶² The Board further found that the common practice of allowing occasional personal use of e-mail would not support a charge of discriminatory application of an employer’s e-mail policy, provided that the employer treats all e-mails soliciting support for a group or organization similarly.⁶³ This is another decision targeted by unions for its practical effect on organizing campaigns. It can hardly be described, however, as a radical pro-employer decision; instead, it should be viewed as a sensible recognition of e-mail practices.

V. STATE AND LOCAL MEASURES

In response to the more measured approach at the federal level, unions and other critics increasingly turned to state and

57. *Dana Corp.*, 351 N.L.R.B. at 434.

58. *Id.* at 438.

59. *Id.* at 434.

60. *See id.*

61. 351 N.L.R.B. at 1110.

62. *Id.* at 1114–16.

63. *Id.* at 1118–19.

local law in pursuit of more dramatic changes. San Francisco and Washington, D.C. enacted mandatory sick leave policies during the period,⁶⁴ and a number of states raised their minimum wages above federal levels. Two prominent, but ultimately unsuccessful, examples of this tactic include California Assembly Bill 1889, which restricted recipients of state funds from assisting, promoting, or deterring union organizing, and the Maryland Fair Share Health Care Fund Act, sometimes called the “anti-Wal-Mart law,” which required Wal-Mart to spend a fixed percentage of its payroll on health insurance or make payments into a state fund. These two cases illustrate both the success with which unions and other Administration opponents pressed their agendas in state legislatures, as well as the potency of federal preemption litigation in defeating such moves.

It took almost the entire Bush Administration for the saga of California Assembly Bill (AB) 1889 to unfold. California Governor Gray Davis signed the bill on September 28, 2000, but it was not until June 19, 2008, that the United States Supreme Court ultimately struck it down in *Chamber of Commerce of the United States v. Brown*.⁶⁵ The bill prohibited certain employers from using state funds “to assist, promote, or deter union organizing.”⁶⁶ Although this language is facially neutral, it was clear from the outset that the purpose of the legislation was to limit anti-union speech and to strengthen union organizing campaigns.⁶⁷ To this end, AB 1889 contained express exemptions for “activit[ies] performed” or “expense[s] incurred” in connection with “[a]llowing a labor organization or its representatives access to the employer’s facilities or property,” and “[n]egotiating,

64. See Nikita Stewart, *Council Approves Sick Leave In District: Bill Will Mandate Paid Job Absences*, WASH. POST, Mar. 5, 2008, at B1.

65. 128 S. Ct. 2408 (2008).

66. CAL. GOV'T CODE §§ 16645–16649 (West Supp. 2009).

67. California was not the only state to pass such a measure. See N.Y. LAB. LAW § 211-a (2003); MASS. GEN. LAWS ch. 7 § 56 (2006). Moreover, one of President Obama’s first acts in office was to issue Executive Order 13,494, 74 Fed. Reg. 6101 (Feb. 4, 2009), *Economy in Government Contracting*, which prohibits government contractors’ recovery of costs incurred “to persuade employees . . . to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively.” It remains to be seen how this measure and a related executive order mandating certain pro-union postings will be interpreted and whether they will face and survive legal challenges.

entering into, or carrying out a voluntary recognition agreement with a labor organization.”⁶⁸

Although the bill was expected to affect employers in a range of industries, it was targeted primarily at the healthcare industry, to which the state’s Medi-Cal program provided substantial funds to a large number of employers.⁶⁹ The bill had included a dual enforcement mechanism, which allowed for civil actions by private taxpayers and the state attorney general, and harsh penalties. Employers running afoul of the law were subject to liability for the amount of funds expended in violation of the statute, as well as a civil penalty equal to twice that amount, plus attorneys’ fees and costs. Passed on a strictly party-line vote, and with unions quickly availing themselves of the statute’s provisions through reporting and litigation, the bill was unsurprisingly and quickly challenged by employer groups.⁷⁰

On a motion for summary judgment, the United States District Court for the Central District of California found AB 1889 to be preempted by section 8(c) of the NLRA,⁷¹ which provides that “[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.”⁷² Although a Ninth Circuit panel affirmed this decision,⁷³ it was ultimately reversed by that court after rehearing en banc.⁷⁴

The Supreme Court granted certiorari and reversed the Ninth Circuit on federal preemption grounds.⁷⁵ In a 7-2 opinion by Justice Stevens, amounting to a complete victory for opponents of the law, the Court held that the AB 1889 “policy judgment that partisan employer speech necessarily ‘interfere[s]

68. CAL. GOV’T CODE § 16647(b), (d) (West Supp. 2009).

69. See John Logan, *Innovations in State and Local Labor Legislation: Neutrality Laws and Labor Peace Agreements in California*, in UNIV. OF CAL. INST. FOR LABOR & EMPLOYMENT, THE STATE OF CALIFORNIA LABOR 2003, at 159–62 (2003).

70. See, e.g., Chamber of Commerce of the U.S. v. Lockyer, 422 F.3d 973, 980–82 (9th Cir. 2005), *vacated*, 463 F.3d 1076 (9th Cir. 2006) (en banc).

71. Chamber of Commerce of the U.S. v. Lockyer, 225 F. Supp. 2d 1199 (C.D. Cal. 2002).

72. 29 U.S.C. § 158(c) (2006).

73. 422 F.3d at 976.

74. 463 F.3d at 1080.

75. Chamber of Commerce of the U.S. v. Brown, 128 S. Ct. 2408 (2008).

with an employee's choice about whether to join or to be represented by a labor union" had been rejected by Congress in the Taft-Hartley Act amendments to the NLRA.⁷⁶

In another piece of employer-targeting legislation backed by unions, the Maryland Fair Share Health Care Fund Act required employers with more than 10,000 employees in the state to spend at least 8% of their total payrolls on employees' health insurance costs or to pay the state for the amount that they fell short.⁷⁷ As the Fourth Circuit noted, however, it was not a law of general applicability: "Resulting from a nationwide campaign to force Wal-Mart Stores, Inc., to increase health insurance benefits for its 16,000 Maryland employees, the Act's minimum spending provision was crafted to cover just Wal-Mart."⁷⁸

In the face of an ERISA preemption challenge by the Retail Industry Leaders Association (RILA) trade group, Maryland argued that Wal-Mart could comply with the law without altering its ERISA plan because it could make payments directly to the state. The Fourth Circuit, however, rejected this argument and held the statute to be preempted, noting that because "in most scenarios, the Act would cause an employer to alter the administration of its healthcare plans," the purported alternatives could not save it from preemption.⁷⁹

In the wake of the decision, RILA's president stated that "[t]he court has sent a strong message at states looking at similar bills: these violate federal law."⁸⁰ The director of state legislative programs for the AFL-CIO, which lobbied for the law, was forced to agree: "We have to go back to the drawing board."⁸¹

If these two cases suggest that federal preemption challenges remain a substantial obstacle to state and local efforts, organized labor and its allies may choose to redirect their efforts toward Washington. With support from the White House, and Democ-

76. *Id.* at 2414.

77. MD. CODE ANN., LAB. & EMPL. §§ 8.5-101 to -107 (LexisNexis 2008).

78. Retail Indus. Leaders Ass'n v. Fielder, 475 F.3d 180, 183 (4th Cir. 2007).

79. *Id.* at 197.

80. Michael Barbaro, *Appeals Court Rules for Wal-Mart in Maryland Health Care Case*, N.Y. TIMES, Jan. 18, 2007, at C4 (quoting Sandra L. Kennedy).

81. *Id.* (quoting Naomi Walker). For a recent discussion of how Wal-Mart has become a leader in addressing health insurance issues without the compulsion of state law, see Ceci Connolly, *At Wal-Mart, a Health-Care Turnaround: Once Criticized, Company Is Now an Innovator in Employee Coverage*, WASH. POST, Feb. 13, 2009, at A1.

atic majorities on both sides of Capitol Hill, the fortunes of organized labor in the federal city may well be looking up in the wake of President Bush's departure. Whether the response to these good fortunes will be a measured one is yet to be seen.

CONCLUSION

In sum, the Bush Administration was effective in reforming and enforcing the laws of the workplace where such efforts were needed most, even if it did not seek the sweeping legal reforms that its proponents would have liked and that its opponents accused it of doing. Ironically, it is that accusation that has been taken as reality and as justification for an ambitious agenda for the Obama Administration. With substantial majorities in the House and Senate, President Obama is likely to have a fair measure of success. But if the labor and employment legacy of a presidential administration can be gauged by sound policies that bring clarity to the law and the effective use of limited resources, stacking up to the Bush Administration's measured approach will be a tall order indeed.

FALSE PREMISES: THE ACCOUNTABILITY FETISH IN EDUCATION

MARTHA DERTHICK* & JOSHUA M. DUNN**

“She took math and reading workbooks home so her children were always ahead in school. And she insisted on discipline and chores to teach the importance of accountability.”¹

—*The New York Times* on Marian Robinson, Michelle Obama’s mother

“Accountability” has become the mantra of education reform in the United States. During the presidency of George W. Bush, it was also the guiding principle of intergovernmental relations, according to a little-noticed essay in the 2002 *Economic Report of the President*. Setting out his presidency’s approach to federalism, it said that “[t]his Administration seeks to create an institutional framework that will encourage the development of measurable standards to which all providers of public services—Federal and local, public and private—can be held accountable.”²

In federal policy for elementary and secondary education, which is susceptible to management through grants-in-aid to state and local governments, measurable standards became an explicit statutory goal, not to say an obsession. In policy for higher education, measurable standards began to glimmer in the federal government’s eyes as well, but because of the greater legal and organizational variety—and because the bulk of federal aid goes to students as grants and loans rather than

* Julia Allen Cooper Professor Emeritus of Government and Foreign Affairs, University of Virginia.

** Assistant Professor of Political Science, University of Colorado at Colorado Springs. The Authors would like to thank John Dinan, Kevin Kosar, Michael Petrilli, James Savage, and Martin West for saving them from errors of fact, and Terry Hartle for advice and facilitating access to his writings.

1. Rachel L. Swarns, *An In-Law, a Mainstay, a White House Resident*, N.Y. TIMES, Jan. 10, 2009, at A1.

2. ECONOMIC REPORT OF THE PRESIDENT 191 (2002) [hereinafter ECONOMIC REPORT].

directly to colleges and universities—federal regulation of higher education is quite problematic politically. The Bush Administration's effort to revise federal regulations on accreditation in higher education stirred a firestorm of opposition and was blocked in Congress.

I. NO CHILD LEFT BEHIND

"Bipartisan education reform will be the cornerstone of my Administration," President Bush said in a position paper sent to Congress only a few days after his inauguration.³ He had campaigned on education reform, repeatedly promising a regime of annual testing, which was the practice in Texas.⁴ As governor, he claimed credit for the improved performance of students there.⁵

This presaged a much deeper federal government intervention in K-12 education, yet President Bush's critique of America's schooling was not new. During the Reagan Administration, *A Nation at Risk*⁶ had raised alarm about the performance of students in the United States as compared with those of other nations. There was also concern over the achievement gap at home between white and minority students. Nor was President Bush's proposed remedy original: Preceded by state governments, the national government had been advocating "accountability" through content standards and testing.⁷

But the national government had been moving only gradually. The Improving America's Schools Act (IASA),⁸ a 1994 renewal of the Elementary and Secondary Education Act of 1965 (ESEA),⁹ nudged rather than compelled the States toward adoption of standards and testing. As the ESEA came up for

3. GEORGE W. BUSH, NO CHILD LEFT BEHIND 2 (2001) [hereinafter BUSH PAPER].

4. See PATRICK J. MCGUINN, NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965-2005, at 153-54 (2006).

5. See *id.*

6. NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983).

7. See KEVIN R. KOSAR, FAILING GRADES: THE FEDERAL POLITICS OF EDUCATION STANDARDS (2005).

8. Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified as amended at 20 U.S.C. §§ 6301-8962 (2006)).

9. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27.

renewal again in 1999, several bills from different political perspectives sought to define a more effective accountability regime, but were never enacted.¹⁰

The advent of the Bush Administration brought several changes, first among them education's greater salience as a political issue. Education had unpredictably shot to the top of the public's concerns in the 2000 election, and President Bush had made education central to his campaign. This was especially noteworthy given that the Republican Party had in the recent past favored a federal retreat from K-12 education. In party postmortems following Senator Bob Dole's loss to President Bill Clinton in 1996, however, then-Governor Bush had argued that this retreat was an error, and that Republicans would benefit from embracing a more compassionate, and hence more activist, conservatism.¹¹ President Bush's election led to a convergence between Republicans and Democrats on a need to deploy federal government power more aggressively vis-à-vis state governments and their local school districts. "Although education is primarily a state and local responsibility, the federal government is partly at fault for tolerating . . . abysmal results," President Bush said. "[A]fter spending billions of dollars on education, we have fallen short in meeting our goals for educational excellence."¹² It was conservative, he suggested, to demand results in return for money.¹³

Yet there was a second face to President Bush's initial position that was kinder, gentler, and more compassionate toward the nation's school establishment than the law that eventually emerged in 2002. Bush's early position, like that taken in the Republicans' ill-fated "Straight A's" bill (Academic Achievement for All Act),¹⁴ favored flexibility for the states with a block grant approach. Under this approach, states would have substantial discretion over spending so long as their academic performance met a standard on which the state governments and

10. See MCGUINN, *supra* note 4, at 137-42.

11. See KOSAR, *supra* note 7, at 185.

12. BUSH PAPER, *supra* note 3, at 1.

13. See *id.* at 2-3.

14. Academic Achievement for All Act (Straight A's Act), H.R. 2300, 106th Cong. (1999).

the federal government jointly agreed.¹⁵ Likewise, President Bush's policy statement promised greater flexibility in the use of federal funds, consolidation of overlapping and duplicative categorical programs, and a radical-sounding "charter option" under which states and districts "would be freed from categorical program requirements in return for submitting a performance agreement to the Secretary of Education and being subject to especially rigorous standards of accountability."¹⁶ The statement promised rewards for "[h]igh performing states that narrow[ed] the achievement gap and improve[d] overall student achievement," as well as one-time bonuses to states that met "accountability requirements" quickly.¹⁷ The *Economic Report* essay on federalism, while asserting that government service providers would be held accountable for meeting measurable standards, said also that these providers would be allowed to find the best way to meet the standards.¹⁸

The law that was eventually enacted, No Child Left Behind (NCLB),¹⁹ contained mostly sanction with little reward except for an increase in authorized funding. It soon elicited angry reactions from governors, state legislatures, and, above all, school teachers.²⁰ The radical-sounding charter proposal turned into an authorization of demonstration projects in seven states and 150 local districts, and has proven to be virtually a dead letter. No state has participated,²¹ and only one locality, Seattle, has.²² The consolidation of categorical programs took place only

15. See Andrew Rudalevige, *No Child Left Behind: Forging a Congressional Compromise*, in *NO CHILD LEFT BEHIND?: THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY* 23, 32 (Paul E. Peterson & Martin R. West eds., 2003).

16. BUSH PAPER, *supra* note 3, at 4.

17. *Id.* at 5.

18. ECONOMIC REPORT, *supra* note 2, at 191.

19. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425. For analyses of the passage of No Child Left Behind, see MCGUINN, *supra* note 4, at 165-95, and Rudalevige, *supra* note 15, at 23-54.

20. Teachers circulated a number of e-mails mocking and satirizing the law. See, e.g., John Taylor, No Dentist Left Behind (2002), <http://www.trelease-on-reading.com/no-dentist.html>.

21. U.S. Dep't of Educ., Awards—State Flexibility Demonstration Program, <http://www.ed.gov/print/programs/stateflex/awards.html> (last visited Apr. 7, 2009).

22. See Press Release, U.S. Dep't of Educ., Seattle's Public School Students Benefit from No Child Left Behind Act's Flexibility (Nov. 6, 2003), available at <http://www.ed.gov/news/pressreleases/2003/11/11062003.html>.

modestly, a frequent outcome for Republican Presidents who have attempted to enact block grants. Meanwhile, NCLB required every school in the country to administer annual tests of reading and math in grades 3 through 8 and to make “adequate yearly progress” toward universal proficiency by 2014.²³ The progress was to be measured not only in the overall student body, but also in “disadvantaged” subgroups defined by income, race, ethnicity, handicapped status, and limited English proficiency.²⁴ Schools that failed to attain their targets were subject to a cascade of sanctions, beginning with permitting students to transfer to better schools in the same district and eventually culminating in “restructuring.”²⁵ This scheme threatened many schools with the prospect of officially declared failure.²⁶

To be sure, elements of federalism (too many elements, in the eyes of many education reformers) remained: NCLB permitted states to design their own standards of proficiency and their own tests. Many had already done so, though they now had to submit their plans for federal approval and suffer consequences—namely a loss of federal money—if they did not respond satisfactorily. NCLB thus created incentives for states to lower standards, making it easier to report that their students were meeting mandated levels of proficiency. Fears of a race to the bottom have not yet been justified; the states’ responses have been more like a “walk to the middle,” albeit one that is slightly downhill. Since 2002, some states have raised their standards, but, to the chagrin of NCLB’s advocates, more have made their tests easier.²⁷ In addition, states have tended to set

23. See FREDERICK M. HESS & MICHAEL J. PETRILLI, *NO CHILD LEFT BEHIND: PRIMER* 31–34 (2006).

24. See *id.* at 35.

25. *Id.* at 42–43.

26. For analyses of the compromises that President Bush made in enacting NCLB, see Frederick M. Hess, *Why LBJ Is Smiling: NCLB and the Bush Legacy in Education*, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, EDUCATION OUTLOOK, Dec. 2008, available at http://www.aei.org/publications/pubID.29057/pub_detail.asp, and Frederick M. Hess & Michael J. Petrilli, *Bush the Hall Monitor: On education-reform legislation, compromise trumped conservatism*, NAT’L REV. ONLINE, Dec. 23, 2008, <http://article.nationalreview.com/?q=YWJhNTRINGUOZDikYjZkMTVjNjU2Nzc3MTNlMzg0YzU=>.

27. See Chester E. Finn, Jr., *Dumbing Education Down*, WALL ST. J., Oct. 5, 2007, at A16.

very low standards in elementary grades and then dramatically raise them in junior high school, setting children up for failure.²⁸ NCLB also put off the most significant requirements for achievement gains until 2013–14.²⁹ As the magical date of universal proficiency approaches, NCLB, as presently designed, will further pressure states to lower standards. Thus, a law designed to inform parents and promote accountability instead fosters a smokescreen of proficiency.

Even with loopholes, NCLB was a much more coercive federal policy than anything that preceded it: It is more widely applicable to schools and more penetrating and burdensome in its requirements, especially the disaggregation of the student population into categories of putative disadvantage. Disaggregation was, for some liberals, the most valuable part of the Bush project—“the heart of what NCLB is all about,” according to a Democratic staff member³⁰—and also the most surprising, because the explicit racialization of policy seemed at odds with the conservative Republican critique of affirmative action. For local officials, disaggregation was the part of NCLB most offensive, inconvenient, and ill-conceived,³¹ particularly as it applied to English-language learners and students with disabilities, for whom federal policy prescribed unrealistic standards of annual progress.³²

Perhaps the clearest contrast between President Bush’s twenty-eight-page outline of January 2001 and the more than six hundred pages of law that Congress enacted lay in provisions for improving teacher quality. President Bush’s outline would have given states more flexibility in the use of federal funds “so that they may focus more on improving teacher quality.”³³ President Bush exhorted states to ensure that all children be taught by effective teachers, but this was an expectation, not a command. At the same time, the President’s compassion extended to teachers who were caught in violent classrooms:

28. *See id.*; *see also* JOHN CRONIN ET AL., *THE PROFICIENCY ILLUSION* 6–7 (2007).

29. *See* HESS & PETRILLI, *supra* note 23, at 33–34.

30. MCGUINN, *supra* note 4, at 189.

31. *See id.*

32. *See* Marie C. Scott, *Resegregation, Language, and Educational Opportunity: The Influx of Latino Students into North Carolina Public Schools*, 11 HARV. LATINO L. REV. 123, 146–47 (2008).

33. BUSH PAPER, *supra* note 3, at 5.

"Teachers will be empowered to remove violent or persistently disruptive students from the classroom."³⁴ Moreover, in a provision designated for action outside of NCLB, "[t]eachers, principals, and school board members acting in their official capacity [were to] be shielded from federal liability arising out of their efforts to maintain discipline in the classroom, so long as they [did] not engage in reckless or criminal misconduct."³⁵

President Bush had been bipartisan in Texas, and he set out to be bipartisan in securing the enactment of NCLB. He met with leading Democrats several times and assured them that he was open to their views. He seems to have developed particular rapport initially with "Big George," as the President christened Representative George Miller, a powerful personality who occupied a powerful office as the ranking Democrat on the House Committee on Education and the Workforce.³⁶ With support from Republican Representative John Boehner, the committee chairman, who convened a bipartisan working group outside the normal committee structure, Big George achieved a big victory in the NCLB provisions governing teacher qualification. He had long been concerned with the subject; his proposed amendment to IASA, which failed by a vote of 424 to 1 in 1994, would have required teachers to be certified in the subjects they taught.³⁷ Yet Miller succeeded in adding language to NCLB that required every public school teacher in the country to be "highly qualified" by the end of the 2005–06 school year.³⁸ In general, to be highly qualified, teachers must be licensed or certified by a state, have a bachelor's degree, and demonstrate a high level of competence in the subjects that they teach.³⁹ This was an enormous expansion of the federal government's involvement in education policy.

Democrats prevailed with vouchers also—none were authorized—and in regard to the limited provision made for school

34. *Id.* at 6.

35. *Id.* at 13.

36. Nicholas Lemann, *Testing Limits: Can the President's education crusade survive Beltway politics?*, *NEW YORKER*, July 2, 2001, at 28, 30–31.

37. *Id.* at 30.

38. See HESS & PETRILLI, *supra* note 23, at 20, 63–65.

39. *Id.* at 65.

choice.⁴⁰ President Bush's statement of principles had said that parents, "armed with data, are the best forces of accountability in education. And parents, armed with options and choice, can assure that their children get the best, most effective education possible."⁴¹ The law provided that students in schools that failed to make adequate yearly progress for two years in a row could transfer to another, more successful school within the district. Before long, advocacy groups, including Clint Bolick's Alliance for School Choice, complained that school districts were failing to inform parents of their options.⁴² Parents were mostly ignoring this purported instrument of accountability, perhaps because they lacked data, or because they were indifferent to the data, or because, as a practical matter, they lacked a better alternative school. In the 2006–07 school year, only 45,000 students, less than one percent of the total eligible, used the choice option.⁴³ The several advocacy groups that sought to help parents with lawsuits were handicapped by the law's omission of a private right of action.⁴⁴

It is typically the hope of executive branch reformers to rationalize the laws enacted by a large and diverse Congress, which is prompted both by constituency expectations and personal eccentricities. This was President Bush's hope in 2001 as he deplored the hundreds of programs that Congress had created in devising a "program for every problem."⁴⁵ NCLB, however, conformed to the congressional paradigm. It authorized more than fifty federal education programs, some new and some that already existed. NCLB was rife with special-interest features such as cultural and language education for Alaskan

40. See MCGUINN, *supra* note 4, at 159, 172; Rudalevige, *supra* note 15, at 40.

41. BUSH PAPER, *supra* note 3, at 18.

42. See Martha Derthick, Address at the American Enterprise Institute/Thomas B. Fordham Institute Conference, From *Brown* to "Bong Hits": Assessing a Half-Century of Judicial Involvement in Education: Litigation Under No Child Left Behind 13 (Oct. 15, 2008), available at <http://www.aei.org/event1746>.

43. David J. Hoff, *New Reports Track 'No Child Left Behind' Progress*, EDUC. WEEK, Jan. 21, 2009, at 5. See generally LEAVING NO CHILD BEHIND? OPTIONS FOR KIDS IN FAILING SCHOOLS (Frederick M. Hess & Chester E. Finn, Jr., eds., 2004).

44. See Derthick, *supra* note 42, at 13–14, 22.

45. BUSH PAPER, *supra* note 3, at 1.

Natives and, at the extreme, exchanges with historic whaling and trading partners.⁴⁶

As the Bush presidency ended, NCLB awaited reauthorization. The President had remained strongly committed to the Act and so had his original allies in the Democratic Party, Senator Edward M. Kennedy and Representative Miller.⁴⁷ There was evidence from national tests, which education experts generally treat as more credible than state tests, showing that the achievement gap in reading and math had narrowed, though in part for the wrong reason. Low-achieving pupils, defined as the ten percent with the lowest scores on the National Assessment of Educational Progress, had made big strides in most areas, while high achievers had failed to show any significant improvement.⁴⁸

Even with the encouraging signs of improvement among low achievers, which Administration partisans cited as proof that the Act was fulfilling its purpose, Republican support fell away as loyalty to the President waned and party members saw the negative consequences of what they had helped enact. Support from teachers and school administrators had never existed. The new president of the American Federation of Teachers said in 2008 that the law should be abandoned, as it was "too badly broken to be fixed."⁴⁹ Invited by the *Washington Post* to offer advice to the incoming president, Diane Ravitch, a leading historian of education and former Assistant Secretary of Education under President George H.W. Bush, told President-elect Obama that he had a chance "to make a historic difference" by abolishing the law, which had "turned our schools into testing factories, narrowed the curriculum to the detriment of everything other than reading and math, and prompted states to claim phony test-score gains."⁵⁰ *A Nation at Risk*, Ravitch lamented, had been "taken over by the testing and accountability

46. See HESS & PETRILLI, *supra* note 23, at 136–40.

47. MCGUINN, *supra* note 4, at 188–89, 192.

48. See TOM LOVELESS, HIGH-ACHIEVING STUDENTS IN THE ERA OF NCLB 19 (2008), available at http://www.edexcellence.net/doc/20080618_high_achievers.pdf.

49. Sam Dillon, *New Vision for Schools Proposes Broad Role*, N.Y. TIMES, July 14, 2008, at A11.

50. Diane Ravitch et al., *So You Want to Be Education Secretary . . .*, WASH. POST, Jan. 12, 2009, at B2.

posse," rather than remembered as an appeal for sweeping improvement in the quality of American education.⁵¹

II. HIGHER EDUCATION

The Higher Education Act,⁵² originally passed in 1965 and regularly reenacted, was due for reauthorization in 2003. Reauthorization moved slowly at first, without the benefit of executive impetus. During its first term, the Bush Administration was preoccupied with administering No Child Left Behind, which set off political brushfires in states as diverse as Connecticut and Utah.⁵³ Reauthorization of the Higher Education Act was completed only in 2008, after fourteen extensions.

Nevertheless, during its second term, the Bush Administration became deeply involved in higher education when Secretary of Education Margaret Spellings—a self-described hawk on accountability who moved from policy adviser within the White House to department head—set out to carry the accountability campaign to the nation's colleges and universities.⁵⁴

Spellings's vehicle was the Commission on the Future of Higher Education, which she created in the fall of 2005 to lead a nationwide dialogue about pressing issues in higher education.⁵⁵ Here, the political foundation lay in a widespread concern with costs, beginning with high and steadily rising tuition, even in elite institutions with spectacularly large endowments. The concern extended to hundred-dollar textbooks and the interest on student loans, which Democrats charged was enriching lenders while impoverishing students and parents.⁵⁶ Still,

51. Diane Ravitch, *A Nation Still at Risk*, HOOVER DIG., Fall 2008, available at <http://www.hoover.org/publications/digest/30694734.html>.

52. Pub. L. No. 89-329, 79 Stat. 1219 (1965).

53. See Sam Dillon, *Education Law Finds Few Fans in Utah*, N.Y. TIMES, Mar. 6, 2005, at 33; Avi Salzman, *A Fight Over Ideas In Education Suit*, N.Y. TIMES, Aug. 28, 2005, at 5.

54. See Paul Basken et al., *Bush's Legacy in Higher Education: a Matter of Debate*, CHRON. HIGHER EDUC. (Wash, D.C.), Dec. 19, 2008, at A14.

55. See Robert Zemsky, *Lower College Costs and Improved Student Learning: Real Answers Missing from the Spellings Commission Report*, ABOUT CAMPUS, July–Aug. 2007, at 7.

56. See Dale Buss, *Sometimes, It's Not the Tuition. It's the Textbooks*, N.Y. TIMES, Sept. 4, 2005, at 8; Greg Winter, *Closed Loophole Hasn't Cut Subsidies for Student Loans: Payments to Lenders Are as High as Ever*, N.Y. TIMES, Apr. 10, 2005, at 18.

no one in America needs to be trapped in a college not of his choice, as children in urban slums have been trapped in dysfunctional, often violent, schools. Whereas primary and secondary schools have been mostly a public monopoly, the market for higher education is extremely competitive. It has offered an ever-widening array of choice: not just the traditional brick-and-mortar four-year institutions on leafy campuses, but also community colleges, trade and technical schools, and for-profit schools that offer professional training. Online schools, which may be either public or private, have also emerged. Noting that many students are adopting a “cafeteria” approach to post-secondary education, making eclectic choices and frequent transfers even into middle age, the Spellings Commission defined higher education as all public and private education that is available after high school.⁵⁷

Given the overwhelming preoccupation with cost, there was not much evidence to support Spellings’s claim that the college-age population and its parents craved the metrics of student achievement. Privately published guides and websites; institutional reputations; campus visits; feedback from friends, neighbors, and siblings; college websites and videos; and the advice of high school counselors all supply a torrent of unscientific yet helpful information to which formal assessments cannot be expected to add much. Though federal officials might like applicants to choose colleges on the basis of how much learning, statistically rendered, they are able to impart per year attended and tuition dollar expended, applicants are likely to be influenced more by offers of aid, intercollegiate athletics, recreational and dormitory facilities, the quantity and quality of easily available food and drink, the intuition derived from a brief campus visit, and—for the more purposeful and mature applicants—the volume, variety, and dependability of course offerings. Moreover, even students know that how much they learn depends, in the end, on how hard they work.

The Spellings Commission kicked off in Charlotte, highlighting the leadership of former North Carolina Governor Jim Hunt,

57. See SEC’Y OF EDUC.’S COMM’N ON THE FUTURE OF HIGHER EDUC., *A TEST OF LEADERSHIP: CHARTING THE FUTURE OF U.S. HIGHER EDUCATION*, at xi (2006) [hereinafter *A TEST OF LEADERSHIP*].

whose public career rested on education reform.⁵⁸ The commission was headed by the Secretary's friend from Texas, Charles Miller, an investor who likewise had a long record of involvement in education reform at the state level and had been chairman of the Board of Regents of the University of Texas.⁵⁹

Within a year the Commission produced a report warning of complacency.⁶⁰ It cited a long list of educational failures both in preparing students for college and in teaching them once they arrived.⁶¹ Over the past decade, literacy among college graduates had actually declined. Compounding all other difficulties was "a lack of clear, reliable information about the cost and quality of postsecondary institutions, along with a remarkable absence of accountability mechanisms."⁶²

Trying to stay ahead of the assessment tsunami, many colleges began using standardized achievement tests. On the first anniversary of the Spellings Report—at which point the secretary said, "[W]e haven't even started"⁶³—the Chronicle of Higher Education reported that the American Association of State Colleges and Universities and the National Association of State Universities and Land-Grant Colleges, representing more than 600 member institutions between the two of them, were developing a common system of online data presentation showing such statistics as the projected costs of attendance and standardized test results.⁶⁴ The Spellings Report touted as an example of outcome-based assessments the Collegiate Learning Assessment, which the Rand Corporation had developed to measure critical thinking, problem solving, analytic reasoning, and written communication, and which had been adopted by 230 colleges, including the Texas system and its fifteen member institutions.⁶⁵ The institutions most resistant to standard tests,

58. See Wanda Rushing, *Inequality and Education Reform: formulating a macro-historical sociology perspective*, 4 RACE ETHNICITY & EDUC. 33, 35–36 (2001).

59. Zemsky, *supra* note 55, at 2.

60. See *id.* at 3.

61. See A TEST OF LEADERSHIP, *supra* note 57, at x.

62. *Id.*

63. Paul Basken, *A Year Later, Spellings Report Still Makes Ripples*, CHRON. HIGHER EDUC. (Wash. D.C.), Sept. 28, 2007, at A1.

64. *Id.* at A20.

65. *Id.*

predictably, were the most prestigious, which were skeptical of the underlying concept of comparability.⁶⁶

So by 2007 it was fair to say, as Spellings did, that “[w]e’re under way,”⁶⁷ yet the going got rough early that year when she constituted a rulemaking panel to rewrite the federal regulations on college accreditation.⁶⁸ The Department of Education set out its aims in an issue paper prepared for the Secretary’s commission by Vickie Schray, a career official who later emerged as the Department’s leader of the ill-fated attempt at negotiated rulemaking.⁶⁹ Beyond insisting that colleges produce standardized, comparable measures of student performance as a condition of accreditation, Schray sought to transform the entire accrediting system.⁷⁰ Much of the issue paper was embraced by the Commission Report.⁷¹

Most college accreditation in the United States is performed by regional organizations composed of the member colleges operating through voluntary peer review.⁷² Schray dismissed this form as “self-regulation with minimal public input and government interference,” and therefore insufficient to protect the public interest.⁷³ She recommended nationalization and bureaucratization. Rather than have professors and administrators reviewing other professors and administrators, “reviews should be conducted by formally trained and certified inde-

66. *See id.* at A21.

67. *Id.* at A20.

68. *See* Doug Lederman, *Fault Lines on Accreditation*, INSIDE HIGHER ED, Feb. 22, 2007, <http://www.insidehighered.com/news/2007/02/22/accredit>.

69. *Id.*

70. *See* VICKIE SCHRAY, ASSURING QUALITY IN HIGHER EDUCATION: RECOMMENDATIONS FOR IMPROVING ACCREDITATION 4–8 (2006), available at <http://www.ed.gov/about/bdscomm/list/hiedfuture/reports/schray.pdf>.

71. *See* A TEST OF LEADERSHIP, *supra* note 57. As the Bush Administration ended, Schray became the Deputy Assistant Secretary for Higher Education Programs, a position that the Administration had converted from political to career status to accommodate her. Posting of Paul Basken to Chronicle of Higher Education News Blog, *At Education Department, as at Other Agencies, It’s Time for Some to ‘Burrow In,’* <http://chronicle.com/news/article/5528/at-education-department-as-at-other-agencies-its-time-to-burrow-in> (Nov. 20, 2008).

72. SCHRAY, *supra* note 70, at 1–2.

73. *Id.* at 5.

pendent reviewers that are experts in the application of national accreditation standards in the accreditation process."⁷⁴

An underlying objective, hotly contested, was to ease the transfer of credits among institutions with the goal of lowering costs and improving efficiency. Nonprofit institutions, which have predominated in American higher education, are now rivaled by profit-makers. As Schray's report somewhat obliquely put it, "[t]he changing structure and delivery of higher education includes new types of educational institutions and the use of distance learning, which allows institutions to operate on a global scale and holds the potential for improving value and access. . . . These new realities require new solutions to ease the transfer process."⁷⁵ Traditional campus-based colleges, however, wished to remain selective and hence to control admissions and transfers of course credits.

Congress stepped in to protect both the colleges' and its own prerogatives. Both in the Fiscal Year 2008 spending bill for the Department of Education and in the renewal of the Higher Education Act passed in 2008, Congress prohibited the Department of Education from regulating accreditation or accrediting organizations.⁷⁶ In addition, Congress ended the terms of all incumbent members of the Secretary's National Advisory Committee on Institutional Quality and Integrity (NACIQI) as of August 14, 2008 (the date on which the reauthorized Higher Education Act took effect), provided that no new members could be appointed until January 31, 2009⁷⁷ (by which time President Bush and his crusading Secretary of Education would have retired to Texas⁷⁸), enlarged NACIQI from fifteen to eighteen members, and provided that six members each

74. *Id.*

75. *Id.* at 3.

76. See Kelly Field, *A Bill That Took Longer Than a Bachelor's Degree*, CHRON. HIGHER EDUC. (Wash. D.C.), Aug. 8, 2008, at A11; Doug Lederman, *Congressional Timeout for Spellings*, INSIDE HIGHER ED, June 8, 2007, <http://www.insidehighered.com/news/2007/06/08/accredit>.

77. Higher Education Opportunity Act, Pub. L. No. 110-315, § 106, 122 Stat. 3078, 3093 (2008).

78. Bush did in fact go back to Texas, whereas Spellings stayed in Washington promising to remain "a warrior in [the accountability] battle." Alyson Klein, *Spellings' Worldview: There's No Going Back on K-12 Accountability*, EDUC. WEEK, Dec. 10, 2008, at 17.

would be appointed by the House of Representatives, the Senate, and the Secretary of Education (thus putting an end to the Secretary's exclusive right of appointment).⁷⁹ Having been authorized by statute in 1972, NACIQI was not Spellings's creation, but Congress clearly feared that it had become her instrument.⁸⁰ The leader of congressional opposition to the Department was Senator Lamar Alexander, a Republican who had been Secretary of Education under President George H.W. Bush, President of the University of Tennessee, and Governor of Tennessee.⁸¹

It would be wrong, however, to read the rebuke of Spellings as a sign that Congress disapproves of regulating higher education. The message to Spellings was "do as I say," not "do as I do." Proceeding with more than usual slowness, through six years and three Congresses, legislation for higher education during the Bush presidency followed the traditional trajectory of more student aid accompanied by more regulation.

The Higher Education Opportunity Act, which renewed the Higher Education Act in August 2008,⁸² was quintessentially a product of the legislature: 1158 pages long, with roughly seventy new spending programs targeted to narrow constituencies and nearly two hundred new reporting and regulatory requirements. Congress's overriding concern was cost. In 2003, Representative Howard P. McKeon, a California Republican and chairman of the House Committee on Education and the Workforce, proposed withholding federal aid from students at colleges whose tuitions increased faster than consumer prices.⁸³ That perverse plan was abandoned, but the law as enacted requires the Secretary of Education to list each year the higher education institutions, broken into nine categories, with the "biggest percentage increases in tuition and fees and in net

79. § 106, 122 Stat. at 3091.

80. See Basken et al., *supra* note 54, at A14; Doug Lederman, *Key GOP Senator Warns Spellings*, INSIDE HIGHER ED, May 29, 2007, <http://www.insidehighered.com/news/2007/05/29/alexander>.

81. Lederman, *supra* note 80.

82. § 2, 122 Stat. at 3082–83.

83. Terry W. Hartle, *Coming Soon: Lots More Federal Regulations*, TRUSTEESHIP, Nov.–Dec. 2008, at 8, 10.

price" (determined by subtracting aid from charges).⁸⁴ Furthermore, "[c]olleges with the fastest increases will be required to prepare reports that describe why tuition went up and the actions being taken to contain increases."⁸⁵ Higher education officials will be tempted to respond that one way they are trying to contain increases is to lobby Congress to refrain from imposing regulations that inescapably increase the cost of doing business.

Virtually none of the new regulations is in any way instrumental to the advance of learning. The subjects include, among many others, fire safety, missing students, readmission procedures for veterans, services for students with intellectual disabilities, lobbying, foreign gifts, and calculation of net prices.⁸⁶ Some of the most challenging components for colleges to implement will be rules designed to protect the interests of the entertainment industry, which claims that it loses millions of dollars a year through illegal downloading of music and video on college campuses. Colleges are required to offer music and video through subscription-based services "to the extent practicable," and to develop technology to curtail peer-to-peer networks through which students trade copyrighted material.⁸⁷

Congressional zeal for gratuitous regulation of higher education long antedates the Bush Administration and cannot be ascribed to anything that Bush or Spellings said or did. Indeed, in a stunningly disingenuous sentence, the Spellings Commission recommended that state and federal policymakers should work "to relieve the regulatory burden on colleges and universities."⁸⁸ In 2001, as Bush was entering office, the American Council on Education reported that "federal regulation of higher education ha[d] grown exponentially in recent years, sending institutional costs and liability soaring."⁸⁹ Much of the regulation has grown out of laws for civil rights, protection of

84. *Id.*

85. *Id.*

86. § 488, 122 Stat. at 3299, 3301; § 487, 122 Stat. at 3290; §§ 766-769, 122 Stat. at 3365; § 119, 122 Stat. at 3117; § 802, 122 Stat. at 3446; § 453, 122 Stat. at 3265.

87. *Id.* at 3309.

88. A TEST OF LEADERSHIP, *supra* note 56, at 2.

89. Richard M. Freeland & Terry Hartle, *Stemming the Rising Tide of Regulation*, PRESIDENCY, Fall 2001, at 24, 25.

the disabled, and protection of the environment rather than from the Higher Education Act, but that law seems from the start to have produced regulation with a peculiarly quixotic quality. For a time, colleges were required to report to the federal government whenever they changed a trustee—a regulation so preposterous that it very likely was never observed and did in fact die.⁹⁰

CONCLUSION

The United States contains more than 14,000 public school districts and more than 4000 institutions of higher education, together constituting one of the country's major industries.⁹¹ Since 1965, when Congress passed both the Elementary and Secondary Education Act and the Higher Education Act during the Great Society wave of government growth, these institutions have been subject to extensive federal regulation via conditional grants-in-aid for schools, fellowship grants, and subsidized loans for undergraduates in higher education. In general, federal spending has been designed to provide education more equally, with a focus on low-income populations in Title I of ESEA and on financial need in the bulk of collegiate grants and loans.

In primary and secondary education, the Bush Administration, with substantial help from Democrats in Congress, pushed federal policy decisively into a different and deeply problematic realm in which the federal government seeks to sanction public schools for failing to produce well-educated children. The aim is of course laudable, with its emphasis on closing the achievement gap and ending "the soft bigotry of low expectations,"⁹² as the President often said. The trouble, keenly felt by the nation's teachers, is that the performance of school children depends not only on the motivation, effort, and skill of their teachers, but also on a host of social, economic,

90. *Id.* at 26; see also Terry Hartle & Melanie Corrigan, *A Road Map to Federal Compliance*, PRESIDENCY, Spring 2006, at 10–13.

91. NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS, 2007, at 117 tbl.83, 385 tbl.255 (2008), available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2008022>.

92. Adam Clymer, *Bush Seeks to Secure California's Big Prize*, N.Y. TIMES, Mar. 6, 2000, at A16 (quoting President Bush).

cultural, and psychological factors that are beyond the reach of the schools. Above all, performance depends on the family environment of the children. In his classic work on government agencies, James Q. Wilson rightly classifies schools not as “craft organizations,” in which outputs and outcomes are observable and hence subject to management, but as “coping organizations,” in which administrators “cannot tell how much students have learned (except by standardized tests that do not clearly differentiate between what the teacher has imparted and what the student has acquired otherwise).”⁹³ The beguiling temptation, succumbed to by the Bush Administration, is to suppose that schools can be transformed into production organizations without significant cost to their efficacy.

Confident of the same false premise—that the products of a college education are readily measurable and just as readily attributable to actions of the collegiate institution—the Administration carried its accountability campaign into higher education. But there, Congress balked and saved the Administration from itself by the anomalous insertion of a prohibition against regulating accreditation in a statute that otherwise was laden with countless new regulations of Congress’s own devising. Some of the strongest defenders of the status quo in accreditation were conservatives who regretted having voted for NCLB.⁹⁴ Thanks to congressional intervention and the work of Senator Alexander, policy under the Bush Administration was less damaging to the country’s educational institutions than first proposed, yet it was disappointing to conservatives nonetheless.

Arguably, an allegedly conservative Administration should have been less disrespectful of the institutions of federalism, and should have hesitated before adopting a standard of universal proficiency that would brand as failures a sizeable share of the nation’s schools, subjecting them to shame—as if being

93. JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 159, 168 (1989). The Authors are indebted to R. Shep Melnick for reminding them of the pertinence of Wilson’s typology to an understanding of the issue of accountability. See R. Shep Melnick, Address at the American Enterprise Institute/Thomas B. Fordham Institute Conference, From *Brown* to “Bong Hits”: Assessing a Half-Century of Judicial Involvement in Education: Taking Remedies Seriously: Judicial Methods for Controlling Bureaucratic Discretion in Public Schools 9 (Oct. 15, 2008), available at http://www.aei.org/docLib/20081010_Melnick3.15.08.pdf.

94. Editorial, *Running from ‘No Child,’* WASH. POST, Nov. 27, 2007, at A16.

shamed would help the poor performers among them improve. One might have thought also that the Administration would exhibit more confidence in the ability of higher education's consumers to hold colleges accountable by taking advantage of a fiercely competitive market. Above all, one would have hoped for more introspection and curiosity about the effects of the federal government's own actions.

In 1987, President Reagan's Secretary of Education, William Bennett, chastised colleges and universities for tuition increases that far outstripped inflation.⁹⁵ Part of the reason, he said, was federal financial aid to students, which enabled them "blithely to raise their tuition, confident that federal loan subsidies would help cushion the increase."⁹⁶ A study group such as the Spellings Commission, which called for increasing federal aid to students, might be expected to take the trouble to rebut this claim rather than assert that rising costs could be cured by "technology," "productivity improvements," and the national imposition of "performance benchmarks."⁹⁷ Moreover, there persisted an indifference, both within the executive branch and the legislature, to the heavy and steadily-growing burden of federal regulation and the resulting increases in costs at all levels of the education system (as assistant principals and assistant deans multiply in an effort to generate the detailed data and the endless reports that the federal government demands).

Even if the federal government stops short of its most extreme ambitions, as it did in 2008, college administrators respond by acting defensively and putting in place "voluntary" regulations that anticipate what an intrusive government is expected to require. In many of the four-year colleges, faculty members today can attest to growing, time-consuming, and intensely bureaucratic burdens of self-assessment, often linked to review of accreditation.⁹⁸

Finally, in the realm of presidential rhetoric, the Bush presidency was so strenuous and dogmatic in calling schools to ac-

95. William J. Bennett, Op-Ed., *Our Greedy Colleges*, N.Y. TIMES, Feb. 18, 1987, at A31.

96. *Id.*

97. A TEST OF LEADERSHIP, *supra* note 57, at 2.

98. See Doug Lederman, *Whither Accreditation?*, INSIDE HIGHER ED, Jan. 28, 2009, <http://www.insidehighered.com/news/2009/01/28/accredit>.

count that it failed to invite attention to the accountability of others, including the general citizenry, parents, and even schoolchildren. Accountability is indeed an important value and it should be expected of public institutions, but as Marian Robinson rather dramatically demonstrated in the upbringing of a child who went from Chicago's South Side to Princeton, Harvard Law School, and the White House, it has an important place as well when applied to young individuals. Incorporating that thought in presidential rhetoric would not constitute a sufficient federal education policy, but might be the beginning of a prudent and sensible one.

THE CONSTITUTION AS THE PLAYBOOK FOR JUDICIAL SELECTION

ORRIN G. HATCH*

The Federalist Society plays an indispensable role in educating our fellow citizens about the principles of liberty, a task that is both critical and challenging. It is critical because, as James Madison put it, “a well-instructed people alone can be permanently a free people.”¹ The ordered liberty we enjoy is neither self-generating nor self-sustaining, but is based on certain principles that require certain conditions. Knowledge and defense of those principles and conditions will be the difference between keeping and losing our liberty.

This educational challenge, however, has perhaps never been more daunting. We live in a culture in which words mean anything to anyone, celebrities substitute for statesmen, and people are no longer well instructed. Forty-two percent of Americans do not know the number of branches in the federal government, and more than sixty percent cannot name all three.² Four times as many Americans say that a detailed knowledge of the Constitution is absolutely necessary as say they actually have such knowledge.³ Twenty-one percent of Americans believe the First Amendment protects the right to own a pet.⁴

* United States Senator (R-Utah); J.D., University of Pittsburgh School of Law, 1962; B.A., Brigham Young University, 1959. This Essay was delivered as a speech to the Harvard Law School Federalist Society and *Harvard Journal of Law & Public Policy* at the Union Club in Boston, Massachusetts, on April 4, 2009.

1. James Madison, Second Annual Message, in 8 THE WRITINGS OF JAMES MADISON 123, 127 (Gaillard Hunt ed., 1908).

2. Press Release, Nat'l Constitution Ctr., Startling Lack of Constitutional Knowledge Revealed in First-Ever National Poll (1997).

3. STEVE FARKAS ET AL., KNOWING IT BY HEART: AMERICANS CONSIDER THE CONSTITUTION AND ITS MEANING 16 (2002), available at http://www.publicagenda.org/files/pdf/knowning_by_heart.pdf.

4. Christopher Lee, *Noted with Interest*, WASH. POST, Mar. 3, 2006, at A15; see also McCormick Tribune Freedom Museum, Americans' Awareness of First Amendment Freedoms, Forum for Education and Democracy, Mar. 1, 2006, <http://www.forumforeducation.org/node/147>.

A few factors contribute to this state of affairs. Most people get their information about the legal system only from television. Unless people sue each other or commit crimes—habits we really should not encourage—they will likely have no first-hand knowledge or experience to draw from. Furthermore, people hold lawyers in low esteem. If you plug the term “lawyer joke” into Yahoo, it returns a whopping 25.7 million hits, a number on the rise almost as fast as the national debt. The problem with lawyer jokes is that most lawyers do not think they are funny and most other people do not think they are jokes. This low view of lawyers means people have little motivation to learn more about what lawyers and judges really do.

The media do not help this state of affairs. The *Harvard Journal of Law & Public Policy* recently published an excellent article by Michigan Supreme Court Justice Stephen Markman,⁵ who served as my chief counsel when I chaired the Senate Judiciary Subcommittee on the Constitution in the early 1980s. He describes how the media’s penchant for focusing on winners and losers significantly shapes and distorts how people understand what judges actually do, often for the worse.⁶

Nonetheless, the timing of this Essay is auspicious in several respects. First, I write in the wake of two very relevant Federalist Society student symposia, last year’s about the people and the courts⁷ and this year’s about the separation of powers.⁸ Second, President Obama has been particularly clear from the time he was a candidate about his intention to appoint judges who will exercise a strikingly political version of judicial power.⁹ Third, he has already started acting on that intention by making his first judicial nominations.¹⁰ New Presidents typically make their first judicial nominations in July or even August,

5. Stephen J. Markman, *An Interpretivist Judge and the Media*, 32 HARV. J.L. & PUB. POL’Y 149 (2009).

6. *Id.* at 151–52.

7. Symposium, *The People & The Courts*, 32 HARV. J.L. & PUB. POL’Y 1 (2009).

8. Symposium, *Separation of Powers in American Constitutionalism*, 33 HARV. J.L. & PUB. POL’Y (forthcoming 2010).

9. See *infra* notes 26–27.

10. President Obama has nominated David Hamilton to the U.S. Court of Appeals for the Seventh Circuit, Gerard Lynch to the Second Circuit, and Andre Davis to the Fourth Circuit. Michael A. Fletcher, *Obama Names Judge to Appeals Court*, WASH. POST, Mar. 18, 2009, at A4; Jerry Markon, *Obama Taps 2 for Key Appellate Courts*, WASH. POST, Apr. 3, 2009, at A6. Each is currently a U.S. District Judge.

yet the Senate Judiciary Committee has already held a hearing on the President's first nominee to the U.S. Court of Appeals, and the President sent two more nominees to the Senate just a few days ago.

Mark Twain popularized the notion that there are three kinds of lies: lies, damned lies, and statistics.¹¹ I prefer Senator Daniel Patrick Moynihan's comment that you may be entitled to your own opinion, but not your own set of facts.¹² Either way, I will statistically describe two macro and two micro factors of the judicial confirmation process to show its recent transformation before turning to how it should be conducted going forward.

The two macro factors are hearings and confirmations. The Judiciary Committee held hearings for fewer judicial nominees during the 110th Congress than any Congress since before I entered the Senate. This lack of hearings is not the result of the Judiciary Committee's inability to multitask. Instead, it is the result of a political choice, one that has been reversed since the last election. The Judiciary Committee has already held a hearing on President Obama's first appeals court nominee, just two weeks after that nominee arrived in the Senate.¹³ Under a Republican President, Judiciary Committee Chairman Patrick Leahy waited an average of 197 days to give an appeals court nominee a hearing.¹⁴ The last election amounted to the political equivalent of Drano, as the confirmation pipes are now wonderfully unobstructed and flowing freely once again.

Some might assume that Republicans demonstrate such strong partisan preference, but they would be wrong. Since I was first elected, Democrats running the Senate have granted hearings to forty-one percent more Democratic than Republican judicial

11. Mark Twain, *Chapters from My Autobiography*—XX, 186 N. AM. REV. 465, 471 (1907) (quoting Benjamin Disraeli).

12. Timothy J. Penny, *Facts Are Facts*, NAT'L REV. ONLINE, Sept. 4, 2003, http://www.nationalreview.com/nrof_comment/comment-penny090403.asp.

13. President Obama nominated David Hamilton to the Seventh Circuit on March 17, 2009. Fletcher, *supra* note 10. His hearing was on April 1, 2009. U.S. Senate Judiciary Comm., Official Hearing Notice (Apr. 1, 2009), <http://judiciary.senate.gov/hearings/hearing.cfm?id=3757>.

14. This statistic, like those that follow, was compiled by Senator Hatch's staff from sources including the *Congressional Record*; Federal Judicial Center, Biographical Directory of Federal Judges, <http://www.fjc.gov/public/home.nsf/hisj>; The Library of Congress, Legislative Information Service Databases, <http://thomas.loc.gov/>; and the records of the Senate Judiciary Committee and Senator Hatch's staff. The statistics are on file with Senator Hatch's staff.

nominees. When Republicans run the Senate, the partisan differential is less than five percent.

Moving from the Judiciary Committee to the Senate floor, the second macro factor is confirmations. In the last eight years, President Bush had the slowest pace of judicial confirmations of any President since Gerald Ford. Last year, the Senate confirmed fewer judicial nominees than in any President's final year since 1968, the end of the Johnson Administration. By comparison, when I chaired the Judiciary Committee during President Clinton's last year in office, the Senate confirmed twice as many appeals court nominees as it did last year.

As with hearings, the picture is not the same when Republicans are in charge. When Democrats run the Senate, they confirm forty-five percent more Democratic than Republican judicial nominees. When Republicans run the Senate, the differential is only nine percent.

At the ground level, the two micro factors in the confirmation process are votes and filibusters. The Senate has traditionally confirmed most unopposed lower court nominees by unanimous consent rather than by time-consuming roll call votes. From 1950 to 2000 the Senate confirmed only 3.2 percent of all district and appeals court nominees by roll call vote. During the Bush presidency, that figure jumped to nearly sixty percent. The percentage of roll calls without a single negative vote nearly tripled. And under President Bush, for the first time in American history, the filibuster was used to defeat majority-supported judicial nominees.¹⁵ With all due respect to Mark Twain, I think these numbers accurately give you at least a taste for the partisan division and conflict that now characterize the judicial confirmation process. It has become, to edit Thomas Hobbes just a bit, quite nasty and brutish.

Turning from what has been to what should be, I believe we can get on a better path by, as Madison emphasized in *The Federalist* No. 39, "recurring to principles."¹⁶ The judicial selection process has changed because ideas about judicial power have changed. My basic thesis is this: Our written Constitution and its separation of powers define both judicial power and judicial se-

15. See Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 UTAH L. REV. 803, 819–23.

16. THE FEDERALIST NO. 39, at 240 (James Madison) (Clinton Rossiter ed., 1961).

lection. They define the judicial philosophy that is a necessary qualification for judicial service, and they counsel that the Senate defer to the President when he nominates qualified individuals.

Consider a judicial nomination as a hiring process based on a job description. The job description of a judge is to interpret and apply law to decide cases. This job description does not mean whatever a President, political party, or Senate majority wants it to mean. Our written Constitution and its separation of powers set the judicial job description. Interpreting written law must be different than making written law. Because law written in statutes or the Constitution is not simply words, but really the meaning of the words, only those with authority to make law may determine what the words of our laws say and what those words mean. Judges do not have authority to make law, so they do not have authority to choose what the words of our laws say or what they mean. In other words, judges apply the law to decide cases, but they may not make the law they apply. Judges and the law they use to decide cases are two different things. Judging, therefore, is about a process that legitimates results, a process by which the law made by the people and those they elect determines winners and losers.

The Constitution and its separation of powers compel this judicial job description. This kind of judge is consistent with limited government and the ordered liberty it makes possible. Justice Markman's article describes what he calls a "traditional jurisprudence—one that views the responsibility of the courts to say what the law 'is' rather than what it 'ought' to be."¹⁷ Such a philosophy of judicial restraint—an understanding of the limited power and role of judges—is a qualification for judicial service. This is the kind of judge a President should nominate.

Our written Constitution and its separation of powers also define how the confirmation stage of the judicial selection process should operate. The Constitution gives the power to nominate and appoint judges to the President, not to the Senate. The best way to understand the Senate's role is that the Senate advises the President whether to appoint his nominees by giving or withholding its consent. I explored this role in more detail in the *Utah Law Review* a few years ago in the context of showing that the use of the filibuster to defeat majority-supported judicial nomi-

17. Markman, *supra* note 5, at 149.

nees is inconsistent with the separation of powers.¹⁸ One basis on which the Senate may legitimately withhold its consent to a judicial nominee, however, is that the nominee is not qualified for judicial service. Qualifications include more than information on a nominee's resume. And with all due respect to the American Bar Association, their rating does not a qualification determine. Instead, qualifications for judicial service include whether a nominee's judicial philosophy—his understanding of a judge's power and role—is in sync with our written Constitution and its separation of powers.

Judges, after all, take an oath to support and defend the Constitution of the United States. To be qualified for judicial service, a nominee must believe there is such a thing, that the supreme law of the land is not simply in the eye of the judicial beholder, and that judges need something more than a legal education, a personal opinion, and an imagination to interpret it.

I propose looking to the basic principles of our written Constitution and its separation of powers to guide the judicial selection process. For the President, those principles require nominees with a restrained judicial philosophy. For the Senate, they require deference to a President's qualified nominees. Senators, of course, must decide how to balance qualifications and deference. Our written Constitution and its separation of powers, however, provide normative guidance for the judicial selection process. Presidents and Senators will have to decide, and be accountable for, how they use or reject that guidance.

No matter how philosophically sound this proposal may be—and I believe it is philosophically rock solid—it may nevertheless be politically controversial. We have traveled a long way from Alexander Hamilton describing the judiciary as the weakest and least dangerous branch.¹⁹ We have traveled a long way from the Supreme Court saying in 1795 that the Constitution is "certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the Legislature, and can be revoked or altered only by the authority that made it."²⁰ We have traveled a long way from the Senate Judiciary Committee saying in 1872 that giving

18. See Hatch, *supra* note 15, at 826–31.

19. THE FEDERALIST NO. 78 (Alexander Hamilton).

20. *Vanhome's Lessee v. Dorrance*, 2 U.S. 304, 308 (1795).

the Constitution a meaning different from what the people provided when adopting it would be unconstitutional.²¹

For a long time now, we have instead labored under Chief Justice Charles Evans Hughes's notion that the Constitution is whatever judges say it is.²² It has become fashionable to suppose that the only law judges may not make is law we do not like. Legal commentator Stuart Taylor correctly observes that "[l]ike a great, ever-spreading blob, judicial power has insinuated itself into every nook and cranny."²³ One of my predecessors as Senator from Utah who later served on the Supreme Court, George Sutherland, described the transformation in 1937 as it was literally under way. He warned that abandoning the separation of powers by ignoring the distinction between interpreting and amending the Constitution would convert "what was intended as inescapable and enduring mandates into mere moral reflections."²⁴ Less than two decades later, Justice Robert Jackson described what he saw as a widely held belief that the Supreme Court decides cases based on personal impressions rather than impersonal rules of law.²⁵

Judicial power and judicial selection are inextricably linked. Sometimes the Senate can appear to produce a lot of activity but take very little action. To some, that means the Senate is the world's greatest deliberative body. To others, it means that it produces a lot of sound and fury signifying nothing. But I hope that the debate over President Obama's judicial nominees will really be a debate over the kind of judge our liberty requires. The debate should be about whether judges should decide cases by using enduring mandates and impersonal rules of law or by using their own moral reflections and personal impressions.

President Obama has already taken sides in this debate. When he was a Senator, he voted against the nomination of John Roberts to be Chief Justice, stating that judges decide cases based on

21. See Raoul Berger, *Original Intention in Historical Perspective*, 54 GEO. WASH. L. REV. 296, 297-98 (1986) (citing S. REP. NO. 21, 42d Cong., 2d Sess. 2 (1872)).

22. Charles Evans Hughes, Speech before the Elmira Chamber of Commerce, May 3, 1907, in ADDRESSES AND PAPERS OF CHARLES EVANS HUGHES 133, 139 (Robert H. Fuller & Gardner Richardson eds., 1908).

23. Stuart Taylor Jr., *Imperial Judges Could Pick the President—Again*, 36 NAT'L J. 2877, 2877 (2004).

24. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 404 (1937) (Sutherland, J., dissenting).

25. *Brown v. Allen*, 344 U.S. 443, 535 (1953) (Jackson, J., concurring in the result).

their deepest values, their core concerns, and the content of their hearts.²⁶ On the campaign trail, he pledged that he would select judges according to their empathy for certain groups such as the poor, African Americans, gays, the disabled, or the elderly.²⁷ The real debate is about whether judges may decide cases based on empathy at all, not the groups for which they have empathy. It is about whether judges may make law at all, not about what law judges should make. Conservatives as well as liberals often evaluate judges and judicial decisions by their political results rather than by their judicial process. But a principle is just politics unless it applies across the board. Professor Steven Calabresi, one of the Federalist Society's founders, wrote last fall that "[n]othing less than the very idea of liberty and the rule of law are at stake in this election."²⁸ He was right, and they remain at stake in the ongoing selection of federal judges.

Judges have no authority to change the law, regardless of whether they change it in a way I like. I am distinguishing here between judicial philosophy, which relates to process, and political ideology, which relates to results. Senators often reveal their view of judicial power when participating in judicial selection, proving once again that the two are inextricably linked. During the debate over Chief Justice Roberts's nomination, for example, one of my Democratic colleagues wanted to know whether the nominee would stand with families or with special interests. She said the American people were entitled to know how he would decide legal questions even before he had considered them.²⁹ Another Democratic Senator similarly said that the real question was whose side the nominee would be on when he decided important issues.³⁰ Would he be on the side of corporate or consumer interests, the side of polluters or Congress when it seeks to regulate them, or the side of labor or management?

In this activist view of judicial power, the desired ends defined by a judge's empathy justify whatever means he uses to

26. 151 CONG. REC. S10366 (daily ed. Sept. 22, 2005) (statement of Sen. Obama).

27. Posting of Mark Murray to First Read, <http://firstread.msnbc.msn.com/archive/2007/07/17/274143.aspx> (July 17, 2007, 16:21 EDT) (report by Carrie Dann).

28. Steven G. Calabresi, *Obama's "Redistribution" Constitution*, WALL ST. J., Oct. 28, 2008, at A17.

29. 109 CONG. REC. S10641 (daily ed. Sept. 29, 2005) (statement of Sen. Stabenow).

30. Interview by Matt Lauer with Senator Edward Kennedy, *available at* <http://www.tedkennedy.com/journal/165/senator-kennedy-nbctoday-show-interview>.

decide cases. This activist view of judicial power is at odds with our written Constitution and its separation of powers and, therefore, with ordered liberty itself. The people are not free if they do not govern themselves. The people do not govern themselves if their Constitution does not limit government. The Constitution cannot limit government if judges define the Constitution.

Terry Eastland aptly described the result of judicial activism in a 2006 essay titled *The Good Judge*: "The people's text, whether made by majorities or, in the case of the Constitution, supermajorities, would be displaced by the judges' text. The justices became lawmakers."³¹ This quotation highlights one of the many differences between God and federal judges. God, at least, does not think He is a federal judge. And it brings up the question of how many federal judges it takes to screw in a light bulb. Only one, because the judge simply holds the bulb as the entire world revolves around him.

There is perhaps some reason for optimism. One poll found last year that, no matter for whom they voted, nearly three-quarters of Americans said they wanted judges "who will interpret and apply the law as it is written and not take into account their own viewpoints and experiences."³² This debate is indeed the one we should be having, whether judges have the power to make law. When judges apply law they have properly interpreted rather than improperly made, their rulings may have the effect of helping or hurting a particular cause, of advancing or inhibiting a particular agenda. They may, at least by the political science bean counters, be considered liberal or conservative. The point, therefore, is not which side wins in a particular case, but whether the winner is decided by the law or by the judge. When judges interpret law, the law produces the results. Thus, the people can choose to change the law. When judges make law, judges produce the results and the people are left with no recourse at all. That state of affairs is the antithesis of self-government.

Let me close by saying that the effort to defend liberty never ends. Andrew Jackson reminded us as he left office in 1837 that

31. Terry Eastland, *The 'Good Judge': Antonin Scalia's two decades on the Supreme Court*, WKLY. STANDARD, Nov. 13, 2006.

32. Press Release, The Federalist Society, Key Findings from a National Survey of 800 Actual Voters (Nov. 5, 2008), available at http://www.fed-soc.org/publications/pubid.1183/pub_detail.asp.

"eternal vigilance by the people is the price of liberty; and that you must pay the price if you wish to secure the blessing."³³ The approach I outline actually joins an effort that began long ago and reminds me of a resolution passed by the Senate Republican Conference in 1997:

Be it resolved, that the Republican Conference opposes judicial activism, whereby life-tenured, unaccountable judges exceed their constitutional role of interpreting already enacted, written law, and instead legislate from the bench by imposing their personal preference or views of what is right or just. Such activism threatens the basic democratic values on which our Constitution is founded.³⁴

There you have it. Our written Constitution and its separation of powers define both judicial power and judicial selection. They require judicial restraint as a qualification for judicial service and require Senate deference to a President's qualified nominees. The weeks and months ahead will provide opportunities to debate these principles and their application. Nothing less than ordered liberty is at stake. I know the Federalist Society will be right in the thick of that debate.

33. Andrew Jackson, Farewell Address, in 2 *THE STATESMAN'S MANUAL: THE ADDRESSES AND MESSAGES OF THE PRESIDENTS OF THE UNITED STATES* 947, 957 (Edwin Williams ed., New York, Edward Walker 1846).

34. On file with Author.

MEASURING META-DOCTRINE: AN EMPIRICAL ASSESSMENT OF JUDICIAL MINIMALISM IN THE SUPREME COURT

ROBERT ANDERSON IV*

One of the most influential recent theories of Supreme Court decision making is Professor Cass Sunstein's "judicial minimalism." Sunstein argues that a majority of the Justices of the Rehnquist Court were "minimalists," preferring to "leave things undecided" by favoring case-by-case adjudication over ambitious judicial agendas. Although many legal scholars have embraced Sunstein's argument, no piece of scholarship has attempted a quantitative empirical test of the theory. This Article develops an empirical measure for judicial minimalism and examines whether minimalism affected the opinion writing and voting of the Justices on the Rehnquist Court. The empirical analysis supports the conclusion that judicial minimalism has a statistically significant effect on the opinions of the Justices, providing the first quantitative evidence of "meta-doctrine" in the Supreme Court. The Article also provides estimates of minimalism for the new Roberts Court, suggesting that the new Court may be drifting slowly away from the minimalism of the Rehnquist years.

* Associate Professor of Law, Pepperdine University School of Law, robert.anderson@pepperdine.edu. This paper was selected for presentation at the Association of American Law Schools 2008 Conference on Constitutional Law in Cleveland, Ohio. I would like to thank Frank Cross, Richard Cupp, Douglas Kmiec, Simon Jackman, Thomas Miles, Mark Scarberry, Neil Siegel, and Cass Sunstein for helpful comments on earlier drafts.

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INTRODUCTION

One of the most influential recent theories of Supreme Court decision making is Professor Cass Sunstein's "judicial minimalism." In an extended series of books and articles,¹ Sunstein has developed the thesis that a primary source of division among the Justices on the Rehnquist Supreme Court was judicial minimalism—that is, disagreement not over *what* to decide in individual cases, but over *how much* to decide in individual cases. Sunstein describes as "minimalists" those Justices on the Rehnquist Court who preferred case-by-case adjudication of disputes on the unique facts before them, but who avoided venturing "broad rules and abstract theories" that resolved other cases not before them.² In contrast, he describes as "maximalists" those Justices who preferred to "set[] broad rules for the future" and "give[] ambitious theoretical justifications for outcomes."³ In the Rehnquist Court, Sunstein argues, the conflict of minimalists against maximalists became "the most striking feature of American law in the 1990s."⁴

Sunstein's theory of judicial minimalism has potentially sweeping implications for the study of the Supreme Court in general, and for the legacy of the Rehnquist Court in particular. Sunstein argues that minimalism has been one of the most significant and divisive issues among Justices on the Rehnquist Court. He asserts that a majority of the Justices on the final Rehnquist Court (1994–2005) were minimalists, including the important swing Justices in the ideological center of the Court—

1. See, e.g., CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999) [hereinafter SUNSTEIN, *ONE CASE AT A TIME*]; CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005) [hereinafter SUNSTEIN, *RADICALS IN ROBES*]; Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006) [hereinafter Sunstein, *Burkean Minimalism*]; Cass R. Sunstein, *Commentary, Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995); Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47 [hereinafter Sunstein, *Minimalism at War*]; Cass R. Sunstein, *Commentary, On Analogical Reasoning*, 106 HARV. L. REV. 741 (1993); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995); Cass R. Sunstein, *Second-Order Perfectionism*, 75 FORDHAM L. REV. 2867 (2007); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996) [hereinafter Sunstein, *Foreword*].

2. SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 1, at 9.

3. *Id.* at 9–10.

4. *Id.* at xi.

Justices O'Connor and Kennedy.⁵ Moreover, Sunstein does not view minimalism as an abstract philosophical difference that only occasionally surfaced in the Justices' written opinions. Instead, he argues that "[t]he largest struggles on the Supreme Court have been over when to speak and when to remain silent," and that in many cases "the justices contest exactly that issue."⁶ If this account of Supreme Court decision making is true, then scholarship about the Court, both in the legal literature and especially in the political science literature, has overlooked much of what really drives disagreement among the Justices.

The practical significance of minimalism, however, is difficult to ascertain without empirical evidence of whether minimalism actually influences the opinion writing and voting of the Justices.⁷ Although many scholars have embraced Sunstein's characterization of the Rehnquist Court,⁸ other scholars have criticized his failure to provide empirical support for the theory.⁹ One recent article, in fact, goes further, arguing that empirical evidence *contradicts* Sunstein's theory.¹⁰ Similarly, Sunstein has been criticized for focusing on specific types of cases and for re-

5. *Id.* at 9 (arguing that the Justices comprising the "analytical heart" of the Court, including Justices O'Connor and Kennedy, were minimalists).

6. *Id.* at xi–xii.

7. Stephen M. Griffin, *Has the Hour of Democracy Come Round at Last? The New Critique of Judicial Review*, 17 CONST. COMMENT. 683, 689 (2000) (reviewing SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 1, and MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2000)).

8. One commentator even goes so far as to describe the descriptive theory of minimalism as "unquestionably correct." Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 92 (1999); see also Jeffrey Rosen, *Foreword*, 97 MICH. L. REV. 1323, 1327 (1999) ("It is rare that a work of constitutional theory so enthusiastically celebrates, and so precisely expresses, the mood of a particular Supreme Court.").

9. Griffin, *supra* note 7, at 689. Commentators have also noted Sunstein's failure to provide evidence of the categorizations of various Justices. See, e.g., Sheldon Gelman, *The Hedgehog, the Fox, and the Minimalist*, 89 GEO. L.J. 2297, 2339 (2001) (reviewing SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 1) ("Sunstein simply classifies the Justices as one or the other without examining their records. Thus, we do not know whether Justice O'Connor or Justice Souter really qualifies as more minimalist than Chief Justice Rehnquist.").

10. See Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 2001 (2005) ("The upshot of the foregoing investigation does not bode well for minimalism's descriptive aspirations: the suggestion that judicial minimalism triumphed at the Supreme Court during the October 2003 Term is, with few exceptions, descriptively false.").

lying on “too few data points to be truly convincing,”¹¹ a criticism that reflects Sunstein’s focus on a handful of high-profile cases in constitutional law, rather than conducting a comprehensive survey of minimalism across a broad range of cases. Thus, although it is certain that judicial minimalism has had an important influence on scholarship, stimulating an “ever-burgeoning literature”¹² on the subject, it is less certain that minimalism has had an important influence on the Justices.

The resolution of this empirical controversy is important not only for positive research on judicial decision making, but also for normative theorizing about judicial modesty and restraint. There are two principal reasons for this. First, the idea of minimalism as a normative theory is controversial and has generated a tremendous “buzz” in legal scholarship.¹³ Yet, despite the scholarly interest, there is certainly nothing like a consensus on the normative desirability of minimalism. Second, even if scholars came to a consensus on the normative merits of minimalism (a seemingly unlikely prospect), the descriptive accuracy of the minimalist account is important to evaluating minimalism as a normative theory of adjudication.¹⁴ This is because, as Sunstein himself acknowledges, “it is unhelpful to urge courts to adopt a role that they will predictably refuse to assume.”¹⁵ In this sense, it seems that both Sunstein and his critics would agree that there is an urgent need for an assessment of the *descriptive* theory of judicial minimalism.

This Article is an attempt to provide the first quantitative empirical assessment of Sunstein’s theory of judicial minimalism. Using new data from the Rehnquist Court’s 1994–2005 Terms and the Roberts Court’s 2005–2007 Terms, this Article

11. Neal Devins, *The Democracy-Forcing Constitution*, 97 MICH. L. REV. 1971, 1992 (1999) (reviewing SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 1).

12. Neal Devins, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1211 n.182 (2001).

13. A LexisNexis search on August 27, 2007, returned 483 works citing Sunstein’s book *ONE CASE AT A TIME*, *supra* note 1, and ninety-nine works citing Sunstein’s *Foreword*, *supra* note 1.

14. It is important to note that Sunstein does not present minimalism as normatively desirable under all circumstances. See, e.g., Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899, 1902–03 (2006) (“[T]he choice between narrow and wide rulings cannot itself be resolved by rule. . . . [T]he better approach . . . calls instead for a case-by-case inquiry into whether case-by-case decisions are desirable.”).

15. Sunstein, *Minimalism at War*, *supra* note 1, at 51.

finds considerable evidence for a “meta-doctrinal” divide among the Justices that is largely consistent with Sunstein’s theory of judicial minimalism. This divide mirrors, in large measure, Sunstein’s descriptive claims about which Justices are minimalist and which are maximalist. Many of the minimalist Justices identified by Sunstein—such as Justices O’Connor, Souter, and Ginsburg—differ systematically from the maximalist Justices identified by Sunstein—such as Justices Scalia and Thomas. Although the evidence may not point to minimalism as the “most striking feature of American law in the 1990s,”¹⁶ these relationships provide the first objective quantitative evidence for a systematic and theoretically important meta-doctrinal divide among the Justices of the Supreme Court.

The results also suggest several important and even surprising amendments to Sunstein’s descriptive account, amendments that respond in part to some of Sunstein’s critics. First, the results suggest that Chief Justice Rehnquist may have been, in fact, one of the most minimalist members of the Court, not the maximalist Sunstein makes him out to be. Second, the results indicate that Justice Breyer was probably less minimalist than Justices Souter, Ginsburg, and even Stevens, a finding inconsistent with Sunstein’s account. Third, the results demonstrate that most of the minimalism-maximalism distinction existed between Justices Scalia and Thomas, on the one hand, and the other seven Justices on the other, with the gradations in between somewhat uncertain based on the available data. Notwithstanding these important amendments, however, the empirical analysis provides strong support for the broad outlines of Sunstein’s theory of minimalism, and the idea of meta-doctrine more generally.

The analysis in this Article unfolds in five Parts. Part I describes Sunstein’s theory of judicial minimalism and provides a measure of minimalism that does not require subjective coding or analysis of individual Supreme Court opinions. Part II describes the data that the analysis employed and introduces the methods by which the Article establishes measures of minimalism for the Justices. Part III presents the results of the statistical analysis for the Rehnquist Court, suggesting support for the meta-doctrinal effect

16. See SUNSTEIN, ONE CASE AT A TIME, *supra* note 1, at xi.

Sunstein has hypothesized. Part IV interprets these results, considers alternative explanations, and addresses some potential criticisms of this measure of meta-doctrine. Part V extends the analysis to the Roberts Court, addressing the extent to which Chief Justice Roberts and Justice Alito exhibited minimalist or maximalist behavior in the 2005–2007 Terms of the Court.

I. MEASURING JUDICIAL MINIMALISM

A. *Introducing Professor Sunstein's Minimalism*

The distinguishing feature of minimalist Justices as described by Professor Sunstein is that they tend to “leave things undecided.”¹⁷ The idea of judges deliberately “leaving things undecided” is in many ways evocative of the “passive virtues” of the Bickelian tradition of judicial modesty,¹⁸ but the account Sunstein has developed differs from other approaches to judicial modesty in two important ways. First, the theory is in large part a positive, as opposed to a purely normative, account of Supreme Court decision making. That is, although Sunstein’s work has often been interpreted primarily as a theory of how much Supreme Court Justices *should* decide, much of Sunstein’s work is about how much Supreme Court Justices *do* decide.¹⁹ Second, although minimalism is a theory *about* constitutional interpretation, minimalism is not itself a theory of constitutional interpreta-

17. *Leaving Things Undecided* was the title of Sunstein’s 1996 *Harvard Law Review Foreword*, Sunstein, *Foreword*, *supra* note 1, as well as a chapter heading in SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 1.

18. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

19. Sunstein’s theory of minimalism goes beyond merely descriptive claims about the Supreme Court, however, to provide some prescriptive guidance for constitutional decision making. In general, Sunstein advocates the philosophy of judicial minimalism in constitutional cases, arguing that “leaving things undecided” will encourage resolution of controversial issues through the deliberative democratic process. Sunstein also acknowledges, however, that in cases where “planning is important, and [where] judges can devise decent rules, width is all to the good.” SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 1, at 209. But even in the cases where Sunstein does not view minimalism as desirable, he suggests that on a multimember tribunal with diverse opinions, minimalism may “not be so much desirable as inevitable.” *Id.* at 57.

tion.²⁰ That is, Sunstein's minimalism does not dictate (and often does not even suggest) how to resolve constitutional questions in individual cases. Instead, the procedural form of minimalism is almost purely meta-doctrinal, a doctrine about doctrine, not a judicial guide for resolving individual cases.²¹

In Sunstein's work, minimalism has two primary dimensions, referred to as the "narrowness" and "shallowness" of decisions.²² The narrowness dimension means that minimalists avoid rulings that implicitly resolve many other cases in addition to the current one.²³ That is, a minimalist is reluctant to write an opinion setting down broad rules controlling many future cases. The shallowness dimension means that minimalists prefer "incompletely theorized agreements" to conclusive decisions on issues of "basic principle."²⁴ That is, the minimalist does not attempt to connect the decision in the instant case to some larger theory of constitutional interpretation. This allows minimalists to agree on particulars without agreeing on the "basis" for the particulars,²⁵ and allows a minimalist Court

20. See, e.g., Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Law Professors Are Wrong for America*, 106 COLUM. L. REV. 2207, 2213 (2006) (reviewing SUNSTEIN, *RADICALS IN ROBES*, *supra* note 1) ("Properly understood, minimalism is not a theory of interpretation at all, at least not as most people understand 'interpretation.'"); James E. Ryan, *Does It Take a Theory? Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. 1623, 1626 (2006) (reviewing SUNSTEIN, *RADICALS IN ROBES*, *supra* note 1) ("[M]inimalism' is not a theory of interpretation . . ."). Indeed, minimalism is a sort of an "anti-theory" of constitutional interpretation. See, e.g., SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 1, at 9 ("Instead of adopting theories, [minimalists] decide cases.").

21. See SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 1. Sunstein distinguishes between procedural minimalism, which affects the scope of opinions but not how cases are decided, and "minimalism's substance," which may affect how cases are decided. This second aspect of "substantive" minimalism constitutes a "core" of "basic commitments" of substantive minimalism. See *id.* at 61–72. The main focus of Sunstein's work, however, is on procedural minimalism. See *id.* at ix; see also Christopher J. Peters, *Assessing the New Judicial Minimalism*, 100 COLUM. L. REV. 1454, 1464 (2000). This Article deals solely with Sunstein's "procedural minimalism," which is how "broadly" and "deeply" cases are decided. Thus, the results presented in Part III should not be construed as support for what Sunstein calls "minimalism's substance."

22. SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 1, at 10 ("[T]he practice of minimalism involves two principal features, narrowness and shallowness.").

23. *Id.*

24. *Id.* at 11. Sunstein describes these two minimalist virtues as "narrowness" and "shallowness," and their "maximalist" opposites as "width" and "depth," respectively. See *id.* at 10–11.

25. See *id.* at 11.

to “settle[] the case before it, but . . . leave[] many things undecided.”²⁶ Taken together, narrowness and shallowness lead the minimalist to prefer “saying no more than necessary to justify an outcome,”²⁷ rather than rendering “clear rules and final resolutions” on the issues in a case.²⁸

The distinction between minimalist and maximalist jurisprudence, Sunstein argues, is illustrated well by the Rehnquist Court. Sunstein asserts that a majority of the Rehnquist Court Justices followed a minimalist approach,²⁹ whereas others followed a decidedly more maximalist approach. The five Justices Sunstein clearly identifies as minimalist are Justices O’Connor, Kennedy, Souter, Ginsburg, and Breyer.³⁰ The two Justices Sunstein clearly identifies as nonminimalists (maximalists) are Justices Scalia and Thomas.³¹ Between the two extremes are Chief Justice Rehnquist, who was “sometimes” maximalist, and Justice Stevens, who was “sometimes” minimalist.³² The ends of the minimalism spectrum in Sunstein’s formulation are anchored by Justice O’Connor, the “most notably” minimalist Justice on the Court, and Justice Scalia, the “most notably” maximalist Justice on the Court.³³

The categorization of Justices as minimalist or nonminimalist, with some gradations in between, suggests that we order the Justices along what Sunstein calls a “rough continuum” of minimalism from “reasonlessness/silence” (that is, total minimalism) to “complete rules/full theoretical grounding” (that is, total maximalism).³⁴ Although Sunstein is not explicit about the relative positions of all of the Justices, his work suggests an ordering along a maximalism-minimalism dimension something like that in Figure 1, with Justice Scalia and Justice Thomas at the maximalist end, Justice O’Connor at the minimalist end, and the rest of the Justices in between. The exact positions of the Justices along the contin-

26. *Id.* at ix.

27. *Id.* at 3; see also Sunstein, *Foreword*, *supra* note 1, at 6.

28. SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 1, at ix.

29. See *id.* at 262.

30. See *id.* at 9; see also Sunstein, *Foreword*, *supra* note 1, at 14.

31. See SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 1, at xiii.

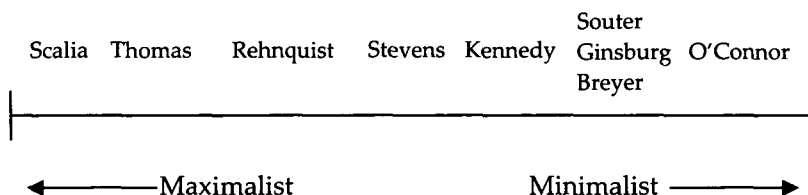
32. See *id.*

33. See *id.* at xiii; see also Sunstein, *Problems with Minimalism*, *supra* note 14, 1901–02, 1907 (arguing that Justice O’Connor is “the Court’s most prominent” minimalist).

34. SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 1, at 10.

uum are left somewhat ambiguous in Sunstein's work,³⁵ but two broad groupings emerge. The minimalist category clearly includes Justices O'Connor, Kennedy, Souter, Ginsburg, and Breyer, and the maximalist group clearly includes Justices Scalia and Thomas. The two remaining members of the Court, Chief Justice Rehnquist and Justice Stevens, are likely somewhere in the middle, with Chief Justice Rehnquist toward the maximalist end and Justice Stevens toward the minimalist end.

Figure 1: Hypothesized Minimalism-Maximalism Dimension



B. *An Empirical Definition of Minimalism*

The most challenging task empiricists face in this area of scholarship is to develop an empirical measure of minimalism that would allow scholars to determine objectively which Justices are minimalist and maximalist, and yet also permit empirical assessment of the theory of judicial minimalism. The uniquely meta-doctrinal nature of minimalism makes such a measure possible, at least in relative terms.³⁶ The description of minimalists as "settling cases" but not saying "more than necessary to justify an outcome" evokes the distinction between the two key outputs of the Supreme Court's decision-making process: the "judgments"

35. Compare, for example, the list of minimalists on page xiii of SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 1, where Justice Stevens seems to be identified as a minimalist, with the list on page 9, which does not include Justice Stevens.

36. Despite Sunstein's occasional claims that the Rehnquist Court was "minimalist," which seems to imply that levels of minimalism can be identified in some absolute sense, it seems clear that he intends minimalism as a relative, not an absolute concept. *See infra* notes 68–69 and accompanying text.

and the “opinions.” The judgments are the dispositions in the individual cases before the Court, such as whether the Court affirmed or reversed the lower court’s decision. This is what Professor Sunstein calls “settling cases”³⁷—deciding which party wins at the appellate level. In contrast, the opinions are the reasoning justifying the Justices’ votes in the cases—rationales for the decisions that may provide guidance in other cases not before the Court as well as theoretical grounding for the decisions. This is what Sunstein calls “justify[ing] the outcome.” Thus, the judgments may be thought of as what the Court does in concrete cases, and the opinions may be thought of as what the Court says about its reasoning in individual cases and how future cases should be resolved.

The strategy for disentangling the effects of minimalism from substantive doctrine relies on the idea that minimalism affects the *opinions* that the Justices write but not the *judgments* in individual cases.³⁸ This is because the two dimensions of minimalism—narrowness and shallowness—are characteristics of the Justices’ reasoning in their *opinions* in the cases,³⁹ not about the dispositions of the cases between the parties. One judgment generally cannot be more minimalist or maximalist than another, as the judgment itself is as narrow as possible—it only binds the immediate parties to the dispute—and as shallow as possible—it *literally* contains no reasoning. In contrast, the opinions the Justices write can certainly differ in this respect; some are narrow and shallow, others wide and deep. In Sunstein’s theory, minimalist Justices can agree on “concrete particulars” despite “disagreements or uncertainty about the basis

37. The Court’s judgment takes the form of a brief statement at the end of the majority opinion such as “affirmed,” “reversed,” “reversed and remanded,” “vacated and remanded,” and so forth. The judgment only affects the specific parties involved in the case.

38. To reiterate, this is the “decisional” or “procedural” aspect of minimalism being tested, not what Sunstein calls “minimalism’s substance.” In addition, the phenomenon of jurisdictional dissents, as well as the possibility of leaving more issues open on remand, may constitute exceptions to this general assumption.

39. That is, “the scope of their reasoning,” because the “decisional” form of minimalism examined here is not even about the content of the opinions, as opposed to their scope. See Ryan, *supra* note 20, at 1650 (“[Minimalism] tells you how judges should write opinions, suggesting that they should try to reach some agreement on some narrow grounds. But it is quite silent as to the substance of that agreement.”).

for those concrete particulars."⁴⁰ This is because minimalists, like nonminimalists, must issue judgments or "render decisions" in favor of one party or the other based on their assessment of the facts and law.⁴¹ Minimalism does not tell the judge what the judgment should be in individual cases. Indeed, minimalist Justices are free to decide the *judgment* in individual cases according to their own interpretations,⁴² as minimalists can be conservative, liberal, or anything in between.⁴³

This argument, that minimalism affects the opinions of the Justices to a greater extent than their judgments,⁴⁴ suggests a way of measuring minimalism based on the differences in patterns of inter-agreement among the Justices on these two aspects of decision making. Specifically, we can compare how often specific pairs of Justices disagree with respect to votes on the opinions with how often they disagree with respect to votes on the judgments and estimate the effect of minimalism from the differences. If the Justices *systematically* disagree more about what

40. SUNSTEIN, ONE CASE AT A TIME, *supra* note 1, at 11.

41. As Professor Bybee observes, even "a minimalist-minded Court will in fact declare one party the winner," but will leave "the principled underpinning of the opinion incomplete." Keith J. Bybee, *The Jurisprudence of Uncertainty*, 35 LAW & SOC'Y REV. 943, 952 (2001) (reviewing SUNSTEIN, ONE CASE AT A TIME, *supra* note 1). The exception is that a purely minimalist Court might use principles of jurisdiction and justiciability to avoid taking the case at all.

42. See SUNSTEIN, RADICALS IN ROBES, *supra* note 1, at 29 ("By itself, minimalism is a method and a constraint; it is not a program, and it does not dictate particular results."); see also James E. Fleming, *The Incredible Shrinking Constitutional Theory: From the Partial Constitution to the Minimal Constitution*, 75 FORDHAM L. REV. 2885, 2907 (2007) ("Instead of advising judges and other interpreters how to find what the Constitution means, minimalism tells judges what to do *after* they have decided that question. In other words, minimalism tells judges the kind of thing they should say to the public in constitutional cases, not how to decide what the Constitution means."); Ryan, *supra* note 20, at 1654 (Minimalism "does not help explain or justify why judges should decide concrete cases in one way or another" and gives "little explanation as to *how* or *why* judges should rule in particular cases.").

43. Sunstein makes the point that minimalism does not require any particular ideological commitment by noting that "[w]e could even imagine liberal minimalism, socialist minimalism, Ku Klux Klan minimalism, libertarian minimalism, Aristotelian minimalism, communist minimalism, Nazi minimalism, and so forth." SUNSTEIN, ONE CASE AT A TIME, *supra* note 1, at 62. The concept of judicial minimalism also is not the same as judicial restraint (or activism); minimalists can be characterized by "judicial activism" or "judicial restraint." See SUNSTEIN, RADICALS IN ROBES, *supra* note 1, at 43-44.

44. This argument is my own interpretation of Sunstein's work and is not directly derived from it. Sunstein never explicitly says that opinions are affected by minimalism to a greater extent than judgments, although I believe this is a fair inference from what he has written.

they say (opinions) than what they do (judgments), then that disagreement may reflect a meta-doctrinal influence. The approach of this Article, therefore, is to find a way to measure disagreement on the reasoning of opinions, holding constant the disagreement on the judgments. The residual disagreement—that is, the disagreement on reasoning in opinions that is not attributable to disagreement on the judgments—is a potential measure for the minimalism or maximalism of the Justices. I develop the model for this approach in more detail below.

II. HYPOTHESES, DATA, AND METHODS

A. *The Data*

To provide a quantitative measure of minimalism, I developed a new data set containing opinions from merits dispositions for the final Rehnquist Court (1994–2005).⁴⁵ For each case, the data set includes each Justice's vote on the disposition of the case and each Justice's vote on each opinion written in the case (for example, majority, concurring, concurring in the judgment, dissenting, and so on), including parts of opinions joined separately (when applicable),⁴⁶ a feature absent in other data sets. This data set makes it possible to ascertain the degree of agreement or disagreement among the Justices on the opinions (the reasoning) in the case, not just in the disposition (the judgment).⁴⁷ This data set also allows the analysis of the "part-by-part voting"⁴⁸ that is increasingly common in the Supreme Court and seems to have a

45. The data exclude *per curiam* opinions, dismissals of certiorari, dissents from denial of certiorari, summary dispositions, decrees, applications for stays, and so forth. The data also exclude opinions from cases in which one or more Justices did not participate. The latter exclusion is limited to a trivial percentage of the total cases in the Rehnquist Court, but constitutes a significant percentage of cases in the Roberts Court, as Justice Alito joined the Court later than Chief Justice Roberts.

46. For example, if a Justice joined Part I of an opinion but not Part II, the parts are encoded as separate opinions with the Justice joining one opinion and not the other.

47. The previous literature, as well as the well known Spaeth database, have dichotomized "concurring in part" opinions into either "regular concurrences" or "special concurrences." See HAROLD J. SPAETH, *Documentation to THE UNITED STATES SUPREME COURT JUDICIAL DATABASE 1953–2007 TERMS 65* (2008), available at http://www.cas.sc.edu/poli/juri/allcourt_codebook.pdf.

48. See Robert Anderson IV & Alexander M. Tahk, *Institutions and Equilibrium in the United States Supreme Court*, 101 AM. POL. SCI. REV. 811 (2007) (developing a formal model of part-by-part voting).

very close relationship to judicial minimalism and maximalism. Some descriptive statistics for the constitutional cases and the nonconstitutional cases are set forth in Table I.⁴⁹

Table I: Descriptive Statistics: Rehnquist Court Data*

	Constitutional	Other	Total
Number of Cases	391	394	785
Number of Majority or Plurality Opinions	479	452	931
Number of Concurring Opinions	168	86	254
Number of Dissenting Opinions	371	221	592
Number of Opinions Concurring in the Judgment	107	36	143
Number of Other Opinions	139	81	220
Total Number of Opinions	1264	876	2140
* Includes as separate opinions parts of opinions joined separately.			

B. *The Justices in "Minimalist Space"*

To measure minimalism, I compare, for each pair of Justices, the pair's agreement on the judgments with the pair's agreement on the opinions. If minimalism (or a similar effect) influences the

49. Sunstein's theory of judicial minimalism primarily applies to constitutional cases. As a result, most of the analysis in this paper centers on constitutional cases. A complete assessment of the theory of minimalism, however, should examine the extent to which the measure of minimalism is different between constitutional and nonconstitutional cases. If Sunstein's hypothesis about minimalism is correct, we would expect to see a greater effect of minimalism in constitutional cases versus nonconstitutional cases. To test this prediction, I will explicitly draw distinctions between the constitutional and nonconstitutional cases later in the Article. A case is coded as involving constitutional issues if the case contains at least one "Constitutional Law" LexisNexis headnote. This measure is probably over-inclusive, as many cases that are not really constitutional have at least one "Constitutional Law" headnote. This over-inclusiveness should, if anything, introduce noise into the measure and make it less likely to find a systematic relationship, making this a conservative assumption.

opinions of the Justices but not the judgments, we would expect these two patterns to differ in a systematic way. To make this concept more concrete, I introduce the idea of “distances” (or “differences”) between pairs of Justices in three different “spaces”: “judgment space,” “opinion space,” and “minimalism space.” The distance between any two Justices in judgment space is the proportion of cases in which the two Justices disagree on the judgment in a case (for example, dissenting from the judgment or concurring in the judgment). The distance between any two Justices in opinion space is the proportion of opinions (or parts of opinions) in which the Justices disagree on the opinion (or part of an opinion). I weighted the opinion distances so that each case counts equally, whether the case is a unanimous one with a single opinion or a highly fractured one with many opinions.⁵⁰

The distance between any two Justices in minimalism space is defined as the distance between the Justices in opinion space after holding constant the distance between the two Justices in judgment space. The intuition for this distance measure is that Justices should be far apart in the minimalism space to the extent that they agree on outcomes (judgments) but disagree on reasons (opinions). In contrast, Justices should be close in minimalism space to the extent they agree on judgments and opinions in roughly the same proportions, or even agree on opinions more than they agree on judgments. Thus, by holding the judgments constant, the distance in minimalism space represents the excess disagreement on opinions relative to what we would expect from the disagreement on judgments. It is this excess disagreement that the Justices’ distance (that is, dissimilarity) in minimalism space produces.

More precisely, the distance in minimalism space for any two Justices is estimated as the residual of an ordinary least squares regression of each unique pair of opinion-space distances on the corresponding unique pair of judgment-space distances. If we let the judgment-space distance between Justice i and Justice j be denoted by γ_{ij} , the opinion-space distance be denoted

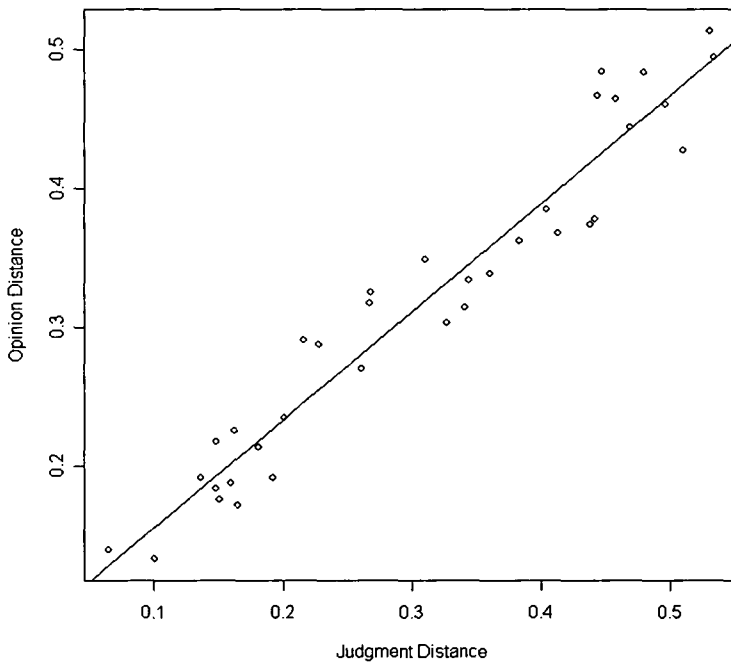
50. This is because some cases have many opinions and “parts” of opinions, whereas others have few. If the opinion parts were not adjusted for equal case weight, cases with more opinions would weigh more heavily. This is a conservative assumption, as weighing cases with more opinions more heavily would have tended to increase the effect of minimalism. The results are qualitatively the same if the alternative weighting is used.

by θ_{ij} , and the minimalism-space distance be denoted by μ_{ij} , then the minimalism space distance is defined as:

$$\mu_{ij} = \theta_{ij} - \alpha_{OLS} - \beta_{OLS}\gamma_{ij}$$

where the parameters α_{OLS} and β_{OLS} are ordinary least squares estimates⁵¹ of the thirty-six opinion-space distance pairs on the thirty-six judgment-space distance pairs. The relationship between these two distance measures is linear and very strong, as Figure 2 depicts.

Figure 2: Relationship Between Opinion Distance and Judgment Distance



51. Ordinary, least squares is a statistical technique that finds the best linear relationship between a dependent variable and one or more independent variables. In the equation presented here, the ordinary least squares technique finds the intercept (α) and the slope (β) for the line of best fit to the judgment distances and opinion distances that Figure 2 presents. These estimates are, in turn, used to predict the "expected" opinion-space distance for any given judgment-space distance. The deviation from the expected opinion-space distance is the minimalism-space distance.

Figure 2 presents the thirty-six unique pairs of Justices in opinion space versus judgment space, with a diagonal showing the ordinary least squares fit to the points. As one would expect, the more two Justices disagree on the judgments, the more they tend to disagree on the opinions. In fact, the correlation between the judgment distance and the opinion distance is approximately 0.97, meaning that disagreement on the judgments accounts for the bulk of the disagreement on opinions. In spite of this correlation, however, the deviations from the diagonal line are of interest in attempting to quantify minimalism. Each point above the line represents a pair of Justices who are farther in opinion space than we would expect based on their distance in judgment space. Each point below the line represents a pair of Justices who are closer in opinion space than we would expect based on their distance in judgment space.

To turn these distances in minimalism space into measures of minimalism, we need a model of how minimalism affects opinions relative to judgments. Suppose, therefore, that each Justice has a level of maximalism corresponding to a position in a single-dimensional space similar to that depicted in Figure 1. On this scale a higher number denotes a higher level of maximalism so that, for example, we would expect Justices Scalia and Thomas to have high values and Justice O'Connor to have a low value. Based on Professor Sunstein's work, we would hypothesize that the level of minimalism or maximalism has two distinct effects: higher levels of maximalism should tend to push Justices apart in opinion space, and differences in levels of maximalism between Justices should tend to push Justices apart in opinion space. Similarly, lower levels of maximalism should tend to draw Justices together in opinion space and similar levels of maximalism should draw Justices together in opinion space. The reason is that as Justices become more maximalist, they want to give broader and deeper justifications, which will create opportunities for conflict in the opinions, especially with minimalist Justices but also with other maximalist Justices (though to a lesser extent). As Justices become more minimalist, they are more easily able to agree with other minimalists on narrow, shallow opinions that engage only with the areas of agreement among the Justices.

Translating the verbal model into a mathematical model, let m_i denote the level of maximalism for Justice i , and λ denote a scaling parameter for the relative influence of the two effects

described above (the absolute levels of maximalism and the differences in maximalism). One formalization of the relationship between minimalism and distance in minimalist space for any two Justices i and j can be defined as:

$$\mu_{ij} = \sum_{i=1}^{n-1} \sum_{j=i}^n (m_i + m_j) + \lambda(m_i - m_j)^2$$

The rationale behind this equation is more straightforward than the formalization may initially appear. The first parenthetical term on the right-hand side is a measure of the absolute level of maximalism of each pair of Justices. This reflects the hypothesis that as Justices become more maximalist, they should tend to disagree more on opinions. The second parenthetical term on the right-hand side is a measure of the squared difference in maximalism of each pair of Justices. This reflects the hypothesis that Justices who have very different levels of minimalism should tend to disagree more on opinions. Sunstein's theory (as operationalized here) would predict that both terms should positively contribute to the value of μ_{ij} , which is the excess opinion disagreement, implying that m_1, m_2, \dots, m_9 should be larger for more maximalist Justices, and λ should be positive. To estimate the level of maximalism for each Justice, we find values that satisfy the above equation as nearly as possible with respect to m_i for $i = 1, 2, \dots, 9$ and λ . In other words, this amounts to finding values of minimalism for each of the nine Justices that accounts as well as possible for the excess opinion distance between all the pairs of Justices.

The next step, therefore, is to investigate whether this effect represents systematic differences between Justices on some meta-doctrinal influence like minimalism, or merely random variation. The minimalism estimates do not lend themselves to any obvious distributional assumptions, so I generated confidence intervals using nonparametric bootstrap resampling.⁵² The

52. See generally A.C. DAVISON & D.V. HINKLEY, *BOOTSTRAP METHODS AND THEIR APPLICATION* (1997); BRADLEY EFRON & ROBERT J. TIBSHIRANI, *AN INTRODUCTION TO THE BOOTSTRAP* (1993). The nonparametric bootstrap is a way of assessing the variability of an estimator, such as our estimates of minimalism, without "long-winded and error-prone analytical calculation." DAVISON & HINKLEY, *supra*, at 2-3. The method involves drawing repeated samples from the data and repeating the original calculation over and over, then assessing variability from the distribution of repeated samples. *Id.*

technical details of this approach are beyond the scope of this Article, but the technique essentially involves resampling (with replacement) from the observations (in the case of the Rehnquist Court's constitutional cases, a total of 391 observations) and calculating the statistic of interest based on the resampled "bootstrap sample." This process is repeated many times and a sampling distribution is generated from those bootstrap samples. The repeated bootstrap samples are then turned into confidence intervals for the parameters of interest (the minimalism estimates for the Justices and the value of λ). The bootstrap approach has the advantage of requiring fewer assumptions about a statistical model of the data,⁵³ avoiding a potential pitfall in the relatively complicated estimation described above.

III. THE EVIDENCE FOR MINIMALISM ON THE REHNQUIST COURT

A. *Measuring Maximalism*

The results support the hypothesis of a meta-doctrinal influence in the Rehnquist Court's voting behavior. Figure 3 presents a graphical depiction of the Justices in minimalism space. Each plot in the Figure represents the minimalism-space distance of a Justice on the Rehnquist Court with respect to each other Justice on the Court. In other words, the vertical bars show, for each pair of Justices, whether the opinion-space distance of the pair is higher or lower than what we would expect based on the judgment-space distance. The Justice pairs above the horizontal line represent Justices who are farther in opinion space than we would expect based on their distance in judgment space (that is, far apart in minimalism space), and the Justice pairs below the horizontal line represent Justices who are closer in opinion space than we would expect based on their distance in judgment space (that is, closer together in minimalism space). The height of each bar is a measure of its uncertainty based on nonparametric bootstrap resampling.

53. See TREVOR HASTIE ET AL., *THE ELEMENTS OF STATISTICAL LEARNING: DATA MINING, INFERENCE, AND PREDICTION* 228 (2001) ("[T]he method is 'model-free,' since it uses the raw data, not a specific parametric model, to generate new datasets.").

Figure 3: Minimalism Space Distance—Constitutional Cases

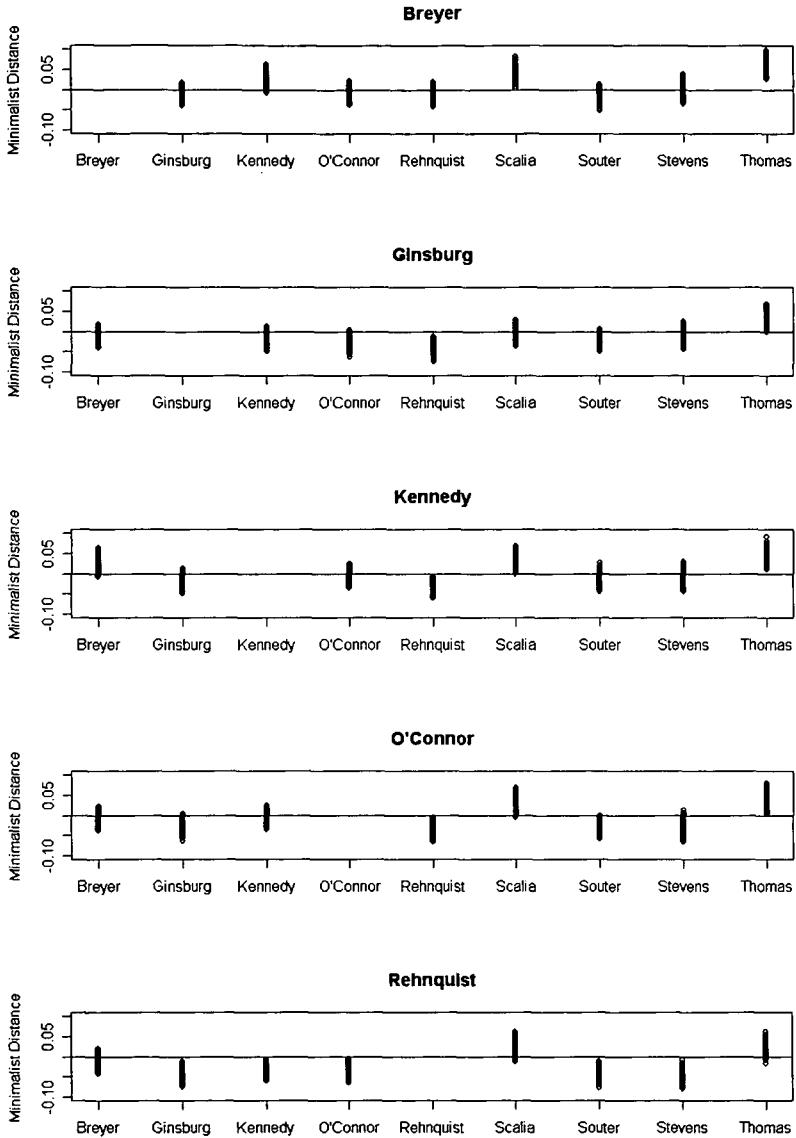


Figure 3 (continued)

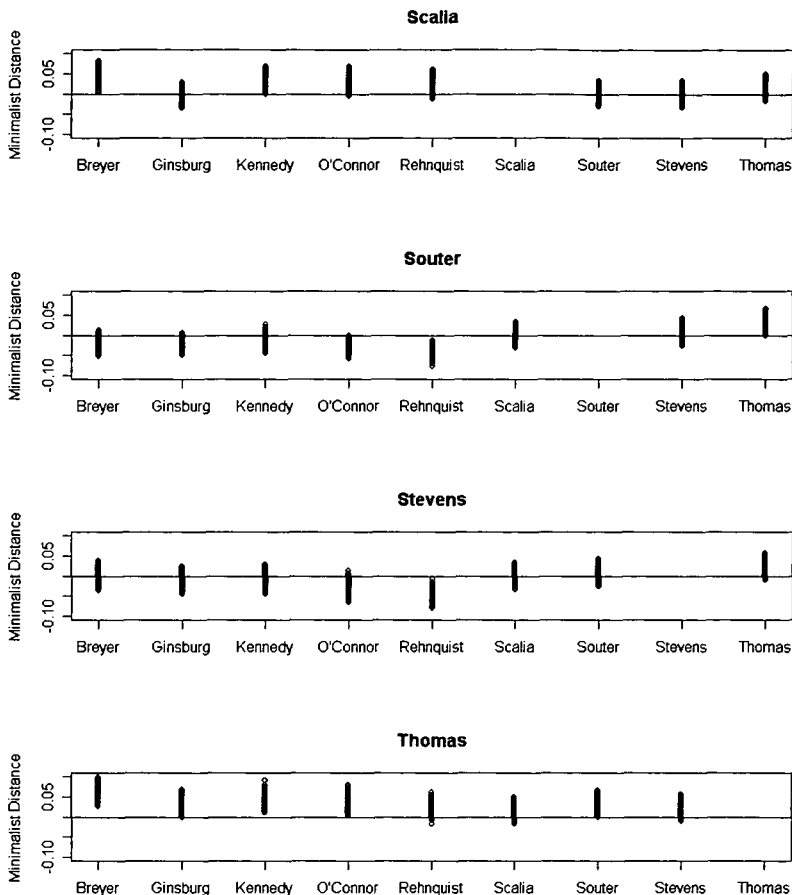


Figure 3 suggests several interesting relationships. First, Justices Scalia and Thomas are relatively far from almost all other Justices in minimalism space, but they are also somewhat far from each other. In contrast, Chief Justice Rehnquist is relatively close to most of the other Justices, including both Justices to whom he is ideologically close (for example, Justice Kennedy) and Justices from whom he is ideologically distant (for example, Justice Stevens), but is quite far from Justices Scalia and Thomas. Justice Breyer is relatively neutral toward all other Justices except Justices Scalia, Kennedy, and Thomas, from whom he is quite distant. The remaining Justices (Justices Stevens, O'Connor,

Kennedy, Souter, and Ginsburg) are relatively close to one another (as well as to Chief Justice Rehnquist), but are all far from Justices Scalia and Thomas. The plots as a whole suggest that Justices Scalia and Thomas are relatively far from everyone else (including each other), but that the other Justices have mixed relationships with their colleagues in minimalism space. At this point it is important to reiterate that the distances in these diagrams have no relationship to the Justices' ideologies—here measured by the patterns of agreement over the judgments.

The next step is to use the model introduced in Part II to translate these distances in minimalism space into estimates of the Justices' positions on the minimalism-maximalism continuum.⁵⁴ The results of this estimation are presented in Table II, divided into columns representing constitutional cases, nonconstitutional cases, and all cases together, respectively. Looking first at the constitutional cases column, many of the results are consistent with Professor Sunstein's predictions. First, Justices O'Connor, Souter, and Ginsburg all have low values of maximalism. Second, Justices Scalia and Thomas have very high values of maximalism (that is, low levels of minimalism); they are both considerably more maximalist than any of the other Justices, and are somewhat far from each other as well. Finally, Justice Stevens is somewhere in the middle of the distribution, which is what we anticipated in Figure 1—namely, that Justice Stevens's status as a "sometimes minimalist" member of the Court means that he does not identify clearly with either extreme on the minimalism-maximalism scale. All of these relationships are consistent with the hypotheses of Sunstein's theory.

54. From this point forward this Article will talk primarily about "maximalism" values, understanding that these are the opposite of "minimalism" values.

Table II: Maximalism Estimates—Rehnquist Court

Maximalism Value Estimates			
Justice	Constitutional Cases	Nonconstitutional Cases	All Cases
Rehnquist	-0.0013 (-0.0260, 0.0554)	-0.0048 (-0.0224, 0.0825)	-0.0171 (-0.0450, 0.0775)
Ginsburg	0.0232 (0.0109, 0.0361)	-0.0143 (-0.0551, 0.0502)	0.0105 (-0.0067, 0.0461)
O'Connor	0.0269 (0.0146, 0.0423)	0.0179 (0.0035, 0.0277)	0.0242 (0.0162, 0.0317)
Souter	0.0272 (0.0158, 0.0401)	0.0079 (-0.0058, 0.0205)	0.0176 (0.0098, 0.0250)
Stevens	0.0312 (0.0150, 0.0491)	0.0194 (-0.0041, 0.0314)	0.0274 (0.0159, 0.0380)
Kennedy	0.0400 (0.0270, 0.0526)	0.0066 (-0.0083, 0.0275)	0.0242 (0.0157, 0.0319)
Breyer	0.0451 (0.0291, 0.0572)	0.0153 (-0.0012, 0.0262)	0.0310 (0.0218, 0.0383)
Scalia	0.0559 (0.0428, 0.0695)	0.0339 (0.0097, 0.0453)	0.0451 (0.0336, 0.0533)
Thomas	0.0659 (0.0497, 0.0787)	0.0253 (0.0048, 0.0359)	0.0463 (0.0352, 0.0536)
λ	8.986 (0.243, 18.807)	0.83 (-6.32, 21.94)	11.2331 (8.88, 19.71)
Bootstrap 95% confidence intervals in parentheses, based on the basic bootstrap method with 1999 bootstrap replicates.			

The Table does reveal several surprises, however, that deviate in important ways from Sunstein's theory. Sunstein depicts Chief Justice Rehnquist as being somewhat maximalist, although certainly not as maximalist as Justices Scalia and Thomas. According to the quantitative measure of maximalism, however, Chief Justice Rehnquist actually had the most *minimalist* estimate⁵⁵ on the

55. Although the point estimate of Chief Justice Rehnquist's maximalism suggests he was the most minimalist, Chief Justice Rehnquist's confidence interval is

Court in constitutional cases.⁵⁶ Similarly, according to Sunstein's theory, Justices Kennedy and Breyer should be among the most minimalist members of the Court, yet according to this measure they are more *maximalist* in constitutional cases than any other Justice except Justices Scalia and Thomas. Further, although it is not surprising that Justices Scalia and Thomas inhabit the maximalist end of the spectrum, it is somewhat surprising both that they are on the opposite end of the scale from Chief Justice Rehnquist and that they are rather far from each other in minimalist space. The latter fact seems to provide support for the hypothesis that maximalists not only find it difficult to agree on opinions with minimalists, but also find it difficult, all other things being equal, to agree on opinions with other maximalists.

The results for nonconstitutional cases are, for the most part, similar to those for constitutional cases. The most obvious difference is that the distances among all the Justices in minimalist space are smaller in nonconstitutional cases. This makes intuitive sense, as Sunstein's theory of minimalism is really about constitutional decision making, and we would expect that minimalism would make less of a difference in statutory cases than in constitutional cases. Another significant difference is that Justices Kennedy and Breyer appear to be considerably more minimalist in nonconstitutional cases, especially Justice Kennedy, who is one of the most minimalist members of the Court in nonconstitutional cases. Finally, Justices Scalia and Thomas, although still somewhat far from each other, appear to switch places in the nonconstitutional cases, with Justice Scalia the more maximalist and Justice Thomas slightly more minimalist. This difference may reflect important differences between the two Justices' constitutional and statutory interpretation approaches, discussed below.

B. Visualizing Minimalism

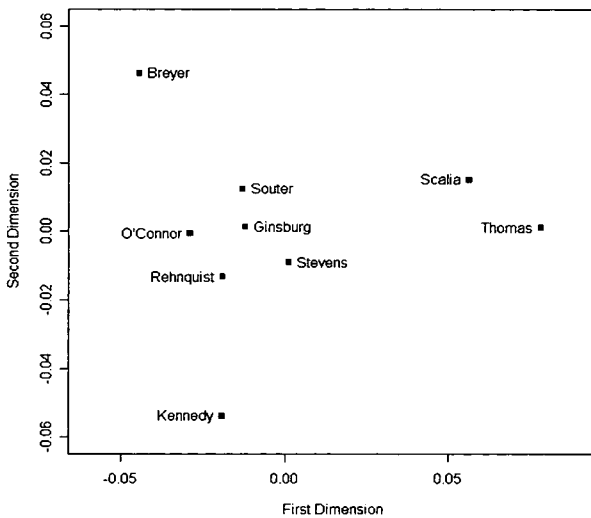
The minimalism space relationships in Figure 3 are somewhat difficult to interpret in their raw form; accordingly, this Part presents a way of visualizing these relationships among the Justices

the widest of all of the Justices, suggesting a considerable amount of uncertainty about his position.

56. At least one commentator has pointed out that Chief Justice Rehnquist seems to belong in Sunstein's "minimalist" category. See Gelman, *supra* note 9, at 2338 ("[I]t is hardly obvious why Chief Justice Rehnquist does not qualify as a minimalist.").

in minimalism space. Figure 4 presents a representation of the distances from Figure 3 in a two-dimensional plane using multidimensional scaling (MDS).⁵⁷ MDS takes as its input the matrix corresponding to the minimalism space distances in Figure 3 and constructs in Figure 4 a configuration of the Justices in a two-dimensional space to correspond as closely as possible to those distances.⁵⁸ The relative positions of the Justices represent, in a graphically interpretable way, the extent to which the patterns of agreements on the opinions differ from the patterns of agreements on the judgments. Justices who are far apart in minimalism space disagree on the opinions more than we would expect from their disagreement on the judgments. Justices who are close in minimalism space agree on the opinions more than we would expect from their agreement on the judgments.

Figure 4: Minimalism Space Distances—Constitutional Cases



57. Specifically, this Article uses metric multidimensional scaling, although ordinal scaling produced virtually identical results.

58. As a result, for two-dimensional space, MDS will take an input distance matrix (in this case the symmetric 9-by-9 matrix of distances between the Justices) and attempt to find locations in 2-dimensional plane such that the distances between those positions match as closely as possible the distances between the Justices in the input matrix.

The relationships described above are apparent in the graphical depiction of minimalism. In Figure 4, we see a cluster of five Justices in the left center (Chief Justice Rehnquist and Justices Stevens, O'Connor, Souter, and Ginsburg), who are all quite close together. The Justices in this cluster are the most minimalist Justices according to the constitutional cases measure in Table II. Situated around the periphery of the Figure are Justices Kennedy and Breyer, who are far from each other and relatively far from the cluster, and Justices Scalia and Thomas, who are somewhat far from each other and even farther from the center cluster. These Justices situated around the periphery are the more maximalist Justices according to the measure in Table II.

The Figure depicts rather clearly the two distinct hypothesized effects of maximalism. First, maximalism tends to push maximalists apart from minimalists, and maximalism tends to push even maximalists apart from one another (hence the "ring" of maximalists encircling the minimalist cluster). Second, minimalism tends to pull minimalists together (hence the center cluster), while keeping them apart from maximalists. We will return to Figure 4 and the interpretation of these measures in Part IV, which explores the meaning of these measures in more substantive terms.

C. *Some Corroborating Evidence*

The evidence presented above requires a caveat: Although the results are consistent with a meta-doctrinal influence like minimalism, the approach in this Article does not directly measure minimalism. In other words, there may be another explanation for the patterns shown above. Indeed, in Part IV.D this Article explores some of the alternative interpretations to the "minimalism" conclusion and rebuts some of those alternative interpretations. In this Part, however, it briefly presents three different kinds of evidence that support the conclusion that this analysis really is measuring something like minimalism. The three pieces of evidence, taken together, provide significant support to the minimalism interpretation.

1. *Dissents from Denial of Certiorari*

The first piece of corroborating data comes from opinions written in dissent from denial of certiorari. In the overwhelming majority of cases, the Court denies certiorari without com-

ment, which is the most minimalist disposition possible.⁵⁹ In some cases, however, Justices who voted to grant certiorari write opinions dissenting from the denial. As discussed above, the hallmark of minimalists is that they “render decisions that are no broader than necessary to support the outcome.”⁶⁰ We would expect, therefore, that minimalists would not write many dissents from denial of certiorari, as it is hard to think of anything more unnecessary to the outcome than dissents from denial of certiorari. In these dissents, Justices provide reasons for why the Court should have decided something that it did not decide, a rationale divorced from a judgment in a case. Indeed, Justice Stevens has described dissents from denial as “totally unnecessary” and “the purest form of dicta.”⁶¹ If minimalism means anything, it certainly must mean avoiding totally unnecessary dicta.⁶² Thus, there is a sense in which the number of dissents from denial of certiorari provides a direct (albeit very rough) measure of minimalism.

The number of opinions written in dissent from denial is presented in the first column of Table III. Justice Thomas is in a class by himself, writing twenty-three dissenting opinions during the period. Justice Scalia is next, with fifteen dissents. The next group is Justice Breyer and Chief Justice Rehnquist, with ten and eleven, respectively. The other five Justices have very few dissents during the period. This rough measure very closely parallels what we would expect from the minimalism measure in the sense that there seem to be two separate groups: one maximalist group with Justices Scalia, Thomas, and Breyer, and one minimalist group with Justices Stevens, O'Connor, Kennedy, Souter, and Ginsburg. The only clear aberration is Chief Justice Rehnquist, who appears more maximalist in this respect than in the minimalism measure. There are different dimensions of minimalism, however, and some of these discrepancies are reversed in the analysis of the next measure.

59. See Sunstein, *Foreword*, *supra* note 1, at 15 (“At the opposite pole from maximalism is reasonlessness, as in a denial of certiorari . . .”).

60. SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 1, at 11.

61. *Singleton v. Comm’r*, 439 U.S. 940, 944–45 (1978) (Stevens, J., respecting denial of certiorari).

62. See Sunstein, *Foreword*, *supra* note 1, at 15 (explaining that minimalists “avoid dicta”).

Table III: Corroborating Evidence

Justice	Dissents from Denial of Certiorari*	Average Opinion Coalition Size	Number of Opinions Written**
Rehnquist	11	5.80	110
Ginsburg	4	5.45	93
O'Connor	4	5.76	141
Souter	1	5.57	119
Stevens	0	5.04	202
Kennedy	4	5.65	134
Breyer	10	5.33	142
Scalia	15	5.11	176
Thomas	23	4.97	147

* Includes only dissents from denial where an opinion was written, and excludes cases where dissent is noted only by a clerk's annotation.
** Includes parts of opinions as separate opinions.

2. Coalition Size

The second piece of corroborating evidence is the size of the coalitions that the Justices join. In his recent article, *Burkean Minimalism*,⁶³ Professor Sunstein hypothesizes a new empirical regularity related to minimalism: Unanimous opinions are more likely to be minimalist.⁶⁴ This is because unanimous opinions are likely to be narrow, as "consensus . . . leads to narrower decisions,"⁶⁵ and shallow, as "diverse people are unlikely to be able to agree on a theoretically ambitious account of some area of the law."⁶⁶ Extending this principle from unanimous opinions slightly, one might hypothesize that minimalist Justices in general write and join opinions that gather broader support,

63. See Sunstein, *Burkean Minimalism*, *supra* note 1.

64. See *id.* at 364–65.

65. *Id.* at 362.

66. *Id.* at 365.

whereas maximalist Justices write and join opinions that gather less support.

The second column of Table III presents some evidence along these lines, giving the average coalition size for each opinion or part of an opinion each Justice joined. Again, Justice Thomas is the most maximalist, with the opinions he wrote or joined attracting only 4.97 votes on average (including Justice Thomas himself). Justices Stevens, Scalia, and Breyer find themselves in the next smallest coalitions, with 5.04, 5.11, and 5.33 votes on average, respectively. The other Justices have larger coalitions, led by Chief Justice Rehnquist, who joined the largest coalitions (5.80 votes), and Justice O'Connor, who joined the second largest (5.76 votes). Again, this measure roughly tracks the primary minimalism measure in this Article, but this time Justice Stevens appears more *maximalist* than in the primary measure.

Combining the two measures into one, we come very close to the original minimalism measure with this new data. If we take the four most maximalist Justices from both measures, the only three to appear in both measures are Justices Scalia, Thomas, and Breyer, our prime candidates for maximalism. In addition, in both measures Justices Scalia and Thomas are the most maximalist, and Justice Thomas is really in a category by himself. All of this parallels the account of maximalism presented above. Thus, these two pieces of independent evidence of minimalism and maximalism provide some support for the interpretation of this Article's results as measuring the minimalism or maximalism of the Justices.

3. Citation Analysis

New research by Professor Frank Cross on citation patterns for Justices on the Rehnquist Court⁶⁷ suggests a third piece of corroborating evidence for this interpretation. Professor Cross hypothesizes that minimalism or maximalism affects the subsequent rate of citation of a Justice's opinions, holding other variables constant. Although Cross does not find strong evidence that minimalism drives citation rates for all Justices, he found general support for Professor Sunstein's taxonomy. More

67. Frank Cross, *The Remarkable Precedential Power of Justice Scalia's Opinions: A Study of Citation Rates* 18 SUP. CT. ECON. REV. (forthcoming 2010).

importantly, and somewhat remarkably, he comes to the same, surprising result about Chief Justice Rehnquist that this Article reaches. Namely, Cross finds that Chief Justice Rehnquist's citation pattern appears more like that of a minimalist than a maximalist. This remarkable similarity between Cross's conclusions and those in this Article, reached using very different approaches, supports the findings here.

D. *Summary and Some Qualifications*

The combination of these data sources shows relatively clear, consistent evidence of some sort of meta-doctrinal divide in the Rehnquist Court. In addition, corroborating evidence suggests support for the idea that this divide is over judicial minimalism. A few qualifications, however, are in order. First, the measure described above is designed to measure the extent to which the Justices disagree about minimalism or maximalism, not whether the Justices are in some absolute sense minimalists or maximalists. Although Professor Sunstein refers to some Justices as "minimalists" or "maximalists," he makes it clear that the term is relative, not absolute.⁶⁸ Thus, although this analysis suggests that the Justices on the Rehnquist Court divided with respect to minimalism, it does not suggest that the Justices are minimalist or maximalist in any absolute sense, or even in an historical context.⁶⁹

The analysis provides evidence not only of a divide over minimalism, but also of two distinct effects of the minimalism-maximalism divide: First, increases in maximalism tend to push the Justices apart; second, differences on the minimalism-maximalism dimension also tend to push the Justices apart. The first effect is reflected in the significantly different estimates for maximalists (such as Justices Scalia and Thomas) versus minimalists (such as Justice Ginsburg). The second effect is reflected in the value of the parameter λ . Although λ is highly unstable for both constitutional and nonconstitutional cases, as the first two columns of Table II suggest, when the cases are combined λ becomes much more stable, as shown in the third column of Table II. As a result, we can reject the null hypothe-

68. See Sunstein, *Foreword*, *supra* note 1, at 15.

69. The question of historical context, however, could be answered by gathering additional data on historical Courts and performing a similar analysis.

sis that the lambda parameter is zero (or negative), meaning that each of the two effects appears to have independent significance in the predicted direction. In light of the instability, however, we cannot say much about the relative importance of the two effects.

IV. THE MEANING OF MINIMALISM

The statistical analysis of opinions and judgments described above provides quantitative evidence that the Justices clash not only over the *content* of opinions, but also over their *scope*. Initially, this conclusion may seem unsurprising; after all, the Justices often quite explicitly emphasize the narrowness of their holdings or criticize the broadness of dicta in other opinions. The cynical observer, however, might regard this minimalist rhetoric as a cloak for substantive disagreement with the majority rather than a genuine preference for narrowness over breadth. That is, we might suspect that the Justices criticize as “unnecessary” or “dicta” those rules that do not support their favored rule, while embracing unnecessary pronouncements and dicta that support their favored rule. This skepticism could lead us to question whether the Justices really disagree over the scope of their opinions, or whether they simply favor narrow, shallow opinions when they disagree with the Court’s holding and broad, deep opinions when they agree.

The findings in this Article, however, challenge that cynical view of the Court and suggest that the Justices really do disagree over how much to decide in opinions. If Justices were only dismissing as “too broad” or “dicta” opinions with which they disagreed, while embracing broad opinions with which they agreed, the patterns of excess agreement and disagreement should wash out when we hold agreement on the judgments constant. Yet the excess agreement or disagreement does not wash out, and we are left to explain why Justices disagree over opinions in ways that they do not disagree over judgments, a phenomenon consistent with, and possibly supportive of, the hypothesis of judicial minimalism. This Part explores some explanations for how minimalism might produce these results and investigates some alternative explanations that might account for this effect.

A. *Interpreting Minimalism*

As suggested above, the tendency of Justices toward minimalism or maximalism is probably best described as a meta-doctrinal phenomenon. Minimalism is a doctrine about the desirable breadth and depth of doctrine, but does not dictate the content of that doctrine. This is how minimalism allows people with diverse doctrinal preferences to bury their differences and compromise.⁷⁰ It may be the reason why in Figure 4 there is a tight minimalist cluster of Justices (Chief Justice Rehnquist and Justices Stevens, O'Connor, Souter, and Ginsburg), some of whom have very different preferences about substantive doctrine, but who share relatively similar meta-doctrinal preferences about breadth and depth. In contrast, maximalism seems to transform latent disagreement into actual doctrinal disagreement. This may explain why in Figure 4 the maximalists Justices Scalia and Thomas are not only far from the minimalists, but also relatively far from each other. Thus, minimalism allows Justices to reach some common ground even when they disagree about a great deal, while maximalism drives Justices apart even when they agree about a great deal.

This feature of the quantitative approach of this Article overcomes a potentially significant criticism of Professor Sunstein's theory of minimalism—that the theory confounds minimalism with “moderation” or even equates minimalism with left-leaning ideological preferences. In Sunstein's formulation, the most minimalist members of the Court are those commonly portrayed as the most moderate members of the Court,⁷¹ with Justice O'Connor as the most common example. In contrast, the most maximalist members of the Court are those portrayed as the most extreme (and the most conservative), with Justices Scalia and Thomas as the common examples. This raises the suspicion that minimalism is simply moderation—or at least nonconservatism—and that minimalist expressions by Justices are merely another way of expressing ideological disagreement. According

70. See SUNSTEIN, *ONE CASE AT A TIME*, *supra* note 1, at 11 (“[M]inimalists generally try to avoid issues of basic principle. They want to allow people who disagree on the deepest issues to converge.”).

71. See, e.g., G. Edward White, *A Multidisciplinary Exploration: Unpacking the Idea of the Judicial Center*, 83 N.C. L. REV. 1089, 1175–79 (2005) (describing “[t]he current association of jurisprudential centrism with what is now typically called judicial minimalism”).

to this argument, there are two potential ways to appear minimalist: A Justice might be able to reach agreement with other Justices of diverse ideological commitments because she is a minimalist, or the Justice may be able to reach agreement with other Justices because she is a moderate.

The findings in this Article, however, allow us to overcome the observational equivalence problem by exploiting the differences between judgments and opinions. By canceling out the differences in judgments, we find that, in contrast to Sunstein's formulation, the most ideologically moderate members of the Court are not always the most minimalist. In fact, Justices Kennedy and Breyer, who sat on opposite sides of the ideological center of the Rehnquist Court, Justice O'Connor, were not particularly minimalist in constitutional cases. In contrast, Chief Justice Rehnquist, who sat relatively far toward the right of the Court, appears to be the most minimalist member of the Court. Thus, the new minimalism measure allows us to avoid the criticism that minimalism is really nothing more than ideological moderation.

B. The Impact of Minimalism on Supreme Court Doctrine

The analysis in this Article suggests that minimalism is a significant influence on the Justices in a statistical sense. But is minimalism significant in the practical sense of having a real-world effect on the Supreme Court's opinions? The answer largely depends on the research question we are interested in investigating. Although it is probably an exaggeration to say that the largest struggles among the Justices on the Rehnquist Court revolved around minimalism, it is probably not an exaggeration to say that minimalism was one of the largest struggles among certain pairs of Justices. Consider, for example, the relationship between Chief Justice Rehnquist and Justice Scalia. Although their absolute distance in minimalism space for constitutional cases is only 0.098, that distance constitutes 43.7% of their total disagreement on opinions. Similarly, consider Justices Scalia and Thomas who, as described above, are very close in judgment space. In both constitutional and nonconstitutional cases, however, Justices Scalia and Thomas are actually farther apart in minimalism space than the average pair of Justices, and the minimalism distance constitutes 63% of their total disagreement on opinions. Thus, if we are trying to investigate the jurisprudential differences between two very different Justices, such as Justices Thomas and Ginsburg, minimalism is likely to be a minor issue, even though Thomas is

quite maximalist and Justice Ginsburg quite minimalist. But if we are trying to investigate the differences between Chief Justice Rehnquist and Justice Scalia, who are rather close ideologically, this analysis suggests that minimalism might be an important part of the explanation.

In fact, the relationship between Justices Scalia and Thomas is an excellent example of the research questions to which this measure of minimalism can lead. Justices Scalia and Thomas do not disagree very often; they cast different votes on the judgment in only about 6.5% of cases. As a result, they are often treated as indistinguishable in both scholarly and journalistic accounts of the Court. Yet, as discussed earlier, Justices Scalia and Thomas are relatively far apart in minimalism space, both in constitutional and nonconstitutional cases. Even more interesting is that although Justice Thomas appears the most maximalist on constitutional issues, Justice Scalia appears the most maximalist on nonconstitutional issues. What is it about these two Justices that leads Justice Scalia to more maximalist approaches in statutory cases and Justice Thomas to more maximalist approaches in constitutional cases? Although various answers might be proposed,⁷² the important point for present purposes is that there is something that pushes these two Justices apart that merits exploration and explanation.

C. *An Example: Webster v. Reproductive Health Services*

The discussion over minimalism up to this point has been somewhat abstract, with few individualized references to specific Supreme Court cases. To make the intuition about the conflict over minimalism more accessible, consider the example of *Webster v. Reproductive Health Services*.⁷³ *Webster* is a particularly apt case because it provides a stark example of conflict over minimalism but is not included in the data for this analysis, thus providing an additional out-of-sample data point. In *Webster*, individual plaintiffs (three physicians, a nurse, and a social

72. One answer might be Justice Scalia's greater tendency than Justice Thomas to respect stare decisis, even in constitutional cases. See Ryan, *supra* note 20, at 1631 ("Justice Scalia—much more so than Justice Thomas—is willing to dilute his originalism with a healthy dollop of stare decisis.").

73. 492 U.S. 490 (1989). Note that *Webster* was decided before Justices Souter, Thomas, Ginsburg, and Breyer joined the Court.

worker), along with two organizations, challenged a Missouri statute that imposed a variety of restrictions on abortion.⁷⁴ The plaintiffs argued that the statute violated the constitutional requirements of *Roe v. Wade*⁷⁵ and its progeny and requested declaratory and injunctive relief. The district court agreed with the plaintiffs and struck down several provisions of the act.⁷⁶ The Eighth Circuit affirmed, except for one issue not relevant to the Supreme Court case.⁷⁷ The Supreme Court reversed the Eighth Circuit in the type of fractured opinion we have come to expect of the Supreme Court's abortion decisions. The majority opinion, written by Chief Justice Rehnquist, clearly exposes the key fault line between the minimalists and the maximalists on the Rehnquist Court.

The *Webster* Court split 5-4 on the judgment, with the Justices voting with the majority writing three separate opinions. Chief Justice Rehnquist wrote an opinion, part of which constituted the majority opinion and part of which constituted the plurality opinion (joined only by Justices White and Kennedy).⁷⁸ The majority opinion upheld two sections of the Missouri act and punted the decision on two other sections as moot or otherwise unnecessary to decide.⁷⁹ The plurality opinion, joined by Justices White and Kennedy, was characterized by a minimalist approach, criticizing the maximalism of the "rigid trimester analysis"⁸⁰ of *Roe v. Wade* and advocating a Constitution "cast in general terms . . . and usually speaking in general principles."⁸¹ The plurality further criticized the maximalist tendency of the abortion decisions, lamenting that those decisions have created "a web of legal rules that have become increasingly intricate, resembling a code of regulations rather than a body of constitutional doctrine."⁸² Thus, the plurality opinion clearly (and self-consciously) steered a moderately minimalist course, acknowledging a conflict with *Roe* but blaming the "rigid" "legal rules" of *Roe* for the conflict.

74. *Id.* at 501-02.

75. 410 U.S. 113 (1973).

76. *Webster*, 492 U.S. at 502-03.

77. *Id.* at 503-04.

78. *Id.* at 498-99.

79. *Id.* at 498, 506-07.

80. *Id.* at 517.

81. *Id.* at 518.

82. *Id.*

In contrast to the plurality opinion, the special concurrences of Justices O'Connor and Scalia took extreme and diametrically opposed positions on the minimalism dimension. Although Justices O'Connor and Scalia agreed on the judgment in the case, they disagreed about the breadth of the rule. On the minimalist side, Justice O'Connor concurred in the judgment, but objected to Chief Justice Rehnquist's plurality opinion on the grounds that there was "no necessity to accept the State's invitation to reexamine the constitutional validity of *Roe v. Wade*."⁸³ Justice O'Connor thought the Court should not "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'"⁸⁴ On the maximalist side, Justice Scalia also criticized the Rehnquist plurality opinion, calling the Court's holding "the most stingy possible" and urging the Court to reconsider *Roe v. Wade* rather than "avoid[ing] the question."⁸⁵

The *Webster* case presents the conflict over minimalism very clearly, with Justices disagreeing explicitly over the scope of the appropriate decision. The Justices who agreed on the judgment splintered into three camps, largely over how much to decide and how much to leave undecided. The *Webster* case does not, however, appear as a prominent example of the minimalism rift in Professor Sunstein's work. In part, this is probably because Sunstein's focus is primarily on the latest iteration of the Rehnquist Court, and a handful of Justices had not yet joined the Court at the time of *Webster*. It also seems probable, however, that Professor Sunstein overlooked *Webster* as an ideal illustration of minimalism because he had not seen Chief Justice Rehnquist as a minimalist. Thus, the example of *Webster* shows how a quantitative measure of minimalism, while admittedly rough, can contribute to greater understanding of some of the most significant modern cases.

83. *Id.* at 525 (O'Connor, J., concurring in part and concurring in the judgment).

84. *Id.* at 526 (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

85. *Id.* at 534-37 (Scalia, J., concurring in part and concurring in the judgment). He also characterized part of Justice O'Connor's analysis as "[s]imilarly irrational." *Id.* at 536 n.*.

D. Objections to the Minimalism Measure

The statistical analysis presented above cannot prove that minimalism is the sole, or even primary, cause of the patterns identified in this Article. It is possible that the systematic influences identified here as meta-doctrinal actually reflect the effect of some other disagreement or difference among the Justices. This Part explores some alternative explanations that could account for the phenomenon identified here; it seems that the many initially attractive alternative explanations are quite vulnerable upon closer scrutiny. Ultimately, whether the measure of meta-doctrine in this Article captures minimalism or some other phenomenon, the patterns identified here are still very important to studying the Court and its decisions. Whether the cause is minimalism, some other meta-doctrine, or some other influence altogether, systematic differences in patterns of agreement over such elements as general and fundamental as judgments and opinions require an explanation.

1. Theories of Constitutional Interpretation

The most obvious objection to the measure of minimalism developed in this Article is that the measure may not really capture minimalism, but rather some disagreement over substantive approaches to constitutional interpretation. That Justices Scalia and Thomas are off to one side, relatively far away from the other Justices, suggests an obvious suspect: originalism. The problem with this interpretation from a substantive perspective, however, is the trouble it poses for the rest of the configuration. After all, although Justice Kennedy certainly is not an originalist in the same way Justices Scalia and Thomas are, it would seem very strange for Justices Scalia and Thomas to be closer to Justice Stevens in Figure 4 than to Justice Kennedy (or for that matter, to Chief Justice Rehnquist) if the diagram were depicting divisions based on originalism. Moreover, it would not make sense for two Justices, as they become more originalist, to disagree more with each other on the opinions (holding constant the difference in originalism between them). But that is what we do observe with our maximalism measure, and in fact, the absolute measure of maximalism appears to dominate the difference of maximalism in the minimalism space. Thus, originalism, although initially appealing, does not make substantive sense in the context of this configuration.

There are also more general reasons for skepticism about whether some alternative theoretical commitment (such as originalism) could account for these results. The differences between the judgment space and the opinion space are caused by a mismatch between what the Justices *say* by writing and joining opinions and what they *do* by voting on the judgments. Almost any other philosophical or jurisprudential commitment that affected the opinions would also affect the judgments in individual cases and therefore would not produce a distance in minimalism space using this measure. It is the special nature of minimalism—that it affects how much the Justices say in the opinions but not what they do in the judgments—that makes it emerge through this technique.⁸⁶ Perhaps, however, there is some theoretical disagreement among the Justices that very regularly rears its head in opinions and has little or no effect on the judgments. Ironically, such a case might actually be evidence *for* a minimalism divide, not evidence *against* it.⁸⁷

2. *Fractiousness or Proclivity to Write Separately*

Another possibility is that the results in this Article reflect nonideological, even stylistic, differences among the Justices, such as how likely Justices are to write separate opinions or how picky Justices are about the opinions they join. One argument would be that a Justice's proclivity to write his or her own separate opinions, such as separate concurrences or dissents, is what drives Justices like Justice Scalia (who writes many opinions) apart from Justices like Justice Ginsburg (who writes few).

Although this interpretation works well for some Justices, it does not work well for others. Consider the third column of Table III, above, which presents the number of opinions (and parts of opinions) written by each Justice. Justice Stevens, for example, wrote the most opinions (by far) of any of the Justices,⁸⁸ yet he is in the center minimalist cluster of Figure 4. Similarly, Justice O'Connor, who is minimalist by all measures, wrote approximately as many opinions as Justice Thomas, who

86. Even *stare decisis*, which is, in a sense, the paradigmatic meta-doctrinal concept, would generally affect the judgments in cases, not just the opinions.

87. See *infra* Part IV.D.4.

88. Because Table III only takes into account opinions written from 1994–2005, Stevens's longevity on the Court is not a factor.

is maximalist by all measures. Thus, the number of opinions written cannot be driving these results. Moreover, even if we did find that maximalists consistently wrote more opinions than minimalists (and there is some evidence of this, albeit inconsistent), there are reasons to think that such a pattern is exactly what we would expect from maximalists under Professor Sunstein's theory. By definition a maximalist has more to say, whether others agree with his views or not.

3. *Rules versus Standards*

One alternative explanation of the results in this Article, however, does seem to withstand scrutiny. That is, the phenomenon presented here might really be capturing the preferences of Justices for rules versus standards, rather than maximalism versus minimalism. An interpretation based on rules versus standards makes a certain amount of sense in the present context. It is easy to imagine a situation where two Justices are able to agree on decisions in concrete fact patterns (the judgments) but disagree about whether to justify those decisions by reference to rules or standards in the opinions. Similarly, it seems plausible that two Justices who are standards-oriented could find agreement on opinion language, notwithstanding substantive disagreement, and that two Justices who are rule-oriented could find disagreement on opinion language, notwithstanding substantive agreement. Thus, it seems at least plausible that preferences for rules versus standards could produce similar patterns.

The question whether the distinction between rules and standards or maximalism and minimalism accounts for the results does not seem to make much difference for the key results of this Article. First, both are meta-doctrinal preferences of the Justices, so the results still establish, for the first time, evidence of a meta-doctrinal divide in the Court. Second, at least in the context of the Rehnquist Court, there seems to be a close connection between rules and maximalism on the one hand and standards and minimalism on the other, and indeed scholars often lump the two categories together.⁸⁹ It may be that the rules-standards

89. See, e.g., Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 40 (2004) (equating minimalism with "standards" and maximalism with "rules"); see also Edward Lee, *Rules and Standards for Cyberspace*, 77 NOTRE DAME L. REV. 1275, 1300

distinction is nothing more than a special case of the minimalism-maximalism distinction: Rules say more than is necessary to resolve individual cases, and standards rely on the case-by-case evaluation of unique fact patterns.⁹⁰ Indeed, even Professor Sunstein agrees that the distinction between rules and standards in the Supreme Court context is often very close to distinctions between minimalism and maximalism.⁹¹

In light of the close relationship between the two concepts, it is encouraging that the "Justices of standards" generally turn out to be the minimalist Justices in this analysis and that the "Justices of rules" generally turn out to be the maximalist Justices in this analysis.⁹² It is interesting to note, however, that both rules-standards scholarship and maximalism-minimalism scholarship places Chief Justice Rehnquist in the maximalist-rules category,⁹³ whereas this analysis suggests that he belongs in the minimalist-standards category. Similarly, both approaches place Justice Kennedy in the minimalist-standards category,⁹⁴ whereas this analysis suggests that he belongs (somewhat more) in the maximalist-rules category. The temptation to see the ideological middle as minimalist and the ideological extremes as maximalist seems to have influenced the way Professors Sunstein and Sullivan interpret Chief Justice Rehnquist's role on the Court.

(2002) (describing "two general approaches" that lie "along a continuum, going from minimalist standards on one end to maximalist rules on the other end").

90. At the same time, it seems obvious that rules are not *necessarily* minimalist or maximalist. A rule can be very narrow (applying only to very circumscribed fact patterns) and shallow (in the limiting case, arbitrary). Similarly, a standard might apply to a quite broad set of possible fact patterns (and therefore be broad), and might rely on a very deep theoretical justification (and therefore be deep).

91. See Sunstein, *Foreword*, *supra* note 1, at 52; see also Sunstein, *Problems with Minimalism*, *supra* note 14, at 1902 ("Any defense of minimalist adjudication is essentially the same in principle as a defense of standards over rules . . ."). In particular, Sunstein states that Justice O'Connor's "preference for minimalism is very close, analytically, to a preference for standards over rules," but is "not identical." *Id.* at 1909.

92. Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 95–107 (1992).

93. See, e.g., *id.* at 113 n.567 ("Justice Scalia's approach to the three levels of the rules/standards question usually attracts Chief Justice Rehnquist and Justice Thomas, and sometimes Justice White.").

94. See *id.* at 117 ("Together with Justice Stevens, Justices O'Connor, Kennedy and Souter last Term evinced a skepticism toward rules suggesting quite a different view of knowledge from that of Justice Scalia's."); see also *id.* at 122 ("When Justices O'Connor, Kennedy, and Souter proved to be Justices of standards, they slowed the Court's predicted veer to the political right.").

4. *General Reasons for the Minimalism Interpretation*

The possibility remains, of course, that some other substantive theoretical disagreement is the real driving force behind this Article's minimalism result. The Justices may disagree on some issue or group of issues that divides them in opinion writing but that has no systematic effect in how they actually decide cases. In looking for such an alternative explanation, we need not look very far. Any such explanation would need to arise in a significant portion of the cases to account for the phenomenon described here. This requirement probably rules out differences related to any specific issue, even high-profile issues such as free speech or abortion. Thus, we are most likely looking for something like a meta-doctrinal disagreement, a disagreement that could, at least in principle, arise in any sort of case. But even with this narrowing of the alternative explanations, we cannot prove that minimalism, rather than some other meta-doctrinal disagreement, accounts for the empirical regularities described in this Article.

We may not, however, need to exclude other explanations for the results here to provide strong evidence of minimalism. Recall that a plausible alternative explanation would require finding a source of theoretical disagreement among the Justices that affects the opinions they write and join, but has little practical "bite" in their decisions on judgments. But even if there were some deep theoretical rift that somehow has no bite in the judgments, that fact itself would suggest that differences over minimalism and maximalism divide the Justices. After all, minimalists would surely shrink from engaging in a theoretical debate that had no practical import on judgments—what could be more "unnecessary" than theorizing that has no effect on the Court's decisions in concrete factual situations?

This means that observing a systematic difference between opinions and judgments would be evidence of at least *maximalism* in the Justices' decision making: The more that Justices engage in this type of inconsequential theoretical bickering, the more likely they are to embrace a maximalist perspective, pulling them apart from one another on the opinions. Moreover, there must be differences in the levels of maximalism among the Justices; otherwise we would not have the two separate effects that we observe. As a result, even if the minimalism measure in this Article is really capturing some other ideological or juris-

prudential difference among the Justices, it seems likely that minimalism versus maximalism is behind the results as well.⁹⁵

5. Professor Siegel's Analysis

The final objection to minimalism brings us back to part of the motivation for this Article: Professor Neil Siegel's argument that Professor Sunstein's minimalism is an inaccurate descriptive account of the Rehnquist Court. Writing in the *Michigan Law Review*, Professor Siegel develops an "operational definition" of minimalism that classifies decisions as minimalist only if they "(a) result from the (apparently) intentional choice by a majority of the Justices (b) to decide a case on the narrowest and shallowest grounds reasonably open to them, even though broader and deeper rationale(s) were reasonably available."⁹⁶ He does so because "[t]o the extent the theory of judicial minimalism aspires to be a descriptively accurate account of the Court's work, it requires a relatively crisp operational definition that can be falsified,"⁹⁷ and the definition Siegel develops, he argues, is the "only version of minimalism that does not incorporate criteria so vague and contestable as to render the theory nonfalsifiable and thus empirically useless."⁹⁸ With this falsifiable version of minimalism in hand, Siegel analyzes a selection of cases from the October 2003 Term of the Supreme Court and finds their minimalism wanting according to his operational definition.⁹⁹ He therefore concludes that, to the extent the October 2003 Term is "illustrative of a larger reality," Sunstein's theory of minimalism is "descriptively false."¹⁰⁰

95. A related point is the possibility that the opinions are simply a better measure of ideology than the judgments and that consequently the difference merely reflects the "extra" ideology in the opinions. This seems plausible because the opinions really carry the ideological content of the Justices' decisions. The problem with this explanation is that if the opinion measure were only a more accurate measure of ideology, then we would not expect to see statistically significant differences between opinions and judgments, just more noise in the judgments. Thus, we are left with the conclusion that, at a minimum, the opinions reflect *different* ideological structures than the judgments.

96. Siegel, *supra* note 10, at 1963.

97. *Id.* at 2018.

98. *Id.* at 1956.

99. Siegel's method obviously involves considerable subjectivity. The approach in this Article is designed to avoid such subjectivity.

100. *Id.* at 2018.

The criticisms Siegel levels against Sunstein's work, however, arguably set up a strawman version of Sunstein's theory of minimalism.¹⁰¹ In reading Sunstein's work, it seems clear that minimalism is, as Sunstein says in multiple places, "relative, not absolute."¹⁰² Thus, Siegel's operational definition of minimalism, formulated in absolute terms, seems inapposite when the notion of minimalism itself is necessarily relative. As other commentators have pointed out, "[o]ne can almost always imagine a narrower and shallower decision, unless the Court has simply denied certiorari without comment. And there is always a broader possible outcome (for example, all laws are unconstitutional), which makes any actual decision seem minimal."¹⁰³ Siegel's analysis seems to emphasize language Sunstein used in an opinion piece—that minimalists decide cases "as narrowly as possible."¹⁰⁴

Siegel's piece, however, seems to have anticipated an empirical test along the lines developed in this Article. As noted above, Siegel initially says that his falsifiable version "is the only version of minimalism that does not incorporate criteria so vague and contestable as to render the theory nonfalsifiable and thus empirically useless."¹⁰⁵ Yet Siegel notes later on that "a respectable minimalism of *relative* narrowness and shallowness, both empirically and normatively, may still be possible."¹⁰⁶ Indeed, Siegel suggests an alternative formulation of Sunstein's hypothesis, namely that "a majority of the Justices (whether considered individually or collectively) tend to favor *relatively* narrow and shallow holdings . . . even if they do not go so far as to adopt the narrowest and shallowest rationale reasonably available," which Siegel says "could nonetheless then be subjected to empirical testing."¹⁰⁷ This Article has attempted to provide support for exactly that hypothesis—that some Justices tend to favor relatively narrow and shallow holdings—which is the hypothesis Sunstein appears to have proffered in the first place.

101. See Cass R. Sunstein, *Testing Minimalism: A Reply*, 104 MICH. L. REV. 123 (2005).

102. SUNSTEIN, ONE CASE AT A TIME, *supra* note 1, at 10; Sunstein, *Foreword*, *supra* note 1, at 15.

103. Gelman, *supra* note 9, at 2301–02.

104. Cass R. Sunstein, Op-Ed., *The Smallest Court in the Land*, N.Y. TIMES, July 4, 2004, at WK9.

105. Siegel, *supra* note 10, at 1956.

106. *Id.* at 1965 (emphasis added).

107. *Id.* at 2018.

E. *A Summary and Some Affirmative Reasons for This Measure of Minimalism*

The discussion in the preceding Part identified and discussed several alternative interpretations of the results in this Article, attempting to defend the basic idea of minimalism against some likely objections. Although each of the objections and alternative explanations seems to have serious flaws, the list of potential alternative explanations is endless. Therefore, rather than merely dismissing the primary alternative candidates, it also makes sense to focus on the affirmative reasons that we might believe this measure captures the distinction between minimalism and maximalism. There are two key affirmative reasons for accepting the measure, each of which, in its own right, suggests possible further insights about minimalism on the Supreme Court.

The first affirmative reason for believing this measure of minimalism is the difference in the results between constitutional and nonconstitutional cases. The difference between judgments and opinions is much smaller when we look at the nonconstitutional cases than when we look at the constitutional cases. In fact, it is not even clear that there is a statistically significant distinction between the Justices in the nonconstitutional cases, whereas several of the minimalists and maximalists are clearly distinct in the constitutional cases. This is consistent with the hypothesis suggested in Part III, specifically, that constitutional cases are where one would expect to see the greatest distinction between minimalism and maximalism.

The second affirmative reason for accepting this measure of minimalism is the statistical support for two distinct effects of maximalism. The first effect is that the total amount of maximalism of two Justices tends to push those Justices away from each other (holding differences in maximalism constant), and the second effect is that differences in maximalism between two Justices tend to push Justices away from each other (holding the total maximalism constant). The combination of these two effects tends to dismiss most alternative explanations of the measure. For example, differences in theoretical approach to constitutional interpretation account for the second effect, but not the first. Similarly, differences among Justices arising from personality traits or stylistic preferences account for the first effect, but not the second. In short, the combination of these

two effects seems to suggest that something like minimalism was at work in the Rehnquist Court.

V. LOOKING AHEAD TO THE ROBERTS COURT

This new perspective on minimalism in the Rehnquist Court naturally raises questions about the direction of the Court with Chief Justice Roberts at the helm. Will Chief Justice Roberts follow the minimalist lead of his predecessor, or will he side with Justices Scalia and Thomas on minimalism versus maximalism and standards versus rules? Professor Sunstein, for his part, has already weighed in, identifying Chief Justice Roberts as a minimalist.¹⁰⁸ But if Sunstein is wrong and Chief Justice Roberts turns out to be a maximalist, then we might see a difference in the scope of Supreme Court opinions. If, for example, there is a "swing" or "median" Justice on the minimalism dimension, just as scholars have hypothesized along the left-right ideological dimension, then switching from a minimalist Chief Justice Rehnquist to a (possibly) maximalist Chief Justice Roberts would make the median Justice more like Justices Scalia or Thomas and less like Justice O'Connor.¹⁰⁹ Likewise, the replacement of Justice O'Connor with Justice Alito could move the median further in the maximalist direction. This, so the story goes, would cause the overall level of maximalism of the Court to move slightly in the direction of Justices Scalia and Thomas and away from narrow, shallow rulings.

The preliminary data from the Roberts Court suggest that minimalists need not worry about a major change in the minimalism of the Court. Table IV sets forth maximalism estimates for the Roberts Court through the October 2007 Term.¹¹⁰ The estimates suggest that Chief Justice Roberts is considerably less maximalist

108. See, e.g., Cass R. Sunstein, Op-Ed., *The minimalist*, L.A. TIMES, May 25, 2006, at B11.

109. It is not clear that the median Justice along the minimalism dimension is meaningful in the same way that the median Justice along substantive issue dimensions is meaningful. Indeed, the significance of the median Justice along even substantive issue dimensions is itself controversial in an environment with multidimensional issues such as the Supreme Court. See generally Anderson & Tahk, *supra* note 48.

110. The estimates in this Table are not broken out into constitutional cases and nonconstitutional cases because there are so few data available for the Roberts Court. The data used include only cases in which Chief Justice Roberts and Justice Alito participated.

than Justices Scalia and Thomas, and fits squarely within the minimalist cluster of Justices Stevens, Souter, and Ginsburg. Although it is still much too early to draw definitive statistical conclusions about Chief Justice Roberts's exact placement, he may be among the more minimalist members of the Court remaining after Chief Justice Rehnquist's and Justice O'Connor's departures.

Table IV: Maximalism Estimates—The Roberts Court

Justice	Maximalism Estimates (All Cases)
Souter	0.00248 (-0.0211, 0.0206)
Kennedy	0.0159 (-0.0052, 0.0363)
Alito	0.0164 (-0.0090, 0.0467)
Roberts	0.0175 (0.0036, 0.0303)
Breyer	0.0251 (0.0047, 0.0448)
Ginsburg	0.0313 (0.0020, 0.0566)
Stevens	0.0366 (-0.1268, 0.0586)
Thomas	0.0439 (0.0207, 0.0674)
Scalia	0.0518 (0.0232, 0.0715)
Lambda	6.697 (-36.099, 21.453)
Bootstrap 95% stability intervals in parentheses, based on the basic bootstrap method with 999 bootstrap replicates.	

The evidence on Justice Alito suggests he is similar in minimalism to Chief Justice Roberts. The estimate for Justice Alito's maximalism is 0.0164, which would make him less maximalist than Justices Scalia and Thomas and quite close to Chief Justice Roberts. Again, however, at this point, it is too early to draw any definitive statistical conclusions, as the number of available data points is rather limited. What we can say with some confidence, however, is that we do not see any evidence of an abrupt move toward maximalism in the Roberts Court. This is significant because a rather dramatic move might have been possible with the replacement of two of the leading minimalists on the Court, Chief Justice Rehnquist and Justice O'Connor.

More broadly, the finding that both Chief Justice Rehnquist and Chief Justice Roberts seem to have tendencies toward judicial minimalism invites institutional explanations that focus on the role of the Chief Justice as an explanation of their minimalist behavior. The Chief Justice's power to assign opinions when he is in the majority could account for the tendency toward minimalism. This institutional explanation seems to weaken, however, when we consider that we should see similar effects with Justice Stevens, who assigned opinions as the Senior Associate Justice throughout the period whenever he was in the majority and the Chief Justice was not, yet Justice Stevens does not seem to have so unexpectedly a minimalist position as Chief Justice Rehnquist. Moreover, as I have argued elsewhere,¹¹¹ there are good reasons to doubt the significance of the prerogative of opinion assignment on the ultimate outcome of the opinion. To the extent that the institutional explanation of the Chief Justice's position is persuasive, the reason probably would be that the Chief Justice has a heightened interest in preserving the prestige and legitimacy of the Court as an institution, an interest that overrides ideological or doctrinal quibbles. But even if true, this explanation is just another manifestation of minimalism, albeit with a more clearly theorized motivation.¹¹²

111. See Anderson & Tahk, *supra* note 48, at 819.

112. In this regard, it would be interesting to contrast Chief Justice Rehnquist's voting behavior as an Associate Justice with his subsequent voting behavior as Chief Justice. The methods described here, with slight modifications, could be used to examine the differences, if any, between the "two Rehnquists." There is some evidence that Chief Justice Rehnquist's behavior did indeed change when he became Chief Justice, so this analysis could prove fruitful in later work. See, e.g.,

CONCLUSION

The data suggest a surprisingly important role for minimalism in the Rehnquist Court, supporting the hypothesis that a majority (but not all) of the Justices exhibited a meta-doctrinal influence like judicial minimalism in their opinion writing and voting. The data support Professor Sunstein's hypothesis that the Justices regularly divided over *how much* to decide, joining and writing opinions in part based on preferences over minimalism, or at least some meta-doctrinal influence close to minimalism. In contrast to Sunstein's account, however, the analysis also reveals that Chief Justice Rehnquist was much more of a force for the conservative minimalism of Justice O'Connor than for the conservative maximalism of Justices Scalia and Thomas. Indeed, in terms of minimalism, the voting decisions of Chief Justice Rehnquist appear closer to the voting decisions of Justices O'Connor, Souter, and Ginsburg than to those of Justices Scalia and Thomas. Thus, although some of the findings conflict with Sunstein's categorization, the analysis here supports his claim that minimalism was an important feature of the Rehnquist Court and that "we can obtain a far better understanding of its distinctive character, and of continuing debates within the Court itself, if we keep this point in view."¹¹³

Frank B. Cross & Stephanie Lindquist, *The Decisional Significance of the Chief Justice*, 154 U. PA. L. REV. 1665, 1690–96 (2006).

113. SUNSTEIN, ONE CASE AT A TIME, *supra* note 1, at 262.

TESTING THE BOUNDARIES OF THE FIRST AMENDMENT PRESS CLAUSE: A PROPOSAL FOR PROTECTING THE MEDIA FROM NEWSGATHERING TORTS

ANTHONY L. FARGO* & LAURENCE B. ALEXANDER**

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* Associate Professor, Indiana University School of Journalism, Bloomington; M.A. and Ph.D., University of Florida; B.A., Morehead State University. The Author wishes to thank Sheng Yuan and Kristen Stetzenbach for their research assistance.

** Professor, College of Journalism and Communications, University of Florida; Ph.D., Florida State University; J.D., Tulane University; M.A., University of Florida; B.A., University of New Orleans. The Author wishes to thank Jasmine McNealy for her research assistance.

The use of undercover techniques and deception to gather news, which became a hot topic for journalists and media attorneys after the highly publicized Food Lion incident in the 1990s,¹ recently resurfaced as a controversial issue as a result of NBC's *To Catch a Predator* series on the *Dateline* news magazine show.² The series, in which NBC worked with police agencies and an Internet watchdog group called Perverted Justice³ to lure men who allegedly wanted to have sex with minors they met online to decoy houses to be humiliated on TV and then arrested, has apparently lost its luster.⁴ In 2008, NBC Universal, the network's parent company, settled a lawsuit filed by the family of a prosecutor who committed suicide in Texas when police and a *Dateline* crew surrounded his home after he failed to show up at a decoy house.⁵ In refusing to dismiss some of the claims against NBC, the judge in the lawsuit became one of the latest individuals to suggest that NBC had violated journalistic ethics and common decency to boost ratings.⁶

The *Predator* controversy both illuminates and obscures legal issues about surreptitious reporting. Moreover, *Food Lion* and similar cases have raised more questions than they have answered about the legal boundaries for newsgathering behavior. These questions include: To what extent, if any, are journalists protected from tort actions when they engage in fraud or other questionable behavior to research a story? To what extent does the public interest served by a story mitigate tort liability? Is there a way to protect newsgathering methods that are fraudu-

1. See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999); see also *infra* text accompanying notes 112–25.

2. See Douglas McCollam, *The Shame Game: 'To Catch a Predator' gets the ratings, but at what cost?*, COLUM. JOURNALISM REV., Jan.–Feb. 2007, at 28; Steven Levy, *All Predators, All the Time? Maybe Not.*, NEWSWEEK, July 3, 2006, at 20.

3. Perverted Justice, <http://www.perverted-justice.com> (last visited Mar. 9, 2009).

4. See Brian Stelter, *'To Catch a Predator' Is Falling Prey to Advertisers' Sensibilities*, N.Y. TIMES, Aug. 27, 2007, at C1 (noting that NBC had filmed seven episodes of the segment in 2006 but only one in 2007). The *To Catch a Predator* website has clips and other information from a January 2008 sting in Kentucky but no announcements of future episodes. See *Dateline NBC—To Catch a Predator with Chris Hansen*, <http://www.msnbc.com/id/10912603> (last visited June 20, 2008).

5. Brian Stelter, *NBC Settles With Family That Blamed a TV Investigation for a Man's Suicide*, N.Y. TIMES, June 26, 2008, at C3. Terms of the settlement were not disclosed.

6. *Conrad v. NBC Universal, Inc.*, 536 F. Supp. 2d 380, 396–97 (S.D.N.Y. 2008); see also Adam Cohen, Editorial, *What's on TV Tonight? Humiliation to the Point of Suicide*, N.Y. TIMES, Mar. 10, 2008, at A16; McCollam, *supra* note 2, at 30–31.

lent, deceptive, or intrusive if they serve the public interest but not if they are used for arguably less honorable ends?

This Article examines these and other questions and offers a possible solution to the problem of holding journalists liable for their methods of newsgathering when the news has high public-interest value. In Part I, the Article examines the formidable problem created by the Supreme Court's First Amendment jurisprudence, which generally has not recognized any special rights protecting the news media's activities. Assuming that the precedents are not completely dispositive in regard to the topic explored here, the Article turns in Part II to examining the legacy of *Cohen v. Cowles Media Co.*⁷ and its most high-profile progeny, *Food Lion*⁸ and *Desnick*,⁹ which together demonstrate the disparities in the ways that the courts have judged newsgathering torts and balanced plaintiffs' damages against the public interest in the stories. Part III more closely examines the less-famous progeny of *Cohen* to identify the inconsistencies and other doctrinal problems the decision has caused, and it discusses earlier suggestions for solutions to the problems. Part IV presents a possible solution to the problem of balancing the legitimate concerns of investigative journalists with the need to protect subjects of news stories from blatantly unethical and illegal newsgathering tactics when the stories serve little or no public interest. Specifically, Part IV examines whether an existing doctrine for "testers" would be applicable to cases in which news gatherers are the defendants. Part V offers additional analysis and concluding remarks.

I. THE FIRST AMENDMENT PROBLEM

[L]iberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.¹⁰

The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen

7. 501 U.S. 663 (1991).

8. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999).

9. *Desnick v. Am. Broad. Co.*, 44 F.3d 1345 (7th Cir. 1995).

10. *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

apart as a favored class, but to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people . . . Knowledge is essential to informed decisions.¹¹

As the two quotes above from *Branzburg v. Hayes*¹² demonstrate, members of the Supreme Court of the United States have often disagreed about the meaning of the Press Clause of the First Amendment.¹³ Although individual Justices have argued that the press serves a special function in a democracy and therefore needs more protection than the "lonely pamphleteer," arguments for special protections have not prevailed. First Amendment historian Margaret Blanchard once noted that among the most consistent lines of Supreme Court reasoning is that First Amendment press and speech rights accrue to individuals, not institutions or journalists in their capacity as journalists, and are inseparable from each other.¹⁴ Professor Blanchard was writing thirty years ago, but her remarks are still accurate, at least on the surface.¹⁵ One recent noteworthy examination of the Supreme Court's Press Clause jurisprudence challenges this traditional interpretation of the Court's rulings and suggests that the Court has quietly recognized press rights separate from individual rights in privacy and taxation cases, among others.¹⁶ The more traditional view remains that the Court has steadfastly refused to grant any "insti-

11. *Id.* at 721 (Douglas, J., dissenting).

12. 408 U.S. 665 (holding that the First Amendment does not shield reporters from grand jury questions about confidential sources' identities when reporters have direct evidence of sources' criminal activity and the grand jury investigation is conducted in good faith).

13. "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I.

14. Margaret A. Blanchard, *The Institutional Press and Its First Amendment Privileges*, 1978 SUP. CT. REV. 225, 227–29, 265.

15. See *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (noting the "generally well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news"); cf. *Hanlon v. Berger*, 526 U.S. 808 (1999) (per curiam) (journalists' presence during execution of search warrant is violation of Fourth Amendment); *Wilson v. Layne*, 526 U.S. 603 (1999) (same).

16. C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 987–90, 1008–10 (2007).

tutional” rights associated with the First Amendment, possibly to the detriment of both institutions and individuals.¹⁷

It is not uncommon for academic theory about the meaning of a particular part of the Constitution to be at odds with Supreme Court jurisprudence. That is certainly true regarding the Press Clause of the First Amendment. Part of the problem stems from the Framers’ near silence on why freedom of the press was protected under the Bill of Rights.¹⁸ Equally unclear is what exactly the phrase “freedom of the press” meant to the Framers and why both freedom of speech and of the press are protected separately.¹⁹ Given the vast changes in society and the media in the two centuries since the First Amendment was ratified, it is not clear that the Framers’ intent in regard to a free press should be a major concern today. Arguably, the lack of guidance from the Framers about the meaning of press freedom could explain the nature of Supreme Court jurisprudence regarding press claims of special First Amendment protections.

Those who suggest that the writers of the First Amendment meant for the words “speech” and “press” to mean two different things often describe the difference between the two words in instrumental terms—what purpose is served by free speech and a free press? For example, Professor Melville Nimmer suggested that speech and press rights serve similar interests but with some distinctions.²⁰ If the speech right is viewed as an individual right of free expression, then it serves three major functions: a conduit for democratic dialogue, a source of “self-fulfillment” for the speaker, and a “safety valve” through which persons can express themselves without resorting to violence.²¹ The press, meanwhile, through its informing and opinion-shaping functions, is more significant than individual speech in the democratic dialogue function but less significant to the self-fulfillment and “safety valve” functions.²²

17. See Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005).

18. See, e.g., LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 103–25 (1999); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 477–83 (1983).

19. See LEVY, *supra* note 18, at 118–20.

20. See Melville B. Nimmer, *Is Freedom of the Press A Redundancy: What Does it Add To Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975).

21. *Id.* at 653.

22. *Id.* at 653–54.

Professor Nimmer also noted that the debates about the First Amendment in Congress before the Bill of Rights was sent to the states for ratification did not imply a distinction between speech and press. One inference that he suggested was plausible from the language of the First Amendment was that the Framers merely wanted to make sure that both oral expression (speech) and written expression (press) were protected from abridgement.²³

Other writers have suggested that Professor Nimmer might have underestimated the value that the Framers placed on the institutional press. For example, Justice Potter Stewart said in a 1974 speech that examining original intent would favor a view of the Press Clause as a protection specifically for the institutional media.²⁴ Justice Stewart argued that the Press Clause would be a "constitutional redundancy" if it was only meant to protect individuals' expressive acts, because the speech clause already served that function.²⁵ Instead, he argued that the Framers intended to protect the press as an autonomous "Fourth Estate" to serve as a check on the three official branches of government.²⁶

The idea that a key purpose of the Press Clause is to enable the press to act as a check on government is popular in literature about the First Amendment, although not everyone limits the responsibility of keeping an eye on government to the press. Professor Vincent Blasi has suggested that the First Amendment serves to facilitate the people's rein on government power.²⁷ He has argued that both the press and the public constitute the Fourth Estate and act as a check when they exercise all of the rights enumerated in the First Amendment, including the rights to free speech, association, and petition.²⁸

Professor C. Edwin Baker has suggested that there are many possible theories about how a democracy should work or does work, and that each theory carries a different set of priorities

23. *Id.* at 640.

24. Potter Stewart, "Or of the Press," 26 HASTINGS L.J. 631, 633 (1975).

25. *Id.*

26. *Id.* at 634.

27. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527-28.

28. See *id.* at 535-44.

for the press.²⁹ All of the democratic theories would favor, at the least, a “watchdog” function for the press to keep a check on government.³⁰ The watchdog analogy, prominent in journalism lore, was a popular defense for journalists facing criminal or civil libel actions or contempt charges for publishing opinions about pending cases as far back as the mid-1800s.³¹ In essence, journalists argued that they should be protected from criminal and civil punishments for libel and “contempt by publication” because they were serving the public interest.

Many of the theories about the Press Clause link the need to protect the press from government interference and the similar need to protect the public interests served by a free press. Professors Nimmer, Blasi, Baker, and others, including Alexander Meiklejohn³² and Thomas I. Emerson,³³ have emphasized that the First Amendment is closely tied to the ability of citizens to learn more about their government officials and government policies. According to these theorists, serving the important function of informing readers and viewers about public issues and public persons is the central mission of the news media.

Traces of the watchdog, or checking, theory and the self-government theory show up in some concurrences and dissents by Supreme Court Justices in Press Clause cases from the 1970s, a particularly active decade for media cases. As noted above, Justice William O. Douglas’s opinion in *Branzburg* argued eloquently, but to no avail, that the press had been given special protection under the First Amendment to serve the public’s right to know.³⁴ Similarly, in his dissent in *Pell v. Procunier*,³⁵ Justice Douglas argued that denying special prison access to the media was effectively a violation of the public’s right to know.³⁶ Few people could be expected to visit prisons on their own to learn

29. See C. Edwin Baker, *The Media That Citizens Need*, 147 U. PA. L. REV. 317, 320–40 (1998).

30. *Id.* at 324–25.

31. See TIMOTHY W. GLEASON, *THE WATCHDOG CONCEPT: THE PRESS AND THE COURTS IN NINETEENTH CENTURY AMERICA* 53–68 (1990).

32. ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 88–89 (1948).

33. THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970).

34. *Branzburg v. Hayes*, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting).

35. 417 U.S. 817 (1974).

36. *Id.* at 841 (Douglas, J., dissenting).

about conditions in penal institutions, Justice Douglas wrote.³⁷ Citizens were likely instead, "in a society which values a free press, to rely upon the media for information."³⁸

Similarly, in *Saxbe v. Washington Post Co.*,³⁹ Justice Lewis Powell, although agreeing with the majority that journalists and their employers did not have any First Amendment rights transcending the rights enjoyed by the general public to enter federal prisons, stated that he could not agree that "any governmental restriction on access to information" would be constitutional so long as it was nondiscriminatory.⁴⁰ As Justice Douglas had emphasized in *Pell*, Justice Powell stressed that knowledge of information important to the public's political responsibilities often depended upon the news media.⁴¹ Justice Powell wrote that it was "hopelessly unrealistic" to expect most people to have personal familiarity with newsworthy events.⁴² The press, he insisted, acted as "an agent of the public at large."⁴³

In a concurring opinion in *Houchins v. KQED, Inc.*,⁴⁴ Justice Stewart determined that television station KQED was entitled to some relief after its employees were denied access to a county jail.⁴⁵ Specifically, Justice Stewart questioned the idea that "equal access" to a jail for the press and public had to mean "identical" access.⁴⁶ Justice Stewart concluded that equal access had to be defined flexibly to accommodate practical distinctions between the media and the general public.⁴⁷ A person touring the jail could see its conditions with her own eyes, he wrote, but a television reporter seeking to convey "the jail's sights and sounds" to viewers must use cameras and sound equipment.⁴⁸ Therefore, restrictions that might be reasonable

37. *Id.*

38. *Id.*

39. 417 U.S. 843 (1974).

40. *Id.* at 857 (Powell, J., dissenting) (emphasis added).

41. *Id.* at 863.

42. *Id.*

43. *Id.*

44. 438 U.S. 1 (1978).

45. *Id.* at 17 (Stewart, J., concurring).

46. *Id.* at 16.

47. *Id.*

48. *Id.* at 17.

when placed on other individuals might not be reasonable when applied to journalists.⁴⁹

These isolated statements in concurrences and dissents do not reflect the majority's holdings regarding the Press Clause and the protection of newsgathering, but they may be as close as the Court has come to a clear and consistent philosophy. In *Branzburg*, the Supreme Court said that newsgathering had to have "some" First Amendment protection or else expression would wither.⁵⁰ But searching later cases for an example of protected newsgathering activities ends up being a zero-"some" game. The Court has held consistently that if the general public cannot do it, neither can the press. Likewise, if it cannot or is not done to the public, it cannot be done to the press. If the public does not have access to federal or state prisons, county jails, or the inmates within them, neither does the press.⁵¹ If other people and their offices are subject to police searches conducted with properly obtained warrants, so are journalists and their offices.⁵² If other people must testify in civil cases about their state of mind when it is relevant, journalists have no right to resist in libel cases.⁵³ If the Fourth Amendment rights of criminal suspects would be violated when individuals other than law enforcement agents are present during the execution of search warrants, that does not change merely because the individuals are journalists.⁵⁴ But because the public traditionally has attended criminal trials, to the betterment of justice and the community's understanding of justice, neither ordinary citizens nor the press can be barred arbitrarily from trials, jury selections, or pretrial hearings.⁵⁵ The press and public can be taxed, but press institutions cannot be singled out for discrimi-

49. *Id.*

50. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

51. See *Houchins*, 438 U.S. 1; *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974).

52. See *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

53. See *Herbert v. Lando*, 441 U.S. 153 (1979).

54. See *Hanlon v. Berger*, 526 U.S. 808 (1999).

55. See *Press-Enter. Co. v. Superior Court*, 478 U.S. 1 (1986); *Press-Enter. Co. v. Superior Court*, 464 U.S. 501 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

natory taxation, particularly if the taxation is aimed at affecting news reporting.⁵⁶

Overall, then, the Supreme Court's extensive First Amendment case law has been clear on at least one issue: The press is not immune from generally applicable laws that affect its business operations and, by extension, its newsgathering operations. Although both the press and the public have a broadly protected right of expression, particularly in regard to matters of public concern, the press has no rights under the First Amendment that are not available to the public as a whole, except for "some" protection for newsgathering that remains undefined, other than in terms of what it does not include.

In one line of cases, however, the Court's protection of expression also encompasses protection for newsgathering. Starting with *New York Times Co. v. United States*,⁵⁷ the "Pentagon Papers" case, the Court has sided with the press when it has published truthful information acquired lawfully, even when the source of the information might have violated criminal or tort law. The case dealt directly with the right to publish news—expression, in other words—but also have implied a boundary for newsgathering rights. The press may publish what it learns so long as that information is truthful; even if the source that supplied the information might have broken the law, the press is not subject to punishment as a beneficiary of or contributor to the source's unlawful action. If the press itself engaged in no illegal activity in gathering the information, then it can be secure in publishing the information without fear of subsequent punishment.

The first of the cases to use this doctrine was arguably the most controversial. In the Pentagon Papers case, a federal employee with access to classified documents on the United States's involvement in the Vietnam War shared those documents with newspaper reporters. As the *New York Times* and the *Washington Post* prepared articles based on the contents of the documents, the executive branch of government obtained an injunction to halt the press from publishing *any* part of

56. See, e.g., *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591 (1983); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936). But see *Baker*, *supra* note 16, at 1009 (suggesting taxation cases single out media companies for special protection).

57. 403 U.S. 713 (1971) (per curiam).

them.⁵⁸ With the possibility of a prior restraint hanging in the balance, the Court upheld the right of the press to publish information of great public concern obtained from documents stolen by a third party.⁵⁹ Yet this case raised, but did not resolve, the question that arises when a journalist or source acquires information unlawfully: whether the government may ever punish not only the unlawful acquisition but also the ensuing publication.

Later cases extended the circumstances under which journalists could without fear publish truthful information obtained lawfully from questionable sources. In *Landmark Communications, Inc. v. Virginia*,⁶⁰ a newspaper was indicted for violating state law because its reporting on a pending judicial inquiry identified a judge who was under investigation but against whom no formal complaint had been filed.⁶¹ Ruling for the newspaper, the Court refused to allow criminal punishment of the press for publishing truthful information regarding the judicial review commission's confidential proceedings.⁶² The operation of the commission was a matter of public interest, and the newspaper had served the constitutionally protected public interest in discussing government affairs by publishing the article.⁶³ Although the Court declined to adopt a categorical rule for all circumstances involving truthful information, it held that Landmark's publication of truthful information withheld from the public record was protected by the First Amendment.⁶⁴

The next year, in *Smith v. Daily Mail Publishing Co.*,⁶⁵ the freedom of the press to identify juveniles was extended to identification that was lawfully obtained, though not necessarily from the public record. Two newspapers independently monitoring the police radio frequency learned that a juvenile had been shot and killed by a classmate.⁶⁶ Reporters dispatched to the scene

58. *Id.* at 714.

59. *See id.* A majority of the Justices reached consensus only on the issue that the government had not met its heavy burden of justifying a prior restraint on the press. *Id.*

60. 435 U.S. 829 (1978).

61. *Id.* at 831.

62. *Id.* at 838.

63. *Id.* at 839.

64. *Id.* at 837-38.

65. 443 U.S. 97 (1979).

66. *Id.* at 99.

discovered the identity of the assailant through interviews with witnesses, and both papers eventually identified him in print despite a state statute prohibiting such disclosure without prior court approval.⁶⁷ The Supreme Court prohibited the state from punishing the newspapers for publishing the juvenile's correct name when the newspapers had obtained the boy's name lawfully, unless protecting the juvenile's anonymity would "further a state interest of the highest order."⁶⁸ The state's interest—furthering juvenile rehabilitation by protecting anonymity—did not meet that standard.⁶⁹ The Court concluded that a state statute punishing the publication of truthful information rarely was constitutional.⁷⁰ If the information at issue was obtained lawfully, through "routine reporting techniques," the state could not punish the publication of the information except where necessary to further a state interest more substantial than protecting the anonymity of a juvenile defendant.⁷¹

A decade later, the Court decided *Florida Star v. B.J.F.*,⁷² a case involving the surviving victim of a robbery and sexual assault who had sued a weekly newspaper for invasion of privacy for reporting her name, which the reporter had obtained from a police report released to the press.⁷³ The Court concluded that imposing damages on the newspaper for publishing B.J.F.'s full name violated the First Amendment.⁷⁴ Following its rationale in *Daily Mail*, the Supreme Court held that the state could not punish publication of lawfully obtained "truthful information about a matter of public significance" unless the statute was narrowly tailored to "further a state interest of the highest order."⁷⁵ Based on the facts of the case, the Court ruled that B.J.F.'s name was obtained lawfully from a police report furnished to the newspaper and that the article involved "a matter of public significance" because it was about a report of

67. *Id.* at 99–100.

68. *Id.* at 103–04.

69. *Id.* at 104–05.

70. *Id.* at 102.

71. *Id.* at 103–04.

72. 491 U.S. 524 (1989).

73. *Id.* at 526–28.

74. *Id.* at 532.

75. *Id.* at 533 (quoting *Daily Mail*, 443 U.S. at 103).

the commission and investigation of a violent crime.⁷⁶ Weighing against disclosure was a finding that the state has a highly significant interest in protecting the privacy and safety of sexual assault victims and in encouraging them to report such crimes “without fear of exposure.”⁷⁷ Despite these weighty state concerns, the Court found that imposing liability on the *Star* in this case was “too precipitous a means of advancing these interests.”⁷⁸

More recently, in *Bartnicki v. Vopper*,⁷⁹ an unknown person intercepted a private cellular telephone conversation between the chief union negotiator and the union president for Pennsylvania high school teachers during collective-bargaining negotiations.⁸⁰ Later, a radio commentator played a tape of the conversation on his public affairs talk show.⁸¹ The commentator had obtained the tape from Jack Yocum, the head of a local taxpayers organization that had opposed the union demands during negotiations.⁸² Yocum testified he found the tape in his mailbox shortly after the interception and recognized the voices on the tape.⁸³ The union representatives were taped discussing how to get the school board to meet their demands, including a reference to “blow[ing] off their front porches.”⁸⁴ The representatives filed damage suits under federal and state

76. *Id.* at 536–37 (quoting *Daily Mail*, 443 U.S. at 103).

77. *Id.* at 537.

78. *Id.* Such an imposition here, the Court feared, could lead to self-censorship when a newspaper gets information from a government news release, allow the standard of negligence per se to sweep too broadly where a case-by-case method would be more appropriate to protect the interests involved, and prove to be underinclusive because the statute prohibits a rape victim from being identified in “an instrument of mass communication” but does not prohibit the victim’s identity from being spread by other means. *Id.* at 538–40 (quoting FLA. STAT. § 794.03 (1987)). The Court posited:

An individual who maliciously spreads word of the identity of a rape victim is thus not covered, despite the fact that the communication of such information to persons who live near, or work with, the victim may have consequences as devastating as the exposure of her name to large numbers of strangers.

Id. at 540.

79. 532 U.S. 514 (2001).

80. *Id.* at 518.

81. *Id.* at 519.

82. *Id.*

83. *Id.*

84. *Id.* at 518–19.

wiretapping laws, alleging that the station had reason to know that the conversation had been illegally intercepted.⁸⁵ The Court reviewed the government interests to determine if they justified restrictions on speech. The Court concluded that “a stranger’s illegal conduct does not suffice to remove the First Amendment shield” from speech about a matter of legitimate public interest.⁸⁶

A. *Defining News in the Public Interest*

The term “public interest” comes into play in a number of First Amendment cases, either directly or indirectly. Although most of the content that the news media produce may be interesting to most of the public, there is a difference between being interesting and being of public interest.⁸⁷ The latter term, as it is used here, refers to journalism that contributes to public understanding of important social and political issues. So, for example, although news about the legal problems of professional basketball player Kobe Bryant and pop music star Michael Jackson might be interesting to many people, extensive coverage of Bryant’s and Jackson’s lives is not necessarily in the public interest.⁸⁸

The Supreme Court and many lower courts have found that expression in the public interest, whether by the press or the general public, may be protected from tort liability even when untruthful or in apparent violation of privacy. Libel plaintiffs who are public officials or public figures have a higher burden of proof than most private persons—they must prove that the publisher of a defamatory statement acted with knowledge that the statement was false or with “reckless disregard” for whether

85. *Id.* at 519–20.

86. *Id.* at 535.

87. The Restatement (Second) of Torts defines matters of public concern as those about which the public is interested in learning. This public interest is determined by societal customs and values. A matter ceases to be of public concern when the publicity surrounding it “ceases to . . . giv[e] information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.” RESTATEMENT (SECOND) OF TORTS § 652D cmt. h (1977).

88. For a general discussion of coverage of the Bryant and Jackson cases, see Jill Rosen, *Et Tu, “Nightline”?*, AM. JOURNALISM REV., Feb.–Mar. 2004, at 18.

it was false.⁸⁹ Private persons who are not heavily involved in setting government policy, are not famous, or are not advocates for social issues sometimes only have to prove that a defamatory statement was published negligently.⁹⁰ But even private persons have a higher burden when they are involved in matters of public interest—they have to prove falsity, rather than placing the burden to prove truth on the defendant.⁹¹

In privacy law, a key defense against a suit alleging a tortious publication of private facts is newsworthiness—were the facts of legitimate public interest?⁹² If so, this weighs heavily in favor of the news media when they are the defendants in such suits. Often the media are given wide leeway when a judge determines what is newsworthy. For example, a California judge ruled against Barbra Streisand in an invasion of privacy suit over aerial photographs taken of her beachfront estate by an environmentalist.⁹³ The Los Angeles Superior Court judge determined that the relationship of Streisand's property to the California coastline was a matter of public interest.⁹⁴

In sum, the Supreme Court and lower courts generally have held that the press cannot be punished for publishing lawfully acquired, truthful information, even if the source of the information obtained it illegally. Additionally, both the press and the public have a broad right to publish unintentionally false and defamatory statements about public officials, public figures, and even private persons engaged in matters of public concern. The press also can claim newsworthiness as a defense for publishing private facts. In short, when matters of public interest are at stake, the press can get away with violating some of the tenets of tort law. All one has to do is figure

89. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); see also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Associated Press v. Walker*, 389 U.S. 28 (1967); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

90. *Gertz*, 418 U.S. at 347–48 (noting that states can choose the standard of liability, so long as they do not impose liability without fault).

91. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776–77 (1986).

92. The determination of newsworthiness requires a finding by reasonable members of a community, a jury, that the information in question is of public interest; this interest is then balanced against the right to privacy. See *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 485–87 (Cal. 1998).

93. See Kenneth R. Weiss, *Judge Rejects Streisand Privacy Suit*, L.A. TIMES, Dec. 4, 2003, at B1.

94. See Jane Kirtley, *Bashful Barbra*, AM. JOURNALISM REV., Feb.–Mar. 2004, at 62.

out what “public interest” means and whether judges are competent to define it.⁹⁵

These concepts leave a gap in the protection of newsgathering. Although journalists are free to report truthful information that is *lawfully* acquired, and also have broad protections from tort law when they are discussing matters of public interest, what happens when journalists violate tort law in order to gather information for stories in the public interest? At first glance, the answer according to *Cohen v. Cowles Media Co.*⁹⁶ appears to be that the First Amendment is not implicated and that the press is not immune from generally applicable tort laws violated while gathering information. As is often the case with the Supreme Court and the First Amendment, however, *Cohen* and its progeny do not provide quite so simple an answer.

II. COHEN, FOOD LION, AND DESNICK

In *Cohen*, a 5-4 majority of the Supreme Court determined that the First Amendment did not bar a lawsuit against two Minnesota newspapers that broke a promise of confidentiality to a source.⁹⁷ Dan Cohen, who worked for the campaign of a Minnesota gubernatorial candidate, gave documents to reporters indicating that an opposing candidate had a criminal record.⁹⁸ After the reporters learned that one misdemeanor charge against the candidate was dismissed and a conviction on another was vacated, the two newspapers independently decided to identify Cohen in their stories about the candidate’s past.⁹⁹ Cohen was fired from his job and sued the newspapers for

95. One issue raised by having judges decide whether publication is in the public interest is whether journalists should be allowed to conceal the identities of confidential sources. Judge David Tatel of the U.S. Court of Appeals for the District of Columbia Circuit argued that courts should “weigh the public interest in compelling disclosure [versus] the public interest in newsgathering.” *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 997–98 (D.C. Cir. 2005) (Tatel, J., concurring in the judgment). A district court judge in a separate case later rejected Judge Tatel’s test, however, on the grounds that it contradicted precedent and also would put judges in the “very troubling” position of defining what is or is not newsworthy. *Lee v. Dep’t of Justice*, 401 F. Supp. 2d 123, 139 (D.D.C. 2005).

96. 501 U.S. 663 (1991).

97. *Id.* at 669.

98. *Id.* at 665.

99. *Id.* at 665–66.

fraudulent misrepresentation and breach of contract.¹⁰⁰ Cohen was awarded \$200,000 in compensatory damages and \$500,000 in punitive damages, but a Minnesota appellate court threw out the punitive damage award along with the fraudulent misrepresentation claim,¹⁰¹ and the Minnesota Supreme Court threw out the rest of the award to Cohen, finding that Cohen also did not have a viable breach of contract claim.¹⁰² The Minnesota Supreme Court also discussed a point of law that Cohen had not raised: whether Cohen would have a viable claim against the newspapers under a promissory estoppel theory.¹⁰³ The court determined that he would not, because enforcement of the reporters' promises under a promissory estoppel theory would violate the First Amendment rights of the newspapers.¹⁰⁴

In reversing the Minnesota Supreme Court and remanding the case, the U.S. Supreme Court explained that its decision was not bound by the line of cases holding that the press should not be punished for publishing lawfully acquired truthful information,¹⁰⁵ but rather by the line of cases holding that the press is not immune from generally applicable laws.¹⁰⁶ One problem with using the "lawfully obtained truthful information" doctrine in this case was that it was not clear that the reporters "lawfully" obtained Cohen's name, given that they did so by making a promise they did not keep.¹⁰⁷ In response to arguments from the newspapers and amici curiae that allowing Cohen's case to go forward would inhibit truthful reporting, the Court said that the alleged chill on reporting would be "no more than the incidental, and constitutionally insignificant," result of enforcing a generally applicable law against the press.¹⁰⁸ Thus, in *Cohen*, the Court found no violation of the First

100. *Id.* at 666.

101. *Id.*

102. *Id.*

103. *See id.* at 666–67. Promissory estoppel is "[t]he principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and the promisee did actually rely on the promise to his or her detriment." BLACK'S LAW DICTIONARY 591 (8th ed. 2004).

104. *Cohen*, 501 U.S. at 667.

105. *See supra* notes 57–87 and accompanying text.

106. *See Cohen*, 501 U.S. at 669–70; *supra* notes 34–56 and accompanying text.

107. *Cohen*, 501 U.S. at 671.

108. *Id.* at 671–72.

Amendment because it reasoned that promissory estoppel, the theory of liability upon which the promise of confidentiality was enforceable, was a law of general applicability—one that applies broadly in society to everyone, including journalists.

One disturbing aspect of the decision was that the Court ignored the reporters' apparent intention to keep their promises of confidentiality to Cohen before they learned the value of his tip and engaged in "consultation and debate" with their editors.¹⁰⁹ According to Justice Blackmun's dissent, the newspapers' publication of Cohen's name was the publication of truthful information. To punish the publication of truthful information, there had to be a state interest of the highest order.¹¹⁰ Also, the conclusion that laws of general applicability also apply to the press without raising a First Amendment issue establishes a dangerous precedent for those on the front lines of investigative journalism. It is troubling that the Court skirted the traditional constitutional analysis given to restrictions on speech content.

The opinion also was inconsistent. Because the enforcement of other generally applicable torts, like libel and privacy, has been held to raise First Amendment concerns when it affects expression (as it nearly always does), the Court's reasoning in *Cohen* was startling, appearing to suggest that the First Amendment issues the suit raised were so incidental as to be almost nonexistent. One commentator, writing ten years after *Cohen*, argued that the Court's "cavalier" dismissal of the newspapers' First Amendment concerns had turned *Cohen* into a "First Amendment neutralizer": It had become the case that parties cited to persuade a court to skip First Amendment analysis and the case courts cited to dismiss First Amendment defenses.¹¹¹

Two federal appellate cases involving hidden-camera investigations by television news shows demonstrate the uncertainties *Cohen* created in press law. In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*,¹¹² the Fourth Circuit rejected ABC's argument that Food

109. *Id.* at 666.

110. *Id.* at 676 (Blackmun, J., dissenting).

111. Alan E. Garfield, *The Mischief of Cohen v. Cowles Media Co.*, 35 GA. L. REV. 1087, 1088 (2001); see, e.g., *Sarl Louis Feraud Int'l v. Viewfinder, Inc.*, 489 F.3d 474 (2d Cir. 2007) (vacating a lower court order that dismissed a French intellectual property claim against an American website publisher and citing *Cohen* for the proposition that the First Amendment does not immunize the news media from liability under generally applicable laws).

112. 194 F.3d 505 (4th Cir. 1999).

Lion's tort claims against the network had to be balanced against the First Amendment. ABC had aired on *PrimeTime Live* a story about the supermarket chain's handling and sale of meat that was past its expiration date.¹¹³ To confirm reports that Food Lion was repackaging expired meat with new expiration labels, ABC got two employees with bogus résumés hired by the company.¹¹⁴ The reporters talked to other employees and used hidden cameras to record video and audiotape of conditions at the stores.¹¹⁵

After the story aired, Food Lion sued ABC, alleging fraud, breach of duty, trespass, and unfair trade practices. Eventually a jury found for Food Lion on the fraud, breach of duty, and trespass claims and awarded about \$1,400 in compensatory damages and more than \$5.5 million in punitive damages. The district court judge later reduced the total damage award to \$315,000.¹¹⁶

On appeal, a three-judge panel of the Fourth Circuit threw out the fraud claim, and with it nearly all of the damage award, but upheld Food Lion's victory on the breach of duty and trespass claims.¹¹⁷ The appellate court said that the torts allegedly committed by the ABC employees "fit neatly" into the *Cohen* framework of generally applicable laws that the press cannot escape.¹¹⁸ The court noted that the torts of breach of duty and trespass did not single out the press for punishment, and the panel said that it was "convinced that the media can do its important job effectively without resort to the commission of run-of-the-mill torts."¹¹⁹

However, the Fourth Circuit panel also noted that there was "arguable tension" in the way the "generally applicable law" doctrine had been enforced.¹²⁰ The panel noted that the Supreme Court had applied heightened First Amendment scrutiny when nude-dancing establishments challenged a generally applicable law against public nudity in *Barnes v. Glen Theatre*,

113. *Id.* at 511.

114. *Id.* at 510.

115. *Id.* at 510–11.

116. *Id.* at 511.

117. *Id.* at 524.

118. *Id.* at 521.

119. *Id.* at 521.

120. *Id.* at 521–22.

Inc.,¹²¹ but not in *Cohen*. The opinion explained that the tension between *Glen Theatre* and *Cohen* was resolved because the breach of promise in *Cohen* was not a form of expression, whereas the nudity ban in *Glen Theatre* directly affected expression.¹²² According to the Fourth Circuit, trespass and breach of loyalty, like the breach of promise in *Cohen*, did not single out the press for punishment and therefore did not require heightened First Amendment scrutiny.¹²³

Interestingly, the Fourth Circuit rejected Food Lion's cross-appeal of a district court decision that barred it from being awarded compensatory damages for harm caused by the broadcast of the show.¹²⁴ The appellate panel said that Food Lion could not do an "end-run" around defamation law by trying to recover reputational damages for nonreputational torts.¹²⁵ This passage in *Food Lion* closely mirrored a passage in *Cohen* in which the Supreme Court hinted that the decision would have been different had Dan Cohen been attempting to "use a promissory estoppel cause of action to avoid the strict requirements for establishing a libel or defamation claim."¹²⁶ Such an attempt to skirt the "actual malice" requirements of libel law was foreclosed by *Hustler Magazine, Inc. v. Falwell*,¹²⁷ in which the Court held that the constitutional requirement for libel suits applied to a claim of intentional infliction of emotional distress based on publication of a parody of the Reverend Jerry Falwell in the magazine *Hustler*.¹²⁸

The reference to plaintiffs' attempts to skirt defamation law's strict requirements by bringing a tort action for the way news was gathered also played a part in *Desnick v. American Broadcasting Co.*,¹²⁹ another federal appellate case involving newsgathering torts. In *Desnick*, ABC's *PrimeTime Live* had done a hidden-camera story about the Desnick Eye Center, which ABC alleged performed many unnecessary cataract surgeries on elderly pa-

121. 501 U.S. 560 (1991).

122. *Food Lion*, 194 F.3d at 521-22.

123. *Id.* at 522.

124. *Id.*

125. *Id.*

126. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991).

127. 485 U.S. 46 (1988).

128. *Id.* at 56.

129. 44 F.3d 1345 (7th Cir. 1995).

tients to defraud Medicare.¹³⁰ The story included comments from Dr. J.H. Desnick, the Center's owner, as well as hidden-camera footage shot by "test patients" who went to Desnick Eye Center for exams to see if they would be diagnosed—incorrectly—with cataracts.¹³¹ ABC had obtained cooperation for some parts of the story by promising Desnick that no "undercover" reporting or "ambush" interviews would be used, but both were.¹³²

A federal district court dismissed the Center's suit against ABC, but the Seventh Circuit reinstated a defamation claim because there appeared to be facts in dispute.¹³³ However, the three-judge panel for the Seventh Circuit upheld the lower court's dismissal of four other tort claims: trespass, invasion of privacy, unlawful electronic surveillance, and fraud.¹³⁴

Chief Judge Richard Posner, writing for a unanimous panel, quickly dealt with most of the claims of the clinic and its doctors. He analogized the fake patients to "testers" who pose as prospective home buyers to uncover discriminatory real estate practices and noted that the "patients" sent by ABC to the clinics did not gather embarrassing private facts or enter places not open to real patients.¹³⁵ Judge Posner also noted that the wire-tapping statutes in question allowed one party to a conversation to record a conversation unless that person did so with intent to commit a crime, tort, or other "injurious act."¹³⁶ Judge Posner indirectly distinguished his reasoning in *Desnick* from the Supreme Court's in *Cohen* by noting that the test patients had no such intent when they entered the clinics.¹³⁷ That lack of intent—even if the resulting broadcast was defamatory under tort law—meant that the electronic-surveillance claim could not stand.¹³⁸ In *Cohen*, however, the Supreme Court did not even consider that the reporters who interviewed Dan Cohen apparently intended to honor their promises of confidentiality

130. *Id.* at 1347–48.

131. *Id.* at 1348.

132. *Id.*

133. *Id.* at 1351. The defamation claim was later dismissed again in the district court, and that time the Seventh Circuit affirmed the dismissal. *Desnick v. Am. Broad. Co.*, 233 F.3d 514 (7th Cir. 2000).

134. *Desnick*, 44 F.3d at 1351.

135. *Id.* at 1353.

136. *Id.*

137. *See id.*

138. *See id.* at 1353–54.

until they checked out the information he gave them.¹³⁹ Judge Posner also suggested that the ends justified the means in regard to the surreptitious taping at the clinics, saying that “[t]elling the world the truth about a Medicare fraud” could not be viewed as an “injurious act” under the electronic surveillance statutes.¹⁴⁰ As for the fraud claim, the panel said that any person “of normal sophistication” would know that an investigative reporter was likely to break a promise to “wear kid gloves” in doing a story.¹⁴¹

Interestingly, in the conclusion of the opinion, Judge Posner seemed both to agree and to disagree with *Cohen*. Citing *Cohen*, he noted that the press is not immune from tort or contract liability. Yet he also noted that, although investigative television reporting could often be “shrill, one-sided, and offensive,” it was still deserving of all the protections the Supreme Court had built around liability for defamation.¹⁴² Further, investigative television reporting was deserving of protection from liability for other torts, regardless of whether the alleged tort resulted from the content of the broadcast or from its production.¹⁴³

Judge Posner’s perspective on the use of hidden cameras to expose wrongdoing and his apparent belief that newsgathering deserves protection analogous to expression cast a different light on journalists’ rights than do *Cohen* and *Food Lion*. One appellate decision does not rewrite Supreme Court precedent, however, and the other high-profile post-*Cohen* newsgathering tort decision, *Food Lion*, was much less of a clear-cut victory for the media. Examining *Cohen*’s progeny reveals very little except confusion about journalists’ right to gather news of public concern using surreptitious means. Judge Posner, however, might have indicated a solution that would provide more consistent protection for the media in at least some circumstances when he alluded to ABC’s test patients as “testers.” Before we explore that possibility in more detail, however, it may be helpful to explore the extent of the problem in need of solution by examining other *Cohen*-related cases.

139. See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 666 (1991).

140. *Desnick*, 44 F.3d at 1353–54 (internal quotation marks omitted).

141. *Id.* at 1354.

142. *Id.* at 1355.

143. *Id.*

III. THE CONTINUING LEGACY OF *COHEN*, *FOOD LION*, AND *DESNICK*

Shortly after deciding *Cohen*, the Supreme Court distinguished its holding from situations in which facially general laws had a more direct and content-based effect on free expression. In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*,¹⁴⁴ the Court struck down a statute that requires that any compensation paid to criminals for recounting their exploits in books, scripts, or interviews be donated to their victims through the Board.¹⁴⁵ The Board contended that the law did not single out the media for any burden it might create, but the Court responded that the argument “faltered on both semantic and constitutional grounds.”¹⁴⁶ First, any “entity” that entered into an agreement to publish a criminal’s speech would necessarily become “a medium of communication, if it was not one already.”¹⁴⁷ But even were the media not specifically implicated, the Court added, “[t]he government’s power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker.”¹⁴⁸ The distinction the Court drew between *Cohen* and *Simon & Schuster* probably helped to limit a potentially disastrous expansion of *Cohen*’s “generally applicable laws” doctrine to disguise content-based regulations. As the following discussion will show, state and lower federal courts also have drawn distinctions in a number of ways that limit *Cohen*’s reach. The harder the case, however, the more *Cohen* plays a significant role in the result.

A. *Cohen Clones*

The most obvious place to start an examination of *Cohen*’s impact on First Amendment law is with cases in which sources alleged that their identity became known despite assurances of confidentiality. *Cohen*’s impact on such cases has been, somewhat surprisingly, mixed.

144. 502 U.S. 105 (1991).

145. *Id.* at 109–10.

146. *Id.* at 117.

147. *Id.*

148. *Id.*

Not surprising was the outcome in another Minnesota case, *Ruzicka v. Conde Nast Publications, Inc.*,¹⁴⁹ in which a source asserted that a reporter had identified her in violation of their confidentiality agreement. In this case, however, the reporter had substituted a false name to shield the source's identity, raising the question of whether she had broken a clear and definite promise.¹⁵⁰ When first confronted with the case, the Eighth Circuit affirmed the district court's grant of summary judgment to Conde Nast on breach of contract and state tort claims, but remanded for a judgment on whether a promissory estoppel claim was viable in light of the recently decided *Cohen*.¹⁵¹ The plaintiff, Jill Ruzicka, argued that a story about women who were sexually abused by their therapists had identified her clearly enough to make her recognizable to friends and associates despite the writer's promise that she would not be identifiable and the use of a pseudonym in the article.¹⁵² After the district court again granted summary judgment to the defendant, maintaining that the reporter's promise was not clear enough to be enforceable, the Eighth Circuit vacated the judgment, relying in large part on *Cohen*.¹⁵³

But in *Steele v. Isikoff*,¹⁵⁴ a case that resembled *Cohen* in some respects, the U.S. District Court for the District of Columbia found in favor of the defendants—*Newsweek* magazine and one of its reporters. The plaintiff, Julie Hiatt Steele, alleged that reporter Michael Isikoff had broken his promise not to reveal that she provided corroborating information about an alleged sexual liaison between her friend, Kathleen Willey, and President Bill Clinton.¹⁵⁵ The district court noted the distinction that the Supreme Court had drawn in *Hustler* and *Cohen* between attempts to bypass the requirements of defamation law and bona fide efforts to hold the media responsible for damages unrelated to reputational harm.¹⁵⁶ Although the court acknowl-

149. *Ruzicka v. Conde Nast Publ'ns, Inc.*, 999 F.2d 1319 (8th Cir. 1993) (*Ruzicka II*); *Ruzicka v. Conde Nast Publ'ns, Inc.*, 939 F.2d 578 (8th Cir. 1991) (*Ruzicka I*).

150. *Ruzicka I*, 939 F.2d at 580.

151. *Id.* at 584.

152. *Id.* at 580.

153. *Ruzicka II*, 999 F.2d at 1323.

154. 130 F. Supp. 2d 23 (D.D.C. 2000).

155. *Id.* at 25–26.

156. *Id.* at 28–29.

edged that some of Steele's claims were more *Cohen*-like—and thus not barred by the First Amendment¹⁵⁷—it ultimately determined that none of her claims had merit under applicable state and D.C. laws.¹⁵⁸

Neither *Ruzicka* nor *Steele* forced the courts to spend much time weighing the public interest served by the stories against the private interests allegedly at stake for the plaintiffs. But in *Multimedia WMAZ, Inc. v. Kubach*,¹⁵⁹ the Court of Appeals of Georgia squarely addressed the policy issues involved. A sharply divided court upheld a lower court judgment against a television station for tortious disclosure of private facts.¹⁶⁰ As part of a show about acquired immune deficiency syndrome (AIDS), the station had interviewed an AIDS patient, promising to hide his identity by “digitizing” his image.¹⁶¹ However, the digitization process failed to disguise his features adequately during the first seven seconds the patient was shown, and he was recognizable.¹⁶² In upholding a judgment against the station for tortious disclosure of private facts, the court determined that the station's relationship with the patient was similar to that of the newspapers' with Dan Cohen; reminiscent of *Cohen*, the station in *Kubach* had persuaded the plaintiff to appear on television in return for a promise of confidentiality.¹⁶³ The court also rejected the defendant's argument that it should be at least partially shielded from liability because it was broadcasting a “public service” show,¹⁶⁴ responding that such public policy considerations cut both ways: Stations might be less likely to do public service stories if the verdict were upheld, but patients might be less likely to agree to be sources for such stories if the verdict were reversed.¹⁶⁵

157. *Id.* at 29.

158. *Id.* at 37–38.

159. 443 S.E.2d 491 (Ga. Ct. App. 1994).

160. *Id.* at 496.

161. *Id.* at 493.

162. *Id.*

163. *Id.* at 495.

164. *Id.*

165. *Id.*

B. Reputation Claims in Disguise

Courts generally have been savvy at separating claims of damage to reputation, a la *Hustler*, from tort claims arising from violations of generally applicable laws. In *Compuware Corp. v. Moody's Investors Services, Inc.*,¹⁶⁶ for example, an appellate court affirmed a lower court's dismissal of a breach of contract claim over the publication of a credit rating report that Compuware contended was inaccurate and damaging. The majority of the Sixth Circuit panel cited *Cohen* for the proposition that although the press was subject to generally applicable laws, strict scrutiny might be needed when a plaintiff used a general law to sidestep libel requirements.¹⁶⁷ Such was the case here, the court concluded, because the company clearly based all of its claims on damage to its reputation.¹⁶⁸

Likewise, in *Anderson v. Blake*,¹⁶⁹ a federal district court in Oklahoma granted the defendant's motion for summary judgment in a lawsuit brought by a rape victim against a television station that had aired brief portions of the rapist's videotape of the incident, finding that the elements necessary for establishing invasion of privacy were lacking.¹⁷⁰ The judge also relied in part on *Cohen* when he denied the plaintiff's motion to amend her complaint to include claims for tortious interference and breach of contract.¹⁷¹ He noted that the causes of action were based on the same "'injury to her reputation and state of mind'" as her original invasion of privacy claim.¹⁷²

In *La Luna Enterprises, Inc. v. CBS Corp.*,¹⁷³ a New York federal district court threw out part of a lawsuit against CBS, brought in response to a news story about Russian mobsters in the United States.¹⁷⁴ The network had shot footage inside a Miami

166. 499 F.3d 520 (6th Cir. 2007).

167. *Id.* at 529.

168. *Id.* at 530. The majority went on to hold that the plaintiff in this case would have to prove actual malice in regard to its breach of contract claim. *See id.* at 531. This led to a strenuous dissent from the third member of the panel, who also cited *Cohen*. *See id.* at 536 (Rogers, J., concurring in part and dissenting in part).

169. No. CIV-05-0729-HE, 2006 U.S. Dist. LEXIS 8454 (W.D. Okla. Feb. 9, 2006), *aff'd sub nom.* *Anderson v. Suiters*, 499 F.3d 1228 (10th Cir. 2007).

170. *Id.* at *4, *9-10.

171. *Id.* at *12-13.

172. *Id.* at *12 (quoting *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991)).

173. 74 F. Supp. 2d 384 (S.D.N.Y. 1999).

174. *Id.* at 387, 393.

Beach restaurant after telling the owner that it wanted footage of its cabaret show for a story on tourism.¹⁷⁵ Instead, the story interspersed scenes from the restaurant—allegedly owned by Russian immigrants—with scenes of violence in Russia linked to organized crime.¹⁷⁶ The court allowed the restaurant to proceed with a defamation lawsuit against CBS¹⁷⁷ but threw out a fraud claim, concluding that the plaintiff was attempting to recover damages for the reputational harm allegedly caused by the broadcast.¹⁷⁸ The court distinguished its analysis from *Cohen*, determining that it fit more neatly into the *Hustler* framework that barred plaintiffs from trying to recover for damage to reputation by using non-defamation torts to circumvent the strict requirements of defamation law.¹⁷⁹

Similarly, in *Muzikowski v. Paramount Pictures Corp.*,¹⁸⁰ a judge threw out a lawsuit seeking damages for defamation, false-light invasion of privacy, and several other torts brought by a plaintiff who alleged that a movie character was based on him.¹⁸¹ The court relied in part on *Cohen* in dismissing commercial disparagement and emotional distress claims because they sought relief for damage to reputation and state of mind.¹⁸² Looking to *Cohen*, *Hustler*, and *Desnick*, the court concluded that the plaintiff would have to overcome the same First Amendment barriers that applied to defamation claims.¹⁸³

In *Brock v. Viacom International, Inc.*,¹⁸⁴ the plaintiffs initiated a suit after they were allegedly tricked into appearing on a show that, as it turned out, ridiculed their belief that schools should teach creationism.¹⁸⁵ They sought damages for defamation, fraudulent inducement, invasion of privacy, misappropriation, intentional infliction of emotional distress, breach of contract,

175. *Id.* at 387.

176. *Id.* at 388.

177. *Id.* at 392.

178. *Id.*

179. *Id.*

180. No. 01 C 6721, 2005 U.S. Dist. LEXIS 13127 (N.D. Ill. June 10, 2005), *aff'd*, 477 F.3d 899 (7th Cir. 2007).

181. *Id.* at *1–2, *5–6.

182. *Id.* at *43–44.

183. *Id.*

184. No. 1:04-CV-1029-CAP, 2005 U.S. Dist. LEXIS 12217 (N.D. Ga. Feb. 28, 2005).

185. *Id.* at *2–5.

promissory estoppel, and unjust enrichment.¹⁸⁶ Citing *Cohen*, among other cases, the court stated that claims related to harm to reputation or state of mind must meet the constitutional requirements of a defamation claim, whereas claims for other torts do not raise First Amendment concerns if “brought under generally applicable laws.”¹⁸⁷ Because all of the claims in this case were related to damage to reputation or state of mind, and the plaintiffs could show only that the program disagreed with their opinions, the court threw out the case.¹⁸⁸

C. Promises Broken

Some courts have made a sharp distinction between promises enforceable under promissory estoppel doctrine and other promises.

For the plaintiff, it helps to have the promise in writing. In *Pierce v. St. Vrain Valley School District*,¹⁸⁹ the Colorado Supreme Court looked in part to *Cohen* to hold that a former school superintendent could pursue a claim for breach of contract, defamation, and other torts against school board members who allegedly broke a settlement agreement.¹⁹⁰ The ex-superintendent alleged that board members had spoken publicly about sexual harassment allegations against him despite a settlement agreement requiring them to keep the allegations confidential in return for his resignation.¹⁹¹ The board argued that it should not be liable for members' comments because the agreement violated members' First Amendment speech rights and conflicted with public policy considerations.¹⁹² That the board had entered the agreement voluntarily did not help, and neither did *Cohen's* language stating that enforcing generally applicable laws does not violate the First Amendment.¹⁹³ The court unanimously remanded the case to the lower courts, which had originally

186. *Id.* at *3–5.

187. *Id.* at *7 (quoting *Steele v. Isikoff*, 130 F. Supp. 2d 23, 29 (D.D.C. 2000)).

188. *See id.* at *17.

189. 981 P.2d 600 (Colo. 1999).

190. *Id.* at 603–04.

191. *Id.* at 601–02.

192. *Id.* at 602.

193. *Id.* at 604.

ruled that the First Amendment barred Pierce's claims against the board and school district.¹⁹⁴

The decision of the Ninth Circuit in *Lind v. Grimmer*¹⁹⁵ lies at the opposite end of the spectrum. There, the court upheld a lower court's dismissal of a lawsuit against a newsletter publisher, distinguishing *Cohen*.¹⁹⁶ The publisher had reported in his newsletter that he had filed a complaint with Hawaii's Campaign Spending Commission against the University of Hawaii Professional Assembly for allegedly failing to report contributions the assembly had made.¹⁹⁷ A state law, however, made it a crime to disclose such information while an investigation was pending.¹⁹⁸ Lind sued to have the law declared unconstitutional as applied to him and unconstitutionally overbroad, and the district court granted his motion for summary judgment.¹⁹⁹ On appeal, the state argued that *Cohen* supported its use of the law because the publisher, by filing an appeal, entered into an implied contract with the commission to keep information confidential, and a law of general applicability governed the contract.²⁰⁰ But the court of appeals held that unlike the promissory estoppel doctrine at issue in *Cohen*, the confidentiality law was not content-neutral, but rather a direct restriction on speech.²⁰¹ Also, the court noted that the state could not allege an implied contract based on the notion that filing a complaint amounted to striking a bargain with the state.²⁰²

In *Pierce v. Clarion Ledger*,²⁰³ a federal district court determined that an agreement between a reporter and source is not a contract and thus cannot be subject to a breach of contract suit.²⁰⁴ The plaintiff alleged that he was injured by a reporter's decision to break a promise to a source that she would not publish a story about a memo concerning the plaintiff until she had confirmed

194. *Id.* at 607.

195. 30 F.3d 1115 (9th Cir. 1994).

196. *Id.* at 1117–18.

197. *Id.* at 1117.

198. *Id.*

199. *Id.*

200. *Id.* at 1118.

201. *Id.*

202. *Id.* at 1118–19.

203. 452 F. Supp. 2d 661 (S.D. Miss. 2006).

204. *Id.* at 665.

the veracity of the memo's contents.²⁰⁵ The court relied on the Minnesota Supreme Court's conclusion in *Cohen* that a reporter-source agreement is not a contract, noting that the Supreme Court's determination that promissory estoppel could apply to the promise did not affect its reasoning.²⁰⁶

In *Chambon ex rel. Morgan v. Celender*,²⁰⁷ a federal district court in Pennsylvania threw out a lawsuit against a newspaper in which the plaintiffs sought damages for invasion of privacy, fraudulent misrepresentation, and intentional infliction of emotional distress.²⁰⁸ A mother and her two minor children sued after a photograph of the mother and one child appeared in the newspaper along with a caption identifying the child as a "victim of sexual abuse."²⁰⁹ The mother averred that a reporter promised that the photograph, taken at a courthouse during a legal proceeding involving the girl's father, who was her alleged abuser, would show them in silhouette and would not identify them.²¹⁰ The court noted what it called "apparent tension" between *Florida Star* and *Cohen* and relied heavily on *Florida Star* in regard to the privacy claim, noting that the charges against the girl's father and the girl's name were both public record and a matter of legitimate public concern.²¹¹ In regard to the fraudulent misrepresentation claim, the court noted that although *Cohen* allowed an action against the media under promissory estoppel doctrine for a broken promise, the Supreme Court did not address, and therefore let stand, the Minnesota courts' rejection of fraudulent misrepresentation as a viable claim for a broken promise between a reporter and source.²¹² *Celender* raises a significant question: What if the photo would not have been taken or published except for the promise that was later broken? Arguably, if the photographer had never made the promise of privacy to the mother, the mother might never have allowed the picture to be taken. It would seem then that the pho-

205. *Id.* at 663.

206. *Id.* at 664-65.

207. 780 F. Supp. 307 (W.D. Pa. 1992).

208. *Id.* at 310-11.

209. *Id.* at 309.

210. *Id.*

211. *Id.* at 309-10.

212. *Id.* at 311.

tographer violated a generally applicable law while gathering news on a story of public concern.

The First Circuit dealt with a similar issue in a different way in New England. In *Veilleux v. National Broadcasting Co.*,²¹³ a truck driver, his employer, and his employer's wife sued NBC over a *Dateline* story on long-distance trucking, alleging defamation, misrepresentation, negligent infliction of emotional distress, invasion of privacy, and loss of consortium.²¹⁴ Among other allegations, the suit contended that NBC employees misrepresented themselves when they claimed the story would be a "positive" portrayal of trucking and would not include comments from a group critical of the trucking industry.²¹⁵ The First Circuit reversed most of a lower court's verdict in favor of the plaintiff, but remanded part of the misrepresentation claim.²¹⁶ The court held that the promise of a positive story was too vague to be actionable, but the promise not to include the anti-trucking group in the story was actionable under Maine law, and such an action would not violate the First Amendment.²¹⁷ Looking to *Food Lion*, the court concluded that the principles articulated there were not applicable because the misrepresentation to gain access to places did not proximately cause damage to Food Lion; its own actions, caught on tape, did.²¹⁸ In contrast, there would have been no story in *Veilleux*, and thus no damage, without the promise to keep the anti-trucking group out of the story.²¹⁹ To determine whether the First Amendment precluded recovery of damages anyway, the court analyzed *Cohen*, *Hustler*, and other cases, synthesizing five guidelines from them:

1. "[T]he First Amendment is concerned with speech itself, not the tone or tastefulness of the journalism that disseminates it."²²⁰

2. "'[N]ot all speech is of equal First Amendment importance."²²¹

213. 206 F.3d 92 (1st Cir. 2000).

214. *Id.* at 101.

215. *Id.* at 102.

216. *Id.* at 135.

217. *Id.* at 119.

218. *Id.* at 125.

219. *Id.* at 126.

220. *Id.* at 127.

3. "[E]ven when the information being disseminated is truthful, the press does not enjoy general immunity from tort liability."²²²

4. "[T]he status of the plaintiff is of constitutional significance."²²³

5. "[T]he type of damages sought bears on the necessity of constitutional safeguards."²²⁴

The court noted that the NBC broadcast dealt with a matter of public concern—dangerous truckers on the road—and was substantially truthful.²²⁵ The court also said, however, that the law against misrepresentation was generally applicable, and NBC might not have gathered its information "lawfully," given the lie about the anti-trucking group's participation.²²⁶ Also, the truck driver, his employer, and the employer's wife "were not public officials or figures inured to the rough-and-tumble of public discourse."²²⁷ The court sent the misrepresentation issue back to the lower court because the factors it considered raised issues of fact as well as law, but it limited the plaintiffs' possible recovery to pecuniary damages attributable to the lie, precluding damages tied to the broadcast's general tone.²²⁸

D. *Surreptitious Newsgathering*

The influences of *Cohen*, *Food Lion*, and *Desnick* most often converge when undercover reporting or similar newsgathering techniques are used. Although *Cohen* was about a broken promise to a source, it helped spawn cases like *Food Lion* and *Desnick* that attacked journalistic methods instead of the end product. As a result, even relatively "easy" cases have become more complicated.

For example, a Third Circuit panel upheld a lower court's summary judgment for a newspaper that published stories about a woman's spousal abuse accusations against her hus-

221. *Id.* (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988)).

222. *Id.*

223. *Id.*

224. *Id.* at 127–28.

225. *Id.* at 128.

226. *Id.*

227. *Id.*

228. *See id.* at 129.

band, a police officer who had been named "Officer of the Year" shortly after she reported an abuse incident to the police.²²⁹ The officer and his wife sued *The Morning Call* in Allentown, Pennsylvania, alleging that the paper, its reporter, and an unknown person had conspired to violate their privacy rights.²³⁰ The couple based their lawsuit in part on the fact that the police report in question was never part of the public record but somehow found its way into the reporter's hands.²³¹ The public interest in knowing about the misdeeds of a decorated police officer seems obvious. But although two of the three judges on the panel found that the couple had no reasonable expectation of privacy because the alleged abuse had been reported to the police,²³² a dissenting judge, relying on *Cohen*, would have allowed the case to go to trial to determine if the newspaper's possibly tortious behavior in obtaining the police report would mitigate its First Amendment protection.²³³

More difficult is the balancing of public and private interests in undercover reporting cases. In some cases the media's ability to analogize their actions to those of "testers" can make a big difference in the outcome of cases.

In *Medical Laboratory Management Consultants v. American Broadcasting Co.*,²³⁴ a federal district judge in Arizona threw out most of a lawsuit against ABC over a news story about medical labs that interpret Pap smear results.²³⁵ Using hidden cameras and microphones, ABC employees posing as people interested in starting their own lab persuaded the owner of a Phoenix, Arizona lab to show them around his business and discuss it.²³⁶ ABC also sent Pap smear slides to the lab that it knew came from patients with cervical cancer and reported that the lab misdiagnosed some of the slides.²³⁷ Noting that there was little doubt that the story dealt with issues "clearly in

229. *Scheetz v. Morning Call, Inc.*, 946 F.2d 202, 203–05 (3d Cir. 1991).

230. *Id.*

231. *Id.*

232. *Id.* at 207.

233. *Id.* at 213–14 (Mansmann, J., dissenting).

234. 30 F. Supp. 2d 1182 (D. Ariz. 1998).

235. *Id.* at 1185–86.

236. *Id.*

237. *Id.* at 1186.

the public interest,"²³⁸ the court granted ABC and two of its employees summary judgment on all claims except fraud.²³⁹ The court also limited the fraud claim to damages incurred by the lab's owner as a result of being "maliciously deceived" by ABC's undercover reporters, such as counseling costs.²⁴⁰ The court barred the plaintiff from recovering for fraud-related damages resulting from the broadcast itself.²⁴¹

The court barely mentioned *Cohen* but did quote from the district court ruling in *Food Lion* on the fraud claim. The court noted that the *Food Lion* judge agreed that a plaintiff could not recover for damage to reputation by suing for fraudulent newsgathering practices because proximate causation could not be established.²⁴² In regard to a trespass claim, the court took issue with the Seventh Circuit's decision in *Desnick*, suggesting that the Seventh Circuit had intertwined trespass and intrusion law.²⁴³ The court noted that some of the cases that *Desnick* cited to support a judgment for the media on the trespass claim, including a "tester" case,²⁴⁴ were not actually about trespass.²⁴⁵ The court also questioned the Seventh Circuit's analysis of why some unauthorized uses of another's property were tortious and others were not when there seemed to be no discernible, legally definable difference between the uses.²⁴⁶ But after noting that *Desnick* also did not accord with Arizona or Ninth Circuit law, the court granted summary judgment to ABC on the trespass claim because the damages alleged, as with the fraud claim, arose from the broadcast and not the way the defendants gathered the information for it.²⁴⁷

Relying largely on *Food Lion* in a case with similar facts, a federal district judge in Florida dismissed a lawsuit by a magazine sales company against the producers of the syndicated

238. *Id.* at 1190.

239. *Id.* at 1209.

240. *Id.* at 1200.

241. *Id.*

242. *Id.* at 1199.

243. *See id.* at 1202.

244. *Id.* at 1203 (citing *Northside Realty Assocs., Inc. v. United States*, 605 F.2d 1348, 1355 (5th Cir. 1979)).

245. *Id.* at 1202-03.

246. *Id.* at 1203.

247. *Id.* at 1203-04.

television show *Inside Edition*.²⁴⁸ Pitts Sales, the magazine sales company, unknowingly employed an associate producer who used hidden microphones and cameras to make recordings that were later used to produce a story about harsh treatment and poor supervision of often-underage traveling sales agents.²⁴⁹ After the story aired, the company sued for illegal interception of oral communications, use of illegally intercepted communications, fraud, and trespass.²⁵⁰ In regard to the fraud claim, the court relied heavily on the Fourth Circuit's analysis in *Food Lion*. The Pitts fraud claim centered on the *Inside Edition* employee's misrepresentations that led to his hiring by Pitts, just as Food Lion claimed fraud in the way the supermarket chain hired ABC employees.²⁵¹ Not surprisingly, the district judge found, as did the Fourth Circuit, that no serious fraud claim existed in relation to hiring someone who did not intend to stay long in a job with no definite term of employment. This was especially true, the judge ruled, when that job had high turnover anyway.²⁵² The court granted summary judgment to *Inside Edition* on all claims except the trespass claim—ironically, also because of *Food Lion*²⁵³—but later reconsidered and ruled in *Inside Edition*'s favor on the trespass claim as well.²⁵⁴

The public interest in the story did not enter into the *Pitts Sales* decision but did factor into another decision involving

248. *Pitts Sales, Inc. v. King World Prods., Inc.*, 383 F. Supp. 2d 1354, 1363–64 (S.D. Fla. 2005).

249. *Id.* at 1356.

250. *Id.* at 1356–57. Pitts Sales also originally sought damages for civil RICO violations and tortious interference with a contractual relationship but agreed to dismiss those claims before the judge heard both parties' motions for summary judgment. *Id.*

251. *See id.* at 1363.

252. *Id.* at 1364.

253. *See id.* at 1366–67. The court noted that the jury in *Food Lion* initially found that the reporters had trespassed because ABC's employees gained entry to Food Lion property that was off-limits to the public through misrepresentation and through a breach of the duty of loyalty to Food Lion. The appellate court in *Food Lion* had upheld the verdict only on the second of the two grounds, finding that misrepresentation alone did not nullify consent. The court in *Pitts Sales* found this reasoning applicable but held that an issue of fact existed as to whether the acts of *Inside Edition* employees had exceeded or conflicted with the purposes for which Pitts Sales gave consent, and that this issue of fact had to be resolved at trial. *Id.* at 1367.

254. *Pitts Sales, Inc. v. King World Prods., Inc.*, No. 04-60664-CIV-COHN/SNOW, 2005 U.S. Dist. LEXIS 42197, at *15–16 (S.D. Fla. July 29, 2005).

Inside Edition. In *Wolfson v. Lewis*,²⁵⁵ a federal district judge, after detailing the behavior of *Inside Edition* employees who were trying to document the lifestyles of a health care company's officers, took the unusual step of granting an injunction to stop some of the syndicated television show's activities.²⁵⁶ The opinion cited *Cohen* for the proposition that "generally applicable laws do not offend the First Amendment" even when their enforcement has "incidental effects" on newsgathering activities.²⁵⁷ After detailing the actions of *Inside Edition* journalists who followed and filmed the chairman of U.S. Healthcare, his daughter and son-in-law, and his grandchildren as they went from home to work and to school, and even on vacation,²⁵⁸ the court said the Wolfsons (the daughter and son-in-law of the chairman) were likely to prevail in a privacy-invasion lawsuit.²⁵⁹ The court said that it was apparent that the *Inside Edition* crew was not involved in "legitimate" newsgathering but was trying to obtain "entertaining background" for the story.²⁶⁰

Similarly, in *Turnbull v. American Broadcasting Co.*,²⁶¹ a federal district court in California rejected most of a motion for summary judgment by ABC in regard to a lawsuit over a 20/20 segment on acting workshops.²⁶² In determining that the plaintiffs' case for invasion of privacy, intrusion, emotional distress, and other claims could go forward, the court rejected ABC's efforts to rely on precedent allegedly in its favor.²⁶³ For example, the court said that *Desnick* did not apply because the acting workshops, at which an ABC employee secretly recorded audio and video of instructors and participants, were not open to the public.²⁶⁴ Later in the opinion, the court rejected ABC's arguments based on *Hustler* and *Medical Laboratory Management* for the dismissal of "defamation type" damage claims, which the

255. 924 F. Supp. 1413 (E.D. Pa. 1996).

256. *See id.* at 1435.

257. *Id.* at 1417 (citing *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991)).

258. *Id.* at 1422-32.

259. *Id.* at 1433.

260. *Id.* at 1432.

261. No. CV 03-3554 SJO (FMOx), 2004 U.S. Dist. LEXIS 24351 (C.D. Cal. Aug. 19, 2004).

262. *Id.* at *6-7.

263. *Id.* at *78.

264. *Id.* at *44 n.9.

court considered to be an unclear category.²⁶⁵ The court noted that the plaintiffs answered ABC's claim by relying on *Cohen's* ruling on the applicability of general laws to the media.²⁶⁶

The apparent lack of a strong public interest motive for the story,²⁶⁷ which examined workshops that charged aspiring actors to participate and for the opportunity to meet a casting director, also challenged ABC's case.²⁶⁸ The court noted that a California Division of Labor Standards Enforcement (DLSE) investigation of the workshops had concluded, and the DLSE and workshops were nearing a settlement when the story aired.²⁶⁹ The court further noted that correspondent Brian Ross admitted that he would have done the story without using hidden cameras but felt the hidden camera footage "was the most effective way to tell the story."²⁷⁰ The court said this statement and others by ABC employees made it "apparent that ABC had little justification in using hidden camera footage."²⁷¹

Although one could argue that any public interest justifications for the *Wolfson* and *Turnbull* activities were weak at best, one could make an entirely different argument in regard to a case where the court did not consider public interest motivations at all. In *Peavy v. WFAA-TV, Inc.*,²⁷² the Fifth Circuit reversed a lower court's grant of summary judgment to a television station and other defendants in a case similar to *Bartnicki*. The television station accepted tapes of phone conversations between a Dallas school board member and others after a neighbor of the board member, Carver Dan Peavy, recorded the tapes over a police scanner.²⁷³ The tapes allegedly indicated that Peavy was involved in some sort of corruption having to do with school district insurance.²⁷⁴ Station employees listened to the tapes but, on the advice of counsel, they did not use any of them in a series of stories suggesting that Peavy

265. *Id.* at *55–60 & n.12.

266. *Id.* at *57–58.

267. *See id.* at *48–50.

268. *See id.* at *7–8.

269. *Id.* at *48.

270. *Id.* at *49.

271. *Id.* at *50.

272. 221 F.3d 158 (5th Cir. 2000).

273. *Id.* at 164.

274. *Id.*

engaged in bribery and other offenses.²⁷⁵ The stories were based on independent research of school district records, other records, and interviews, though the stories did mention some of the context from the tapes.²⁷⁶ Eventually, Peavy and another man were indicted on bribery and other charges but were both acquitted at trial.²⁷⁷

Peavy sued the station, alleging, inter alia, various violations of federal and state wiretapping laws.²⁷⁸ A district court granted summary judgment to the station on all counts, finding that, although the station "us[ed]" and "disclos[ed]" illegally intercepted communications in violation of both the federal and state laws, liability for the actions would violate the First Amendment.²⁷⁹

In reversing the district court, the Fifth Circuit panel largely focused on whether the television station "procured" or "obtained" the tapes in violation of both federal and Texas law.²⁸⁰ The appeals court determined that summary judgment was not appropriate because there was some doubt about the station's part in encouraging ("procuring") the taping of the illegally intercepted calls.²⁸¹ The appellate panel also said that the district court applied the wrong level of scrutiny to enforcement of the laws against WFAA because it followed the incorrect line of precedent. Although the district court relied on *Florida Star* and applied strict scrutiny, the appellate court held that *Florida Star* did not apply because it was not clear that the station lawfully acquired the information from the tapes.²⁸² Instead, the appellate panel wrote, the district court should have applied intermediate scrutiny and held that the wiretapping laws were laws of general applicability with only an incidental effect on the press.²⁸³ For the principle that enforcement of generally applicable laws do not raise First Amendment concerns, the court relied heavily on the Supreme Court's decision in *Cohen*.²⁸⁴ There

275. *Id.* at 165–66.

276. *Id.* at 166.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 167–72.

281. *Id.* at 172–73.

282. *Id.* at 190.

283. *Id.* at 190–91.

284. *See id.* at 185–86.

was no discussion, however, of whether the station acted in the public interest in exposing possible corruption or malfeasance by a public official in regard to his official duties.

More recently, the D.C. Circuit, in a non-media case, raised questions about both *Bartnicki's* vitality and *Cohen's* meaning in a sharply divided and narrow opinion. In *Boehner v. McDermott*,²⁸⁵ a 5-4 majority determined that the First Amendment did not protect U.S. Representative James McDermott when he disclosed the contents of an illegally taped telephone call to the press.²⁸⁶ The tape, made by a couple who recorded a conference call between House Speaker Newt Gingrich and other Republican members of Congress in 1996, found its way to McDermott because of his membership on the House Ethics Committee, which was investigating Gingrich.²⁸⁷ Because McDermott was a member of the Ethics Committee when he received the tape, the question became whether he had violated a committee confidentiality rule and thus waived First Amendment protection.²⁸⁸ Citing *Cohen*, among other cases, the en banc majority noted that even the disclosure of lawfully acquired information could be restricted, such as when a promise of confidentiality was broken.²⁸⁹ The dissenters argued that the majority misread *Cohen* as neutralizing McDermott's First Amendment defense rather than limiting it.²⁹⁰

Finally, at least two other cases besides *Desnick* have discussed whether journalists could play the role of "tester" and receive some legal benefit from that status. The results were mixed.

In *W.D.I.A. Corp. v. McGraw-Hill, Inc.*,²⁹¹ *Cohen* and the "tester" concept met with mixed results for the defendant. *Business Week*, a publication of McGraw-Hill, gave false information to a consumer credit information vendor in order to obtain a contract with a vendor, W.D.I.A., and obtain personal information about various people. The magazine's purpose was to test whether W.D.I.A. was complying with the Fair Credit Report-

285. 484 F.3d 573 (D.C. Cir. 2007) (en banc).

286. *Id.* at 581.

287. *Id.* at 575-76.

288. *Id.* at 579.

289. *Id.* at 578.

290. *Id.* at 587-88 (Sentelle, J., dissenting).

291. 34 F. Supp. 2d 612 (S.D. Ohio 1998).

ing Act in safeguarding people's information.²⁹² W.D.I.A. alleged that the magazine's actions forced it to spend money to repair its relationships with those credit bureaus from whom it purchased information and to address concerns raised by the Federal Trade Commission and Congress.²⁹³ Although the court found that *Cohen* barred it from dismissing fraud and breach of contract claims against the publisher,²⁹⁴ it also noted that testers "serve an important role in determining whether a statute intended to safeguard the rights of individuals is properly protecting those rights."²⁹⁵ The court said that *Business Week's* actions did not support a punitive damages award because the story "served to inform Congress and the general public about a matter of vital public interest."²⁹⁶ The court awarded W.D.I.A., which had sought more than \$75,000 in compensatory damages and \$45 million in punitive damages, a total of just under \$7,500.²⁹⁷

The decision in *Hornberger v. ABC, Inc.*²⁹⁸ provided a more encouraging decision for the media. In *Hornberger*, the New Jersey Superior Court Appellate Division upheld a lower court's dismissal of a lawsuit by three police officers caught on hidden camera during a traffic stop.²⁹⁹ The officers claimed defamation, false light invasion of privacy, fraud, and violation of the New Jersey wiretapping law.³⁰⁰ For a story called "DWB" (Driving While Black), ABC arranged for three African-American men to "cruise" through a New Jersey town at night in a late-model Mercedes.³⁰¹ The officers stopped the car and searched it, apparently without probable cause, and were caught on hidden microphones and cameras.³⁰² The appellate court said that the lower court correctly relied on the reasoning of *Food Lion* and *Hustler* regarding the fraud claim because the police officers were attempting to use a law of general applicability to recover

292. *Id.* at 615.

293. *Id.*

294. *Id.* at 624.

295. *Id.* at 628.

296. *Id.*

297. *Id.* at 615, 628.

298. 799 A.2d 566 (N.J. Super. Ct. App. Div. 2002).

299. *Id.* at 571.

300. *Id.*

301. *Id.* at 570-72.

302. *Id.* at 570-71, 598.

for damage to reputation and emotional distress.³⁰³ The court also criticized the First Circuit's ruling in *Veilleux*, noting that the federal appellate court did not explain why it allowed the plaintiff to recover for lost business under a misrepresentation claim when the *Food Lion* court had not allowed similar recovery for reputation-related damages.³⁰⁴

E. Possible Solutions

Many commentators have suggested ways to resolve the tensions in the law created by *Cohen* and its progeny. It would be impossible to discuss all of the ideas in detail here, so instead this Part will summarize the suggestions under three headings that reflect the range of ideas on how the law should change—or not—to better protect journalists using surreptitious newsgathering methods to produce stories that are in the public interest.

1. Do Nothing

A small contingent of authors has suggested that the law does not need to change or needs to change very little. One professor has noted that *Cohen* produced only a “trickle” of new cases, not enough to create a crisis demanding major changes in the law.³⁰⁵ Any limitations that might be appropriate on compensatory or punitive damages for newsgathering torts are already available through common-law doctrines.³⁰⁶ Similar points are made in several student notes.³⁰⁷ From a practical perspective, some in the news media just view tort claims simply as a cost of doing business and do not expect

303. *Id.* at 596–97.

304. *Id.* at 597.

305. David A. Logan, *Masked Media: Judges, Juries, and the Law of Surreptitious Newsgathering*, 83 IOWA L. REV. 161, 214 (1997) (quoting Carl Werner, Note, *Collision Without Injury: Three Years After Cohen*, *Contract Principles and Freedom of the Press Co-Exist Nicely*, 30 HOUS. L. REV. 2085, 2101 (1994)).

306. *Id.* at 209–10.

307. See, e.g., Mark Weidemaier, Note, *Balancing, Press Immunity, and the Compatibility of Tort Law with the First Amendment*, 82 MINN. L. REV. 1695, 1723–25 (1998) (suggesting that no privilege is needed but that publication damages should not be awarded for newsgathering torts); Werner, *supra* note 305, at 2101–06 (suggesting that *Cohen* had been interpreted narrowly to that point and was unlikely to hurt the news media significantly).

any help from the courts.³⁰⁸ Professor Randall Bezanson has suggested that the press should have no special legal immunity for newsgathering, although his concerns are more philosophical than practical.³⁰⁹

2. *The Media Should Change*

Another thread running through post-*Cohen* commentary about protecting the press from newsgathering torts suggests that it is the media, not the courts, that need to change. These authors say that media practices, not court decisions, are to blame for whatever mess journalists find themselves in when they are sued over newsgathering methods. Another branch of this category argues that the media have been getting off too easily and that the courts should make it more painful for the media to use undercover newsgathering methods.

Noted First Amendment scholar Rodney Smolla warned more than ten years ago that resorting to "tabloid" tactics could subject the press to increased legal pressure.³¹⁰ Professor Smolla characterized tabloid journalism, in contrast to "serious" journalism, by the use of sensationalism, a focus on "sinfulness," a blurring of lines between public and private life, reduced coverage of political and social issues, a lack of adequate sourcing and attribution, paying sources for material, an increased use of surreptitious newsgathering methods, and an increased use of paparazzi photography.³¹¹ Professor Smolla argued that, although some publications or broadcasts usually associated with tabloid journalism had made efforts in recent years to become more serious, the more striking trend had been the increased use of tabloid tactics by "serious" news organizations.³¹² He attributed the shift to tabloid tactics among mainstream media to increased competition, "changing cultural norms," and "the proliferation of media."³¹³ Although Professor

308. See, e.g., Jane E. Kirtley, *Vanity and Vexation: Shifting the Focus to Media Conduct*, 4 WM. & MARY BILL RTS. J. 1069, 1108-09 (1996) (discussing the view of Lawrence K. Grossman, former president of NBC News).

309. See Randall P. Bezanson, *Means and Ends and Food Lion: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895, 896-97 (1998).

310. See Rodney A. Smolla, *Will Tabloid Journalism Ruin the First Amendment for the Rest of Us?*, 9 DEPAUL-LCA J. ART & ENT. L. & POL'Y 1 (1998).

311. See *id.* at 2-3.

312. See *id.* at 6-7.

313. *Id.* at 7-10.

Smolla did not believe that the shift to tabloid methodology in mainstream media outlets would lead courts to change formal First Amendment doctrine, he concluded that the likely result was that more salacious stories will be found not to be of legitimate public concern, leading to more “findings of liability and higher damages awards.”³¹⁴

Along similar lines, several authors have suggested that courts should more aggressively hold the press liable for questionable newsgathering methods. Ethan Litwin, for example, criticized the press for its “sense of entitlement” to information.³¹⁵ To better protect privacy interests, Litwin argued, courts should adopt a “least-intrusive-means” test to judge whether the media have adequately respected privacy rights.³¹⁶ Applying this standard to the *Food Lion* case, Litwin said that the reporters there did not use the least intrusive means available to get their story and thus should be held liable for various torts.³¹⁷

Litwin’s prescription for holding the media liable for torts committed while gathering news was mild compared to some other recommendations. For example, one set of authors condemned the use of hidden cameras and suggested that their use should create a presumption that journalists acted with actual malice.³¹⁸ Another author suggested expanding privacy rights to corporations, expanding the use of punitive damages, and creating better guidelines for the media on the limits of newsgathering.³¹⁹ Similarly, yet another author has recommended strengthening the use of intrusion torts against the media.³²⁰ Professor Richard Epstein has argued that the courts should reject First Amendment exceptionalism and hold the press liable for publishing illegally obtained information, while

314. *Id.* at 16.

315. Ethan E. Litwin, Note, *The Investigative Reporter’s Freedom and Responsibility: Reconciling Freedom of the Press with Privacy Rights*, 86 GEO. L.J. 1093, 1099 (1998).

316. *Id.* at 1100–01.

317. *Id.* at 1119.

318. See David A. Elder et al., *Establishing Constitutional Malice for Defamation and Privacy/False Light Claims When Hidden Cameras and Deception Are Used by the Newsgatherer*, 22 LOY. L.A. ENT. L. REV. 327, 338 (2002).

319. See Lori Keeton, Note, *What Is Really Rotten in the Food Lion Case: Chilling the Media’s Unethical Newsgathering Techniques*, 49 FLA. L. REV. 111, 128–35 (1997).

320. See Enrique J. Gimenez, Comment, *Who Watches the Watchdogs?: The Status of Newsgathering Torts Against the Media in Light of the Food Lion Reversal*, 52 ALA. L. REV. 675, 699–703 (2001).

allowing them to publish legally obtained information without penalty.³²¹ More generally, other authors have suggested simply that the press should stay within the confines of criminal and tort law when gathering news³²² or that the press should adopt better and clearer standards for newsgathering.³²³

An interesting counterpoint to the preceding arguments is the suggestion that suspicion or hostility regarding visual images may be coloring academic and judicial responses to hidden cameras and other surreptitious methods of newsgathering. Professor Diane Leenheer Zimmerman has written that, despite excesses, the value of undercover news reporting has been "great" on occasion,³²⁴ and has cautioned against translating "image anxiety" into law.³²⁵ She suggested that camera images also protect the targets of stories from lying reporters, just as they allow the media to expose the lies of others.³²⁶

3. Courts Should Provide More Press Protection

The most popular line of scholarship on the inconsistent case law that has developed since *Cohen* is that the press deserves more protection from the courts. The specific recommendations vary widely, ranging from sweeping calls for giving newsgathering the same kind of constitutional protection as publishing to narrow limits on types of damages awarded to plaintiffs.

Professor Paul LeBel is among several authors who recommend that courts faced with newsgathering tort cases use a constitutionally based balancing test, weighing the public in-

321. See Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 STAN. L. REV. 1003, 1047 (2000).

322. See, e.g., John J. Walsh et al., *Media Misbehavior and the Wages of Sin: The Constitutionality of Consequential Damages for Publication of Ill-Gotten Information*, 4 WM. & MARY BILL RTS. J. 1111, 1111 (1996).

323. See, e.g., Michael W. Richards, *Tort Vision for the New Millennium: Strengthening News Industry Standards As a Defense Tool in Law Suits Over Newsgathering Techniques*, 10 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 501 (2000); Joseph W. Ragusa, Comment, *Biting the Hand That Feeds You: The Reporter-Confidential Source Relationship in the Wake of Cohen v. Cowles Media Company*, 67 ST. JOHN'S L. REV. 125, 143 (1992).

324. Diane Leenheer Zimmerman, *I Spy: The Newsgatherer Under Cover*, 33 U. RICH. L. REV. 1185, 1206 (2000).

325. *Id.* at 1224.

326. See *id.* at 1228.

terest in news against state interests.³²⁷ Professor LeBel argued that courts should recognize the gathering of news to be constitutionally protected as a necessary corollary to the right to publish news.³²⁸ Professor Smolla, who had expressed concern about the trend toward tabloid methods of newsgathering by the mainstream media,³²⁹ nevertheless wrote that he favors a qualified privilege for the media in cases like *Food Lion*, balancing the public interest in the news produced with privacy interests.³³⁰ Several other authors also have advocated some form of balancing test between a constitutionally protected right to gather news and privacy or other personal interests.³³¹

Another popular solution is to extend the actual malice standard of fault from libel and emotional distress cases to newsgathering torts. This would essentially put newsgathering torts on equal footing with publication torts with respect to First Amendment protection. Perhaps most intriguing is the suggestion by Professor Eric Easton that a modified version of the actual malice test be used in newsgathering tort cases.³³² Professor Easton's test would require the plaintiff to prove that the newsgatherer either engaged in deliberate wrongdoing in bad faith or engaged in outrageous behavior to get the story.³³³ Other commentators have also suggested using the actual malice test in newsgathering tort cases,³³⁴ especially in cases in-

327. See Paul A. LeBel, *The Constitutional Interest in Getting the News: Toward a First Amendment Protection from Tort Liability for Surreptitious Newsgathering*, 4 WM. & MARY BILL RTS. J. 1145, 1154-56 (1996).

328. *Id.* at 1154.

329. See *supra* text accompanying notes 310-14.

330. Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097, 1130 (1999).

331. See, e.g., Daniel A. Levin & Alan C. Roline, *Undercover Reporters, Tort Law, and the First Amendment: Food Lion v. ABC and the Future of Surreptitious Newsgathering*, 11 KAN. J.L. & PUB. POL'Y 575, 606-08 (2002); Kimberly A. Dietel, Note, *Shadow on the Spotlight: The Right to Newsgather Versus the Right to Privacy*, 33 SUFFOLK U. L. REV. 131, 156 (1999); Olga C. Puerto, Comment, *When Reporters Break Their Promises to Sources: Towards a Workable Standard in Confidential Source/Breach of Contract Cases*, 47 U. MIAMI L. REV. 501, 530-35 (1992) (recommending a five-part balancing test in cases in which reporters have broken promises to sources).

332. See Eric B. Easton, *Two Wrongs Mock a Right: Overcoming the Cohen Maledicta That Bar First Amendment Protection for Newsgathering*, 58 OHIO ST. L.J. 1135 (1997).

333. *Id.* at 1211-15.

334. See Dynn Nick, Note, *Food (Lion) for Thought: Does the Media Deserve Special Protection Against Punitive Damage Awards When It Commits Newsgathering Torts?*, 45 WAYNE L. REV. 203, 227 (1999) (suggesting that a showing of actual malice

volving plaintiffs who are public figures or private persons involved in matters of public concern.³³⁵ Along similar lines, Professor Gyong Ho Kim recommended borrowing an “extreme departure” test from libel law, where it is used to determine whether defamatory material was published with actual malice—knowledge of falsity or careless and reckless disregard for whether the information was false.³³⁶ He explained that determining whether an extreme departure from journalistic standards for newsgathering existed would require an analysis of media ethics codes and case law on newsgathering issues.³³⁷

Other commentators would borrow from different parts of free-expression doctrine, requiring the courts to ignore *Cohen* to some degree and bring the First Amendment back into discussions of whether the press should be liable for newsgathering torts. One group of authors recommended a modified strict scrutiny examination, in which the plaintiff would have to show “compelling harm” caused by the newsgathering, not the publication, in order to prevail.³³⁸ Rejecting the actual malice test as unworkable in a nonpublication context, the authors also argued that requiring plaintiffs to show a compelling harm would protect newsgatherers from trivial cases and discourage plaintiffs from seeking damages under the guise of fraud, trespass, and similar newsgathering tort actions.³³⁹ Along similar lines, Professor Erwin Chemerinsky has recommended that courts use intermediate scrutiny, requiring a showing of an important government purpose before liability could be im-

should be required before punitive damages could be awarded); Stephen M. Stern, Note, *Witch Hunt or Protected Speech: Striking a First Amendment Balance Between Newsgathering and General Laws*, 37 WASHBURN L.J. 115, 148–50 (1997) (arguing that to protect newsgathering on issues of public concern, plaintiffs should have to prove actual malice).

335. See, e.g., Jacqueline A. Egr, Comment, *Closing the Back Door on Damages: Extending the Actual Malice Standard to Publication-Related Damages Resulting from Newsgathering Torts*, 49 U. KAN. L. REV. 693, 718 (2001).

336. Gyong Ho Kim, *Extreme Departure Test as a New Rule for Balancing Surreptitious and Intrusive Newsgathering Practices with Competing Interests: The Use of Hidden Cameras vs. the Right to Be Let Alone*, 10 UCLA ENT. L. REV. 213, 256 (2003).

337. *Id.* at 261.

338. Matthew D. Bunker et al., *Triggering the First Amendment: Newsgathering Torts and Press Freedom*, 4 COMM. L. & POL'Y 273, 294 (1999).

339. See *id.* at 294–95.

posed on the media.³⁴⁰ He argued that intermediate scrutiny would balance the state's interests, "as reflected in tort laws," with the media's need to gather news and "the public's right to know."³⁴¹ Professor C. Thomas Dienes endorsed the same approach more indirectly, suggesting with approval that Judge Posner's approach in *Desnick* was a use of intermediate scrutiny.³⁴² He argued that any restriction on the press should "substantially be related to important privacy interests."³⁴³

Not all recommended adjustments to the law require constitutional reinterpretation. Professor David Anderson has suggested that granting the press First Amendment preferences would complicate a number of issues related to press activities.³⁴⁴ Professor Anderson argued that any preferences in the law for the press should be provided by "statute, regulation, and other nonconstitutional means" to avoid difficult "questions that do not lend themselves to constitutional resolution."³⁴⁵ Various suggestions for nonconstitutional protections include enacting statutes to shield the media³⁴⁶ and relying on state tort law interpretation.³⁴⁷

Focusing on the chilling effect that some fear could result from excessive judgments against the media for newsgathering torts, several authors recommend limiting or eliminating punitive damages.³⁴⁸ One author tied the call for limits on punitive

340. See Erwin Chemerinsky, *Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143, 1161 (2000).

341. *Id.* at 1162.

342. See C. Thomas Dienes, *Protecting Investigative Journalism*, 67 GEO. WASH. L. REV. 1139, 1150 (1999).

343. *Id.*

344. See David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 510–11 (2002).

345. *Id.* at 515.

346. See e.g., Jeffrey A. Richards, Note, *Confidentially Speaking: Protecting the Press from Liability for Broken Confidentiality Promises—Cohen v. Cowles Media Co.*, 111 S. Ct. 2513 (1991), 67 WASH. L. REV. 501, 518–19 (1992).

347. See, e.g., James A. Albert, *The Liability of the Press for Trespass and Invasion of Privacy in Gathering the News—A Call for the Recognition of a Newsgathering Tort Privilege*, 45 N.Y.L. SCH. L. REV. 331, 355–56 (2001–2002); David A. Anderson, *First Amendment Limitations on Tort Law*, 69 BROOK. L. REV. 755, 811–24 (2004).

348. See, e.g., Tracy Dreispul, *Circumventing Sullivan: An Argument Against Awarding Punitive Damages for Newsgathering Torts*, 103 DICK. L. REV. 59, 62 (1999); Andrew B. Sims, *Food for the Lions: Excessive Damages for Newsgathering Torts and the Limitations of Current First Amendment Doctrines*, 78 B.U. L. REV. 507, 530–31 (1998); Nick, *supra* note 334, at 233; Charles C. Scheim, Comment, *Trash Tort or Trash TV?: Food Lion, Inc., v. ABC, Inc., and Tort Liability of the Media for Newsgathering*, 72 ST. JOHN'S L. REV. 185, 191–92 (1998).

damages to a more general call for immunity from newsgathering tort damages for non-criminal acts of the media and for tortious behavior tied to reporting on matters of significant public concern or, in cases of intrusions on private places, a showing that the story served very serious public interest goals.³⁴⁹

Ten years ago, Professor Lyrissa Lidsky provided one of the more interesting and nuanced approaches to the problem of protecting newsgathering without completely sacrificing privacy interests.³⁵⁰ Professor Lidsky argued that both constitutional law and tort law have failed "to reach an appropriate accommodation between privacy and press freedoms."³⁵¹ Professor Lidsky's solution, which does not fall neatly into the categories discussed above, would be to reform the tort of intrusion to make it a better barrier to the most egregious media invasions of privacy, particularly in private places but also sometimes in public.³⁵² She also, however, would create a qualified newsgatherer's privilege in order to protect journalists who intrude on privacy to serve the public interest.³⁵³ The newsgatherer would prevail in an intrusion suit if "she had probable cause to believe that the plaintiff's conduct posed a significant threat to the health, safety, or financial well-being of others" and if "her methods were not substantially more intrusive than necessary to obtain documentation of [the] plaintiff's wrongdoing."³⁵⁴

Professor Lidsky noted that the accommodation of newsgathering and privacy she recommended would raise some tricky issues, particularly in regard to the privacy interests of businesses and their employees.³⁵⁵ Professor Lidsky suggested that reasonable expectations of privacy are often minimal in businesses open to the public. For example, she noted that critics and health inspectors often patronize restaurants without identifying themselves truthfully, social scientists sometimes pose as patients to monitor health care providers, and people often monitor landlords, banks, and car repair businesses to

349. See Sims, *supra* note 348, at 533–37.

350. See Lyrissa Barnett Lidsky, *Prying, Spying, and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173 (1998).

351. *Id.* at 176.

352. *Id.* at 236–38.

353. *Id.* at 239.

354. *Id.*

355. *Id.* at 244–46.

guard against discrimination or unfair practices.³⁵⁶ She noted, however, that businesses not open to the public or parts of businesses off-limits to customers might have a greater claim against intrusive newsgathering methods.³⁵⁷

The recommendations discussed above have varying degrees of merit, both individually and in combination with other recommendations. There are also varying degrees of problems with many of them. The next Part will discuss an alternative to the recommendations made above that is perhaps less ambitious but that also avoids many of the problems associated with other protections of reporting in the public interest from torts based on newsgathering methods.

IV. TESTERS AND REPORTERS

Professor Lidsky's discussion of businesses' diminished privacy rights indirectly suggests the approach that is recommended here to better protect the press from newsgathering torts in limited situations. Professor Lidsky's article described, without using the word, "testers" who pose as customers, patients, or other patrons of businesses to test compliance with laws or ethics guidelines. The relatively obscure section of American law dealing with testers could, if expanded and more clearly defined, benefit journalists performing undercover investigations. Before discussing how viewing undercover journalists as testers could change the law of newsgathering, it is necessary first to discuss how the law regarding testers has developed.

A. *Testers and the Law*

The use of testers has most commonly created legal controversies with respect to standing and in the context of enforcement of employment and housing laws. In the 1958 case *Evers v. Dwyer*,³⁵⁸ the Supreme Court determined that an actual controversy existed and the plaintiff had standing to bring a class-action lawsuit against the city of Memphis over laws that re-

356. *Id.* at 245.

357. *Id.* at 245-46.

358. 358 U.S. 202 (1958) (per curiam).

quired racially segregated seating on city buses.³⁵⁹ The plaintiff, an African American forced to move to the back of a city bus, leave the bus, or face arrest, “boarded the bus for the purpose of instituting this litigation.”³⁶⁰ The district court dismissed his suit seeking a declaratory judgment that the segregation law was unconstitutional because the court found that he had never boarded a city bus before this incident and, therefore, did not represent “a class of colored citizens who do use the buses in Memphis as a means of transportation.”³⁶¹ The Supreme Court determined that the lower court erred in dismissing the lawsuit without reaching the merits, and found it “not significant” that the plaintiff boarded the bus strictly to spur litigation.³⁶² The Court based this determination on two previous cases in which the Court held that a petitioner’s improper motive for filing suit did not warrant a denial of relief.³⁶³

The Supreme Court also endorsed the idea that citizens could act as “private attorneys general” in enforcing the Civil Rights Act of 1964.³⁶⁴ In *Newman v. Piggie Park Enterprises, Inc.*,³⁶⁵ the Court determined that a lower court had erroneously limited the awarding of attorneys’ fees to successful plaintiffs in a civil rights action against a restaurant chain that discriminated against African Americans.³⁶⁶ The Court noted that Congress knew enforcement of the Civil Rights Act would be “difficult” and would depend upon private litigation.³⁶⁷ However, the law did not allow these private plaintiffs to recover damages. If a plaintiff succeeded in getting an injunction against someone violating the law, “he does so not for himself alone but also as a ‘private attorney general,’ vindicating a policy that Congress considered of the highest priority.”³⁶⁸ If a successful plaintiff could not recover attorneys’ fees, however, “few aggrieved parties would be in a position to advance the

359. *Id.* at 203.

360. *Id.* at 203–04 (internal quotation marks omitted).

361. *Id.* at 203 (internal quotation marks omitted).

362. *Id.* at 204.

363. *Id.* (citing *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434–35 (1952); *Young v. Higbee Co.*, 324 U.S. 204, 214 (1945)).

364. 42 U.S.C. § 2000a (2006).

365. 390 U.S. 400 (1968) (per curiam).

366. *Id.* at 400–01.

367. *Id.* at 401.

368. *Id.* at 402.

public interest” by going to court.³⁶⁹ The case thus expressly affirmed that a public interest of high order justified encouraging private citizens to help enforce the law.

The Court has never really questioned the concept of using “testers” or “private attorneys general” to aid law enforcement in securing civil rights. The few cases that have reached the Court have dealt more with standing and statutory definitions of remedies. In *Gladstone, Realtors v. Village of Bellwood*,³⁷⁰ for example, the Court said that testers could sue real estate companies for violations of the Fair Housing Act of 1968,³⁷¹ even if they could not prove direct harm from “racial steering” practices.³⁷² A few years later, the Court also declared that African American testers had standing to sue over racial steering in rental decisions even if white testers did not, and that a time limit in the statute did not apply if the alleged discrimination was ongoing.³⁷³

In the lower federal courts,³⁷⁴ similar cases have led to similar results. In 2000, the Seventh Circuit ruled that employment testers (African Americans allegedly denied interviews or jobs because of race) had standing to sue under Title VII of the Civil Rights Act of 1964,³⁷⁵ but not Section 1 of the Civil Rights Act of 1866.³⁷⁶ The court held that testers could not claim they were denied a contract under Section 1 if they never intended to enter into a contract with an employer, but Title VII only required that they be deprived of an opportunity for employment because of race.³⁷⁷ The court stated that “[r]ecognizing tester standing is consistent with the statute’s purpose [and] Title VII reflects the strong public interest in eradicating discrimination from the workplace.”³⁷⁸

369. *Id.*

370. 441 U.S. 91 (1979).

371. 42 U.S.C. § 3601 (2006).

372. *Gladstone, Realtors*, 441 U.S. at 102–03. The Fair Housing Act makes it illegal for any person or corporation to steer prospective buyers or renters from available property on the basis of “race, color, religion, sex, handicap, familial status, or national origin.” 42 U.S.C. § 3604(d) (2006).

373. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–75 (1982).

374. This study is confined to federal law for purposes of brevity.

375. 42 U.S.C. § 2000e (2006).

376. 42 U.S.C. § 1981 (2006).

377. *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 303 (7th Cir. 2000).

378. *Id.* at 298–99.

In *Shaver v. Independent Stave Co.*,³⁷⁹ the Eighth Circuit reversed part of a lower court decision against a former lumber mill employee who claimed that a former supervisor retaliated against him in violation of the Americans with Disabilities Act (ADA)³⁸⁰ when prospective employers contacted the supervisor as a reference. The court said the question was controlled by the tester cases and held that the employee could pursue his lawsuit even if it was shown that he purposely used his supervisor's name as a reference in order to "manufacture" an ADA case.³⁸¹ In summarizing the tester cases, the court said that the cases were allowed to proceed for two reasons: because "the mere fact of discrimination offends the dignitary interest that the statutes are designed to protect, regardless of whether the discrimination worked any direct economic harm to the plaintiffs," and because the "private attorney general" theory gave "litigants an incentive to attack illegal activity by employers[;] Congress enlisted private self-interest in the enforcement of public policy."³⁸²

Because most of the tester cases have involved standing, they would appear to have little application to journalism law. But a notable exception to the general line of cases is *Northside Realty Associates, Inc. v. United States*.³⁸³ In that 1979 case, the Fifth Circuit rejected the appeal of a realty firm found in civil contempt for violating the terms of an injunction barring it from discriminatory practices.³⁸⁴ Among other things, the appellate court rejected Northside Realty's argument that evidence gathered by testers should have been excluded because the testers' actions amounted to an unreasonable search in violation of the Fourth Amendment.³⁸⁵ The realty firm argued that the testers were working, indirectly, for the Justice Department.³⁸⁶

379. 350 F.3d 716, 724 (8th Cir. 2003).

380. 2 U.S.C. § 12203(a) (2006).

381. *Shaver*, 350 F.3d at 725 (citing *McFadden v. State Univ. of N.Y.*, 198 F. Supp. 2d 436, 455 (W.D.N.Y. 2002)).

382. *Id.* at 724–25.

383. 605 F.2d 1348 (5th Cir. 1979).

384. *Id.* at 1350.

385. *Id.* at 1354–55.

386. *Id.* Northside Realty contended that the tester program originated with the Atlanta Community Relations Commission, which forwarded whatever information it received to the Department of Justice. *Id.* at 1355 n.18.

In ruling against Northside Realty on this question, the court reasoned that, even if the testers could be viewed as government agents, their actions did not intrude on any "reasonable expectation of privacy" that Northside could entertain.³⁸⁷ The court noted that the testers acted precisely as any legitimate prospective homebuyer would act.³⁸⁸ The court took pains to note that the only unusual aspect of the testers' behavior was that they were only pretending to be potential home buyers, but that this "element of deceit ha[d] no significant effect."³⁸⁹ If the testers had "intruded into restricted areas or ransacked Northside's private papers, we would have a different situation altogether."³⁹⁰

It is a bit of a stretch to call the court's ruling an endorsement of a "privilege," and, to the extent that it does provide testers with some protection from liability, the protection is limited. The Fifth Circuit in *Northside* was careful to note that "the testers' acts must be lawful."³⁹¹ However, extending a "tester's privilege" to the news media in certain situations would provide a presumption of non-liability that could help tip the scales in favor of the media when they are most worthy of protection.

B. Journalists As Testers

In *Pell v. Procunier*,³⁹² Justice Douglas noted in dissent that citizens were unlikely to inspect prisons to learn about penal conditions for themselves, but instead were likely "in a society which values a free press, to rely upon the media for information."³⁹³ Similarly, Justice Powell noted in *Saxbe v. Washington Post Co.*³⁹⁴ that it was "hopelessly unrealistic" to expect most people to become personally familiar with the vast majority of newsworthy events. The press, he said, acted as "an agent of the public at large."³⁹⁵ Similarly, testers act as agents of the public in determining whether laws are being obeyed and in

387. *Id.* at 1355.

388. *Id.*

389. *Id.* at 1355 n.19.

390. *Id.* at 1355 n.20.

391. *Id.* at 1355 n.19.

392. 417 U.S. 817 (1974).

393. *Id.* at 841 (Douglas, J., dissenting).

394. 417 U.S. 843 (1974).

395. *Id.* at 863 (Powell, J., dissenting).

reporting violations to authorities. So, when are journalists also testers, and what does that mean in a legal sense?

Just as real estate agents who discriminate against potential home buyers and renters are unlikely to admit freely that they are breaking the law, the people the media expose as lawbreakers could hardly be expected to stand before cameras or tape recorders and confess. So, just as testers must pose as potential home buyers and renters to find out how real estate agents behave in realistic situations, journalists must sometimes hide their identities—and their recording devices—to expose wrongdoing in real-world situations. Journalists are therefore most closely analogous to testers when they are trying to determine whether someone else is obeying the law. The *Food Lion* and *Desnick* stories are classic examples of journalists attempting to hold companies and individuals accountable for violating laws designed to protect the public from unsafe food and fraudulent practices.³⁹⁶ NBC's *To Catch a Predator* series may fall into the same general category, although it is more problematic.³⁹⁷ Certainly *Hornberger*, in which the appellate court repeatedly referred to the occupants of a car stopped by police as "testers," is a good example of journalism as a form of testing.³⁹⁸

But how does one fashion a privilege out of the analogy? And how would it change the legal environment for surreptitious newsgathering?

The cases cited earlier³⁹⁹ suggest an answer. The courts in the tester cases admit that law enforcement authorities cannot, by themselves, catch all of the people who are breaking laws. It is often in the public interest to encourage private persons to take on the responsibility of investigating transgressions and attempting to enforce the law. Real estate and employment testers do this by pretending to be home buyers and renters or prospective employees and then suing when they uncover discriminatory practices. Journalists pose as supermarket employees, eye clinic patients, minors home alone, or minorities out for a drive—among others—and then expose any wrongdoing they

396. See *supra* text accompanying notes 112–25 and 129–43.

397. See *supra* text accompanying notes 2–6.

398. See *supra* text accompanying notes 298–304.

399. See *supra* Part IV.A.

find on television or in print in order to alert the public and authorities to problems.

Because the media are not bringing legal actions in order to force people to comply with the law, standing issues sometimes faced by testers do not apply. Unlike other testers, journalists are more likely to be the defendants in legal actions rather than the plaintiffs. A "tester's privilege" for the media would, therefore, need to provide some protection from tort actions. It would require courts to weigh whether surreptitious newsgathering methods, while technically fraudulent or misrepresentative, are nevertheless immune from liability. A court applying such a privilege in litigation against the media would weigh the public interest in disclosure of the information gathered against the interest in protecting plaintiffs from fraud or misrepresentation.

The privilege suggested here is not necessarily the only approach that could be taken to better protect the press when it acts in the public interest, as the preceding Part demonstrated.⁴⁰⁰ Doing nothing has the advantage of simplicity, but it does not resolve the inconsistencies in post-*Cohen* law or prevent *Cohen* or its progeny from chilling responsible, as well as irresponsible, newsgathering. Also, as First Amendment scholar C. Edwin Baker has said in another context, "[t]he Court and the law should get it right!"⁴⁰¹ It is not clear that the law has gotten newsgathering tort liability right. As for forcing the media to change, it goes without saying that journalists should respect ethical guidelines and that newsgathering is not an excuse to commit crimes or behave outrageously. But news industry ethics codes already discourage surreptitious or undercover reporting unless there is no better way to get an important story.⁴⁰² Under the current state of the law, even stories

400. See *supra* Part III.E.

401. Baker, *supra* note 16, at 1024 (arguing that, even though the press had survived without an independent interpretation of the Press Clause that could support special protections for the press, this did not excuse the failure of the courts to recognize such an interpretation).

402. See, e.g., SOC'Y OF PROF'L JOURNALISTS, CODE OF ETHICS, available at <http://www.spj.org/ethicscode.asp> ("Avoid undercover or other surreptitious methods of gathering information except when traditional open methods will not yield information vital to the public. Use of such methods should be explained as part of the story."); RADIO-TELEVISION NEWS DIRECTORS ASS'N, CODE OF ETHICS AND PROFESSIONAL CONDUCT, available at http://www.rtnda.org/pages/media_items/

that appear to serve important public interests are the subject of expensive litigation and sometimes adverse judgments, as in *Desnick* and, more controversially,⁴⁰³ *Food Lion*. Demanding that the media solve a problem that the courts have created seems fundamentally unfair.

Finally, the most popular response to *Cohen* and its progeny among commentators has been to suggest changes in constitutional interpretation to provide greater protection for the news media. This, however, would either require lower courts to ignore *Cohen* and other related precedents or for the Supreme Court to reverse its *Cohen* decision or, more broadly, its precedents disfavoring special First Amendment privileges for the press. Even authors who favor some sort of additional tort protections or privileges for the media suggest that the Court is unlikely to change its First Amendment Press Clause interpretation radically.⁴⁰⁴

In contrast, the tester's privilege would not require courts to make radical changes in their current approach to lawsuits over newsgathering techniques.⁴⁰⁵ Even if largely implicit, it appears that the courts in *Desnick*, *Food Lion*, and *Hornberger* weighed public interests against private considerations in ruling, for the most part, in favor of the media. The Seventh Circuit's decision in *Desnick* was the most obvious example of public interest balancing. Judge Posner's opinion for the panel pointedly noted that ABC could not be found liable for an "injurious act" under electronic surveillance statutes because

code-of-ethics-and-professional-conduct48.php?g=36?id=48 ("Professional electronic journalists should . . . [u]se surreptitious newsgathering techniques, including hidden cameras or microphones, only if there is no other way to obtain stories of significant public importance and only if the technique is explained to the audience.").

403. See Elder et al., *supra* note 318 (arguing that *Food Lion* reporters staged stories and engaged in other outrageously unethical behavior).

404. See, e.g., Susan M. Gilles, *The Image of "Good Journalism" in Privilege, Tort Law, and Constitutional Law*, 32 OHIO N.U. L. REV. 485, 494–96 (2006) (noting that the Supreme Court has already rejected institutional, functional, or content-based definitions of "the press" and seems unlikely to change course); Logan, *supra* note 305, at 163.

405. The approach recommended here most closely resembles Professor Lyrissa Lidsky's, *supra* notes 350–57 and accompanying text, in that both would provide protection only for journalists acting in the public interest. Professor Lidsky's approach, however, would require courts to reverse or ignore the *Cohen* holding that claims of tortious behavior in newsgathering do not raise First Amendment issues so long as the torts in question are matters of generally applicable law.

“[t]elling the world the truth about a Medicare fraud” was not injurious.⁴⁰⁶ Also, the privilege could provide a more consistent legal landscape for both parties than the current system does.

A tester’s privilege of the type outlined above would be useful to the media in close cases, such as the *Veilleux*,⁴⁰⁷ *Medical Laboratory*,⁴⁰⁸ and *W.D.I.A.*⁴⁰⁹ cases discussed earlier, in which the courts believed that *Cohen* compelled them to allow certain claims against the media, while either sharply limiting them or dismissing most other claims. The tester’s privilege, derived from leeway already given to private citizens in other venues, would be a generally applicable tool that would not raise issues of media favoritism when stacked against a generally applicable law. It would, in other words, help to neutralize *Cohen*. The most important factor in neutralizing *Cohen* would be a finding that the journalists’ conduct, under the tester’s privilege, was lawful. The determination that the newspapers in *Cohen* might not have acted lawfully allowed the Court to bypass the protection for expression offered by *Daily Mail* and *Florida Star*.⁴¹⁰ Thus, in a suit against the media for tester activities, a plaintiff would be required to prove that his claim passed strict scrutiny—a very high standard.

The most obvious example of a case in which the media would benefit from a tester’s privilege is *Peavy*.⁴¹¹ Although the Dallas television station embroiled in that case began its investigation of alleged school system corruption based on illegally recorded phone conversations, it conducted its own investigation and did not use the tapes of the conversations on the air. Even though a jury ultimately did not find the allegedly corrupt school board member, Mr. Peavy, guilty, it still seems obvious that the public interest was best served by hearing the allegations. But the Fifth Circuit panel that ruled for Peavy did not even entertain public interest questions in its ruling. General recognition of a tester’s privilege would have required it to do so.

Application of such a privilege might raise concerns that the media would run amok, ruining careers and lives while hiding

406. *Desnick v. Am. Broad. Co.*, 44 F.3d 1345 (7th Cir. 1995).

407. *See supra* text accompanying notes 213–28.

408. *See supra* text accompanying notes 234–47.

409. *See supra* text accompanying notes 291–97.

410. *See supra* text accompanying notes 65–78.

411. 221 F.3d 158 (5th Cir. 2000); *see supra* text accompanying notes 272–84.

behind this legal shield. But the public interest standard would adequately protect private interests while shielding the media from frivolous lawsuits inspired by stories that enriched public discourse and knowledge about government and corporate activities. Widespread recognition of the tester's privilege would, however, make it less likely that some plaintiffs, unable to win publication damages for substantially true stories, would then resort to suing over newsgathering techniques. The privilege would be of little help to the media when the undercover activities of journalists seem designed to gather sensational tidbits of information that have little public service value. So, for example, the activities of *Inside Edition* staffers in the *Wolfson* case would not be analogous to testing because the producers and camera persons were merely filming evidence of the Wolfsons' lifestyle for vague purposes somewhat related to a story about their employer.⁴¹² Although the undercover filming of acting workshop participants and instructors for a story highlighting questionable business practices would appear to be more in line with the general purpose of testing, the judgment in *Turnbull*⁴¹³ was arguably correct because the state was already aware of the allegedly questionable practices of the workshops. In addition, ABC held the story until the state and the workshops were nearing a settlement; thus, the need to expose the questionable practices was virtually nonexistent, leading the court to question whether there was any public interest served in airing the private moments captured on tape.⁴¹⁴

The inclusion of both corporate and governmental activities, within those that a tester's privilege might help the news media expose, could raise alarm bells among some legal experts. In *Cohen*, *Desnick*, and *Food Lion*, the plaintiffs were individuals or private corporations. Traditionally, even the strongest advocates of press freedom have suggested that the government is the only enemy of a free press, at least for constitutional purposes.⁴¹⁵ It may be time, however, to rethink the implications of

412. See *supra* text accompanying notes 255–60.

413. *Turnbull v. Am. Broad. Co.*, No. CV 03-3554 SJO (FMOx), 2004 U.S. Dist. LEXIS 24351 (C.D. Cal. Aug. 19, 2004); see *supra* text accompanying notes 261–71.

414. See *supra* text accompanying notes 261–71.

415. See, e.g., Blasi, *supra* note 27, at 538 (stating that although corporations often have vast power, government power is a greater concern because government has access to the use—or misuse—of “legitimized violence”).

the role that big corporations—and powerful individuals—can play in affecting the public. As the Supreme Court suggested in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,⁴¹⁶ the case in which it extended First Amendment protection to commercial speech, businesses play a central role in American society. The Court noted that society has an interest in maintaining a “free flow” of commercial advertising for much the same reason as it does in maintaining a free flow of political information.⁴¹⁷ According to the Court, a free flow of commercial information is necessary to preserve the free-enterprise system and to help participants make decisions about how that system should be altered or regulated.⁴¹⁸ The government’s plan to use taxpayer money to rescue banks and insurance companies that made unwise business decisions threatening the U.S. economy underscores the major role that corporations play in people’s everyday lives⁴¹⁹—and why private entities like corporations warrant scrutiny by an aggressive press.

Of course, the news media are also corporate in nature. Although this does not deprive them of First Amendment protection, it does suggest a role in society different from the government’s role. For that reason, the Texas case against NBC for its *To Catch a Predator* filming may provide an instructive exception to the tester’s privilege. NBC, in cooperation with local Texas police officers and the Internet watchdog group Perverted Justice, went to the home of a prosecutor accompanied by police and, eventually, a SWAT team.⁴²⁰ NBC’s Chris Hansen, the on-camera correspondent for the *Predator* series, told police that Louis Conradt had contacted a Perverted Justice decoy posing as a juvenile boy online and arranged to meet at a “sting house,” but Conradt never showed up there.⁴²¹ According to the district court’s opinion granting in part NBC’s motion to dismiss a lawsuit filed by Conradt’s family, Hansen

416. 425 U.S. 748 (1976).

417. *Id.* at 763–64.

418. *Id.* at 765.

419. *See, e.g.,* Edmund L. Andrews & Eric Dash, *U.S. Expands Plan to Buy Banks’ Troubled Assets*, N.Y. TIMES, Mar. 24, 2009, at A1.

420. *Conradt v. NBC Universal, Inc.*, 536 F. Supp. 2d 380, 386 (S.D.N.Y. 2008).

421. *Id.* at 385.

urged the police to go to Conradt's home and arrest him if he did not go to the sting house. The police complied.⁴²²

When police and an NBC crew, including Hansen, arrived at Conradt's house in November 2006, he did not answer his door or acknowledge he was home. However, police determined he was there and called in a SWAT team to arrest him, even though he was not believed to be armed. After SWAT team members entered the house, Conradt emerged from a back room, said he did not intend to hurt anyone, and shot himself.⁴²³ A police officer then reportedly said to an NBC producer, "That'll make good TV."⁴²⁴ Conradt was taken by helicopter to a hospital in Dallas and died there.⁴²⁵

The judge took pains to note that NBC was involved in the planning and execution of the raid on Conradt's home and had access to the scene. NBC later aired an episode of *Predator* focused on Murphy, Texas that included the raid on Conradt's home. The episode included audio of the gunshot and photographs of the gun, the body, and Conradt's transfer to a helicopter.⁴²⁶ The judge determined that, if the allegations of the amended complaint were true, a reasonable jury could find that NBC had been, in effect, a state actor because of its close relationship with the police in planning and executing the raid.⁴²⁷ He therefore denied NBC's motion to dismiss a claim by Conradt's estate that NBC had violated Conradt's Fourth Amendment right to be free from unreasonable searches and seizures.⁴²⁸

The tester's privilege proposed in this Article should attach only to news entities that perform a journalistic function, not a governmental one. Therefore, in the unusual case like *Conradt*, in which a news organization allegedly crosses the line from reporter to active law enforcement participant, the news or-

422. *Id.* at 386.

423. *Id.*

424. *Id.* at 387.

425. *Id.*

426. *Id.*

427. *See id.* at 390-92.

428. *Id.* at 392.

ganization could not claim the privilege—provided, of course, that the allegations of state action were true.⁴²⁹

CONCLUSION

Quite simply, the Supreme Court was wrong when it said in *Cohen* that a tort action against the press for newsgathering tactics raised no First Amendment concerns if the tort was “generally applicable.” The Court had already granted broad protection to the press and public from tort laws such as libel and privacy, even though libel and privacy laws are also generally applicable. The Court has also never explained the extent to which newsgathering is protected under the First Amendment, and *Cohen* was a missed chance to do so clearly.

As a result of *Cohen*, lower courts such as the Fourth Circuit in *Food Lion* and the Seventh Circuit in *Desnick* have issued contradictory opinions when undercover newsgathering techniques have been challenged. The decisions flowing out of *Cohen* and its progeny leave the press vulnerable to legal actions that sidestep defamation law and weaken the press’s ability and resolve to expose wrongdoing in the public interest.

One solution to the indecision involving the media and their investigatory newsgathering techniques is to allow for a tester’s privilege for journalists. The rights of those who test adherence to certain federal civil rights laws has been acknowledged as conduct done in the public interest. Similarly, journalists act in the public interest when they uncover news and hold corporations and individuals accountable for their misdeeds. It stands to reason, then, that journalists should be allowed a privilege to obtain and disseminate publicly such news.

Although no privilege has yet been recognized, now is the time for the press to fight harder than ever to preserve and expand First Amendment protection of its ability to gather the news. Particularly in these uncertain times, the public needs an aggressive free press to look out for its interests. Perhaps someday soon the courts will agree.

429. It should be noted that the decision cited above was only in regard to a Rule 12(b)(6) motion to dismiss by NBC and was not a final judgment in the case. The subsequent settlement leaves the state action question unresolved.

**RECONSIDERING THE FELONY MURDER RULE IN
LIGHT OF MODERN CRITICISMS: DOESN'T THE
CONCLUSION DEPEND UPON THE
PARTICULAR RULE AT ISSUE?**

DAVID CRUMP*

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The felony murder doctrine has long been a target for detractors.¹ In some instances, the criticisms have had merit, or at least they have had merit when aimed at certain ill-considered

* John B. Neibel Professor of Law and Faculty Director, Continuing Legal Education, University of Houston Law Center; J.D., University of Texas School of Law; A.B., Harvard College.

1. See, e.g., Guyora Binder, *The Culpability of Felony Murder*, 83 NOTRE DAME L. REV. 965, 966 (2008) (asserting that commentators are “almost unanimous in condemning felony murder”).

formulations of the rule.² In other cases, however, the critics have articulated poorly reasoned arguments. Surprisingly, this group includes the drafters of the Model Penal Code (MPC)³ and the Michigan Supreme Court,⁴ which saw no arguments whatsoever for the rule. There was a time when virtually no commentator could find anything to say in favor of retaining the rule, even though it had proven extraordinarily durable over time and almost every state had chosen to retain it.⁵ That history ought to have prompted scholars to consider whether there might be valid reasons for the near-universal retention of the felony murder doctrine, but for most of the rule's existence, few scholars did so.

In 1985, my co-author and I attempted to do what had been neglected up until that time: describe the policies that are arguably served by the felony murder rule.⁶ The resulting article, *In Defense of the Felony Murder Rule*, appeared in the *Harvard*

2. See *infra* Part II.B.

3. The MPC purported to abolish the doctrine, largely on the asserted ground that it separated criminal liability from blameworthiness. The drafters contended that “[p]rincipled argument in favor of the felony murder doctrine is hard to find.” MODEL PENAL CODE § 210.2(1)(b) cmts. (Official Draft 1980). But principled arguments can in fact be found. See *infra* Part II. Furthermore, the MPC actually retained a form of felony murder, with a highly ambiguous definition. See *infra* notes 48–50 and accompanying text.

4. See *People v. Aaron*, 299 N.W.2d 304, 312–16 (Mich. 1980) (concluding that to the extent that various States have placed limits on the rule, they “call into question the continued existence of the doctrine itself”). This reason for abolishing the rule is solidly illogical. See *infra* notes 51–56 and accompanying text.

5. See MODEL PENAL CODE § 210.2(1)(b) cmts. (Official Draft 1980) (noting the absence of commentary in support); James J. Tomkovicz, *The Endurance of the Felony Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429 (1994) (recognizing the persistence of the rule).

6. David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL’Y 359 (1985). Many of the articles citing *In Defense of the Felony Murder Doctrine* deviate from the preexisting scholarship by asserting that the felony murder doctrine serves valid purposes. See, e.g., Sean J. Kealy, *Hunting the Dragon: Reforming the Massachusetts Murder Statute*, 10 B.U. PUB. INT. L.J. 203, 240 & n.279 (2001) (describing as “[m]ost persuasive” the argument that “the rule offers a rational, proportional grading of offenses”); Mitchell Keiter, *With Malice Toward All: The Increased Lethality of Violence Reshapes Transferred Intent and Attempted Murder Law*, 38 U.S.F. L. REV. 261, 273 & n.36 (2004) (supporting the deterrence rationale for the rule); Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1579 n.192 (2005) (describing *In Defense of the Felony Murder Doctrine* as “excellent and fascinating”). Nevertheless, “huge disagreement” exists over *mentes rea* for homicide and over the theories set out in the 1985 article. Christopher Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 145–46 (2005).

Journal of Law and Public Policy, has been cited by a wide variety of courts, and appears in almost every criminal law casebook.⁷ Our conclusion was that the question whether to retain the felony murder rule could be argued either way, but that the decision should not be made with a blind eye toward the reasons for retaining the rule. Since that time, the debate has changed. Opponents of the rule still exist, and they should. But with relatively few exceptions, academics no longer argue that the felony murder rule is without any support.⁸

The debate continues, of course. It largely — although not entirely — consists of arguments that detract from the felony murder rule. But there are two remaining questions. First, what arguments, if any, can furnish answers to the newer criticisms of the rule? As was the case years ago, many of the criticisms are subject to answers or counter-criticisms, but the answers have not been uniformly developed. Second, given that most jurisdictions still retain the felony murder doctrine in some form, how should a statute expressing the rule be designed? As is the case with any other legal principle, there are both good and bad versions of the felony murder doctrine.

This Article is an attempted reply to the rule's opponents, including the newest critics. It also contains an appraisal of different types of felony murder laws. Part I briefly summarizes the older rationales for and against the felony murder doctrine, including the arguments contained in the earlier article referred to above. Part II describes various forms that the felony murder rule takes in different states and under a variety of statutes today. Some of the versions are sound; others are not. Part III considers some of the most salient new criticisms of the rule. This discussion illustrates that the relative merit of the criticisms depends heavily upon which version of the rule is at issue.

7. For recent citations by state courts, see, for example, *People v. Hansen*, 885 P.2d 1022, 1028 (Cal. 1994), *McMillan v. State*, 956 A.2d 716, 731 (Md. Ct. Spec. App. 2008), and *Bowman v. State*, 172 P.3d 681, 685 (Wash. 2007). See also JOSHUA DRESSLER, CRIMINAL LAW 310 (3d ed. 2003).

8. Most articles critical of the rule at least recognize the contrary arguments. See, e.g., Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 706–08; Nelson E. Roth & Scott E. Sundby, *The Felony Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 450–60 (1985). For more dubious commentary that instead asserts that the rule is “rationally indefensible,” see Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 695–96 (1994).

The Conclusion recognizes that retaining the felony murder rule is a policy decision that can be argued either way, but contends that the decision should not be made with a one-sided bias. In addition, the Conclusion includes the observation that when evaluating the criticisms, a great deal depends upon which version of the felony murder doctrine the critics choose to denounce. The better versions are responsive to, and can withstand, the critics' assaults, whereas the less acceptable formulations give ammunition to the rule's opponents.

I. FOR AND AGAINST THE FELONY MURDER RULE:
THE WELL-WORN ARGUMENTS

A. *Traditional Arguments in Opposition*

The classic arguments against the felony murder rule have been asserted for many years, and they are partially collected in commentary to the MPC.⁹ The most frequent assertion seems to be that the doctrine divorces criminal liability from blameworthiness.¹⁰ If this criticism were found to have merit, it would represent a serious concern, because relationship to blameworthiness is an important criterion in shaping the criminal law.¹¹ A second point in opposition is the assertion that the rule serves no positive purposes.¹² For reasons described below,

9. See *supra* note 3.

10. See, e.g., Robert M. Elliot, *The Merger Doctrine as a Limitation on the Felony Murder Rule: A Balance of Criminal Law Principles*, 13 WAKE FOREST L. REV. 369, 371 (1977) (arguing that "the rule does violence to the philosophy which dictates that criminal liability should be commensurate with moral culpability"); George P. Fletcher, *Reflections on Felony Murder*, 12 SW. U. L. REV. 413, 427-28 (1981), Jeanne H. Seibold, *The Felony Murder Rule: In Search of a Viable Doctrine*, 23 CATH. LAW 133, 160-61 (1978) (asserting that the rule is "grossly misplaced in a legal system which recognizes the degree of mental culpability as the appropriate standard for fixing criminal liability" and that abolishing the rule would lead to blameworthiness as the guide for imposing punishment).

11. See Crump & Crump, *supra* note 6, at 362 ("Proportionality is an important value in the criminal law. Such diverse philosophers and judges as Jeremy Bentham, H. L. A. Hart, Sir James Fitzjames Stephen, Joel Feinberg, and Chief Justice Warren Burger have noted the disrespect that the law engenders when its response is disproportionate to public evaluations of the severity of an alleged violation. Many penal codes declare proportionality to be among their major objectives.").

12. See, e.g., Roth & Sundby, *supra* note 8, at 450-60 (discussing the proposed purposes of the rule and examples of how each purpose has failed); Seibold, *supra* note 10, at 151-52 (describing the theory that the purposes existing for the felony murder rule at its creation no longer exist).

this argument is dubious.¹³ Third is the argument that the felony murder rule is encumbered with so many limitations that its own exceptions undermine it.¹⁴ This is probably the weakest of the traditional arguments,¹⁵ although at least one court has accepted it.¹⁶ Each of these contentions warrants discussion. Examination will show that, although the critics generally do not specify which version of the rule they are attacking, each argument depends on precisely which kind of felony murder doctrine is under discussion.

The chief complaint of the MPC drafters appears to be that the felony murder doctrine results in convictions unrelated to individual blameworthiness.¹⁷ Unfortunately, the commentary to this part of the MPC is not well developed. The underpinnings of the argument seem to include an assumption that the rule inevitably will be written to avoid any connection to individual blameworthiness, which is not true.¹⁸ The argument also seems to assume that felony murders are not, as a class, more blameworthy than felonies that do not result in death. This assumption is debatable,¹⁹ and it further presupposes that differences in moral blameworthiness cannot be addressed appropriately in sentencing laws.²⁰ Ultimately, the drafters seem to be saying that *mens rea* is the only legitimate determinant of blameworthiness,²¹ that the traditional determinants of *mens rea* for mur-

13. See *infra* notes 24–25 and accompanying text.

14. See Joseph M. Conley, *Michigan Supreme Court Abrogates Common Law Felony Murder Rule*, 15 SUFFOLK U. L. REV. 1304, 1318 (1980) (stating that “restricting the scope of felony murder to inherently dangerous felonies rendered the doctrine superfluous to most prosecutions because defendants who perpetrate such felonies usually display sufficient culpability to support a murder conviction”).

15. See *infra* notes 51–56 and accompanying text.

16. See *People v. Aaron*, 299 N.W.2d 304, 312–16 (Mich. 1980).

17. See MODEL PENAL CODE § 210.2(1)(b) cmts. (Official Draft 1980); see also Tomkovicz, *supra* note 5, at 1437–41.

18. See *infra* Part II.

19. See Crump & Crump, *supra* note 6, at 363–65 (pointing out that at least some versions of the felony murder rule do not divorce liability from blameworthiness, and citing information taken from court opinions, jury verdict research, and empirical public opinion surveys).

20. Note that nothing in the felony murder rule requires “equal” sentences for all murders. Furthermore, nothing prevents any jurisdiction from authorizing its courts to take into account other circumstances, including the defendant’s lack of intent to cause a death.

21. See Crump & Crump, *supra* note 6, at 366 (observing that “[m]ens rea is not a ‘unified field theory’ of homicide, and while such a theory might make the subject

der are the only way to describe the appropriate mental states for murder,²² and that the felony murder rule cannot be crafted to create an equivalent requirement of moral blameworthiness.²³ Again, the argument rests upon debatable propositions.

The classic arguments also assert that the felony murder rule cannot advance other goals of the criminal law, including those founded on utilitarian concepts such as deterrence.²⁴ This criticism sometimes asserts that the felony murder rule cannot deter accidental killings that occur during felonies because felons will not know the law and cannot conform their conduct to the goal of minimizing accidental killings.²⁵ The argument is dubious because the same reasoning could be applied to many rules aimed at avoiding accidents, including those penalizing negligence or creating strict liability. No one advocates rescission of those laws because actors may not know the law. Finally, some critics argue that the exceptions or limits to the felony murder rule somehow undermine the rule in its entirety.²⁶ This position seems to be grounded in an assumption that no rule should have exceptions, and that the existence of any such limits shows the rule itself to be illegitimate, even if the limits produce results consistent with the policy of the rule by avoiding

artificially 'logical' or 'consistent,' it does not reflect our society's more complex understanding of the nature, function, and purpose of the criminal law"); see also Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763, 770 (1999) (stating that "[m]ental state or 'mens rea' is the decisive yardstick for determining culpability").

22. See *infra* note 92 and accompanying text (citing authority for adoption of mens rea conceptions different from traditional intent); see also Tomkovicz, *supra* note 5, at 1437 (noting that "it is the widely accepted view today that criminal liability must rest on proof of a recognized level of mental fault for every essential element of an offense").

23. See *infra* notes 59–61 and accompanying text (citing a particular formulation of the felony murder rule and explaining why it corresponds to blameworthiness); see also Tomkovicz, *supra* note 5, at 1438 (stating that "[e]very true variation of the felony murder rule is to some extent inconsistent with these contemporary notions of culpability and fault" (footnote omitted)).

24. See Crump & Crump, *supra* note 6, at 369–71; Seibold, *supra* note 10, at 151 (claiming that deterrence "is furthered by the felony murder rule only marginally, if at all" and that "[s]ince neither negligence nor accident can be deterred, the felony murder rule cannot fulfill such a purpose").

25. Justice Holmes, among others, offered this criticism. See O. W. HOLMES, JR., *THE COMMON LAW* 58 (Boston, Little, Brown, & Co. 1881).

26. See *supra* note 4 and accompanying text.

its application when the rule could not carry out its purposes.²⁷ These arguments, too, are subject to criticism.

It should be immediately added, however, that these arguments might have more currency for certain formulations of the felony murder rule than for others. The California jurisprudence on felony murder, for example, is poorly designed.²⁸ The California version of felony murder produces arbitrary distinctions that excuse from murder some individuals with greater moral blameworthiness than other individuals found liable for murder.²⁹ This is not the same thing, however, as detaching felony murder from considerations of moral blameworthiness, because the California decisions resulting in murder convictions do reflect moral blameworthiness; the problem is that California uses odd distinctions to exonerate others who also are blameworthy.³⁰ This is the perennial condition of the criminal law, which is written to minimize errors of conviction and which therefore creates anomalies of exoneration. But there is no doubt that the California rule is badly designed, and that the moral blameworthiness rationale has something to do with the reasons why. In any event, California's approach is not the only way to formulate the felony murder rule. There are other types of felony murder statutes that do not reflect the disadvantages of California's law, as Part II of this Article will show.

B. *Traditional Arguments Supporting the Rule*

Are there any defensible rationales for the felony murder rule? Yes, there are, and developing these arguments was one purpose of my earlier article.³¹ As the present Article will ex-

27. See Crump & Crump, *supra* note 6, at 377–93 (discussing extent to which limits on the felony murder rule are policy-driven, in that they attempt to avoid application of the doctrine to situations not justified by the underlying policies).

28. See *infra* Part II.B.; see also Stephen L. Miller, Comment, *People v. Dillon: Felony Murder in California*, 21 CAL. W. L. REV. 546, 549–51 (1985) (discussing the California ruling that a felony must be dangerous “in the abstract” and giving examples of cases in which felonies were deemed not to be so).

29. See M. Susan Doyle, Comment, *People v. Patterson: California's Second Degree Felony Murder Doctrine at "The Brink of Logical Absurdity,"* 24 LOY. L.A. L. REV. 195, 197–99 (1990) (discussing the notion that drug-related deaths will likely never be prosecuted under California's felony murder rule since the rule requires that there be “a high probability that furnishing the drug would prove fatal” and this almost never occurs).

30. See *infra* notes 79–81 and accompanying text.

31. Crump & Crump, *supra* note 6, at 361–77.

plain, the rule's most important purpose is enhancing the connection between moral blameworthiness and the imposition of criminal liability. Also, the idea that deterrence is impossible may be overstated; it seems probable that at least some meaningful deterrence may result from the felony murder rule. In addition, the rule may serve some subordinate purposes that might not suffice alone to support it: decreasing the utility of perjury,³² preserving fine calibration of adjudication for cases in which it is most appropriate,³³ condemning the taking of human life,³⁴ and providing clear, unambiguous definitions of crimes.³⁵ Finally, the exceptions to the rule arguably do not undermine it; every rule requires limits, and the exceptions to the felony murder rule can be seen as logical and policy-driven.³⁶ Each of these issues has been underestimated by the classical opponents, and each requires discussion and development.

First, the felony murder rule may actually serve the policy of linking the criminal law to moral blameworthiness,³⁷ contrary to its critics' assertions. Specifically, the rule arguably produces proportional grading of criminal offenses. This argument rejects criticisms of the rule founded on a mens-rea-only assumption. The criminal law has never been limited to mens rea alone in assessing the severity of crime. Actus reus and results count, too.³⁸ Murder is not the same offense as attempted murder, even though the two crimes have similar *mentes reae*. Murder is a more serious crime, even if the main difference is the result. The felony murder rule, like classical criminal law in general, is founded on the proposition that the result is sometimes a factor that aggravates or reduces the severity of a crime. Specifically, the felony murder rule reflects a judgment that a robbery that causes a human death is not merely a robbery but something more serious; it is more akin to a murder than to a robbery.³⁹

32. See *infra* note 42 and accompanying text.

33. See *infra* note 43 and accompanying text.

34. See *infra* note 44 and accompanying text.

35. See *infra* notes 45–50 and accompanying text.

36. See *infra* notes 51–56 and accompanying text.

37. See Crump & Crump, *supra* note 6, at 361–67.

38. See *id.* at 362–66.

39. See *id.* For further commentary discussing this concept, see Binder, *supra* note 1 (describing a method of defining felony murder that links it to blameworthiness or culpability); Tomkovicz, *supra* note 5, at 1430–32 (explaining the persistence of the rule).

In addition, the ancient policy of deterring killings, which has justified the felony murder rule for many years, may have more truth to it than the critics recognize.⁴⁰ It seems doubtful that felons are so different from other people that they cannot understand that a killing makes a criminal episode more serious. Surely, a robber who causes a human death during the crime knows that he has bought more trouble for himself than if he had left everyone alive. Furthermore, the assumption that the rule cannot deter accidental killings is extravagant. If that were the case, the law would have long since discarded every principle based on negligence, as well as strict liability, on the ground that accidents are not deterrable. Finally, the rule may well deter intentional killings. If the defendant falsely claims that the gun discharged accidentally, and the jury cannot tell beyond a reasonable doubt whether this claim is true, the result would be acquittal without the felony murder rule.⁴¹

There are several other justifications for the rule. As the last example above shows, the rule removes some of the incentives to commit perjury⁴² and, as the California Supreme Court has recognized, it reserves finely calibrated (and scarce) trial resources for more substantial issues.⁴³ The rule also performs a function involving condemnation, because it reaffirms the sanctity of human life by reserving severe sanctions for crimes that destroy human life.⁴⁴

In addition, the felony murder rule serves the purpose of providing a clear and unambiguous crime definition.⁴⁵ This is an important (albeit certainly not the only) value in the criminal law.⁴⁶ Ambiguity encourages discriminatory and inconsistent adjudication. Clarity, on the other hand, limits the discretion of both jurors and judges to import invidious criteria into decisions concerning criminal liability.⁴⁷ A well-drafted felony murder statute, such as the one considered in the next Part of

40. See Crump & Crump, *supra* note 6, at 369–70.

41. See *id.*

42. See *id.* at 375–76.

43. See *People v. Burton*, 491 P.2d 793, 801–02 (Cal. 1971); Crump & Crump, *supra* note 6, at 374–75.

44. Crump & Crump, *supra* note 6, at 367–68.

45. *Id.* at 371–74.

46. *Id.*

47. Cf. *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983) (explaining problems relating to the application of vague statutes).

this Article, serves this goal. In contrast, the MPC attempts to cover the felony murder situation by an odd combination: a confusing concept of recklessness coupled with a presumption. First, the MPC defines murder to include homicides committed "recklessly under circumstances manifesting extreme indifference to the value of human life."⁴⁸ This sentence contains several vague concepts that are likely to produce inconsistency and arbitrariness in verdicts. For example, two juries can differ significantly enough over the kinds of indifference that are "extreme" that they produce seriously inconsistent verdicts. Furthermore, some jurors may be motivated to find "extreme" indifference because of improper factors such as the defendant's lifestyle, personality, or ethnicity. Next, the MPC provides that the requisite recklessness and indifference are "presumed" if the actor was engaged in any of several named felonies.⁴⁹ A criminal presumption, of course, requires the judge to tell the jury that it can follow or disregard the presumption as it chooses.⁵⁰ A well-crafted felony murder law would provide greater clarity and thus confine discretion better than the MPC's backdoor method of ostensibly "abolishing" the rule while actually preserving it in an altered form.

What about the exceptions to the rule? Do they destroy its very legitimacy?⁵¹ Here, the critics' argument involves a non sequitur, because every legal principle requires delimitation. The classic murder statute is limited both by its own terms and by exceptions that range from self-defense to insanity. But no one advocates abolishing the crime of murder because it is subject to exceptions. These limits help the criminal law to carry out its underlying policy aims by confining convictions for murder to cases that should be denoted as murder.

Do the exceptions to felony murder perform a similar function? Upon examination, the exceptions and limits to the felony murder rule similarly turn out to reflect instances in which a

48. MODEL PENAL CODE § 210.2(b) (Official Draft 1980).

49. MODEL PENAL CODE § 210.2(b) (listing robbery, rape, deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping, and felonious escape).

50. *Sandstorm v. Montana*, 442 U.S. 510, 522-24 (1979) (explaining that criminal presumptions cannot be mandatory); *County Court v. Allen*, 442 U.S. 140, 157 (1979) (distinguishing between mandatory and permissive presumptions in criminal law).

51. The Michigan Supreme Court concluded that they did. See *People v. Aaron*, 299 N.W.2d 304, 312-16 (Mich. 1980).

conviction for murder would not be justified by policy reasons.⁵² Although every jurisdiction that recognizes exceptions to the felony murder rule seeks to advance the rule's underlying policy aims, some jurisdictions' limits and exceptions have proved far more effective than others' in achieving this goal.⁵³ The merger doctrine, for example, keeps the felony murder rule from swallowing up the system of crime grading reflected in lesser homicides.⁵⁴ The dangerous act (or less reliably, the dangerous felony) requirement is designed to confine the murder category to instances of blameworthiness.⁵⁵ Causation doctrines are another effort to correlate the application of the rule with blameworthiness.⁵⁶ Basing a blanket abolition of all types of felony murder doctrines on the existence of exceptions and limits is poor reasoning, but that has not kept critics from asserting the argument.

Once again, it should be observed that both the critics' arguments and the rationales for the felony murder rule depend to some extent upon which form of the rule one is discussing. There are better felony murder statutes, and there are worse ones. The better statutes can stand up to the critics' attacks more persuasively than the worse ones can.

II. WHAT KIND OF FELONY MURDER STATUTE? GOOD ONES AND BAD ONES

A. "Good" Felony Murder Definition (Although "Good" Is Always in the Eye of the Beholder)

A good felony murder statute would have several characteristics. First, it would avoid interfering with the policies underlying other kinds of crime grading contained in statutes defining lesser homicides and other related crimes. It also would tie the definition of murder to situations involving relatively high degrees of individual blameworthiness. Such a rule would also maximize effectiveness in carrying out utilitarian goals such as deterrence. It would avoid ambiguity, which is always a diffi-

52. For an analysis of this issue, see Crump & Crump, *supra* note 6, at 377-91.

53. *See id.*

54. *Id.* at 377-83.

55. *Id.* at 391-93.

56. *Id.* at 383-91.

cult problem in the criminal law. Finally, it would minimize the anomalies that result from schemes of crime grading.⁵⁷

As an example, consider the following state statute, which is excerpted here to remove other definitions of murder and to isolate the felony murder component. The most important language is italicized:

A person commits an offense if he:

....

(3) *commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.*⁵⁸

This law is currently in place in at least one state. It is a relatively good statute, considered by the criteria outlined above, although it is subject to some potential criticisms. This Part will examine the reasons for calling this version a good one.

First, this statute is a good law because it ties the crime of murder to relatively high degrees of individual blameworthiness. It does not automatically apply if the defendant commits a felony and a death results, as one might think could happen under a crude definition of the crime. In fact, it does not automatically apply even if the felony, in the abstract, is "dangerous."⁵⁹ It requires the defendant to undertake two kinds of actions. First, the defendant must be acting in the course of committing a felony. Most felonies are serious crimes requiring a mens rea of intent or knowledge.⁶⁰ But second, and more importantly, the defendant must himself engage in an act that is "clearly dangerous to human life."

Thus, under this statute, mere accident is not enough. In fact, dangerousness is not necessarily sufficient either, because the act must be one that is not just dangerous in the abstract, but one

57. These criteria are distilled from the criticisms of and supporting arguments for felony murder laws generally. See *supra* Part I.

58. TEX. PENAL CODE § 19.02(b)(3) (2008) (emphasis added).

59. Thus, it differs in an important way from the approaches of some states, such as California. See *infra* Part II.B.

60. But not all felonies require this mens rea. The criticism that might be addressed to this aspect of the statute is discussed below. See *infra* note 67 and accompanying text.

that is “clearly dangerous to human life.” Furthermore, this clearly dangerous act must be the agency that “causes” the death of an individual. In summary, this statute focuses on individual blameworthiness more than other felony murder statutes⁶¹ by centering its criteria on the actions of the individual defendant.

By the same token, the statute is confined to circumstances that are more readily subject to deterrence. Even though it is obvious that accidents in general are deterrable,⁶² this statute does not cover every situation that involves an accident. The defendant is called upon to avoid only conduct that is “clearly dangerous to human life.” Defining murder in this way confines the label of murder to those situations in which the defendant has the most reason to be both able and motivated to avoid liability for the crime.

The statute does not seem likely to require a great deal of interpretation. Its language is transparent enough to guide jury deliberation, and it can be used directly in jury instructions.⁶³ In other words, it is not ambiguous, considered relative to other criminal laws. And the statute seems less prone than other versions considered below to exonerating more blameworthy individuals while convicting less blameworthy individuals, because its “clearly dangerous act” requirement is targeted directly at blameworthy conduct.

A critic could certainly find ways to attack this statute. First, the “clearly dangerous act” component seems to require only an objective standard of dangerousness. That is to say, the “clearly dangerous” requirement seems to demand only that a reasonable person be able to perceive the act as clearly dangerous; the subjective mental state of the individual defendant appears to be irrelevant. A meticulous critic might argue that the statute should be written so that the defendant is liable only if he “knows” that the act is clearly dangerous to human life, and perhaps even then, only if he “intends” to commit the act anyway. But then, this meticulous critic would have much greater difficulty with other common kinds of crime definition, such as the widespread use of

61. For comparison, see *infra* Part II.B.

62. See *supra* notes 40–41 and accompanying text.

63. See 1 ELIZABETH BERRY & GEORGE GALLAGHER, TEXAS CRIMINAL JURY CHARGES § 3:80 (2008) (quoting the statute virtually verbatim in model jury instructions).

“depraved heart” murder statutes,⁶⁴ which present more significant possibilities of misapplication.

Additionally, the careful critic might note that the statute requires an act that “causes” the victim’s death. It does not require “proximate” causation.⁶⁵ One can speculate that a felon who commits an act that is dangerous to human life from a clearly foreseeable cause, but that causes a death in some unpredictable way or even by a freak accident, might be swept up by this statute. For example, imagine that a criminal pours a large quantity of gasoline into the first floor of a building with a large number of people in it, and lights the fluid; but instead of death from fire, an individual falls because the floor is slippery, hits his head, and dies. Critics have speculated about odd causation scenarios, as discussed later in this Article.⁶⁶ The statute quoted above could conceivably produce a conviction in this highly unusual and contrived circumstance. Many people would conclude that an arsonist who pours and lights gasoline in a building with people trapped inside can justly be called a murderer even if the mechanism of death is not precisely the one that seems most likely, but for other people the statute would be better if it required proximate causation. It seems doubtful, however, that the difference in crime definition would be significant enough to warrant the change.

A more substantial problem arises because some felonies are capable of being committed through *mentes reae* lesser than intent or knowledge, and some felonies even can be committed negligently. Negligent homicide is an example, if it is defined as a felony rather than as a misdemeanor. The statute above has a narrow merger exception that carves out only manslaughter and no other felony. Does someone who commits negligent homicide, and who commits an act clearly dangerous to human life, get bootstrapped into being convicted of murder, because the felony is “other than manslaughter” and all other elements of

64. For a critique of the “depraved heart” formula, see David Crump, “Murder *Pennsylvania Style*”: Comparing Traditional American Homicide Law to the Statutes of Model Penal Code Jurisdictions, 109 W. VA. L. REV. 257, 305–12 (2007) (comparing depraved heart statutes to “crime definition by literary metaphor”).

65. The word “causes” seems to imply only but-for causation or cause-in-fact. “Proximate” causation, on the other hand, requires foreseeability—a cause and effect that are linked by objectively reasonable expectation of the possibility that the result will occur. See BLACK’S LAW DICTIONARY 234 (8th ed. 2004).

66. See *infra* note 105 and accompanying text.

the crime are present? The courts in the state of this statute actually had to decide this question. They answered no: negligent homicide is not a proper predicate felony for felony murder.⁶⁷ Still, it might have been better if the statute had said so expressly. In addition, there are other felonies that can be read as supporting a murder conviction, including aggravated assault and endangering a child. If child endangerment is capable of being committed negligently, and if it is committed in a way that is clearly dangerous to the child's life, can the actor be convicted of murder with only negligent conduct involved? The answer is yes, and Texas courts have so interpreted the statute.⁶⁸ Perhaps, then, to some critics there is value in the idea of requiring in the felony murder statute that the defendant act intentionally or knowingly in committing the object felony.

It seems doubtful, once again, that these changes would make significant differences in the actual incidence of murder convictions under the quoted felony murder rule. One might, however, conclude that the statute quoted above could be improved if it were amended to include additional language. The requirements that would be added are contained in the draft that follows, in italics:

A person commits an offense if he:

....

(3) *intentionally or knowingly* commits or attempts to commit a felony, other than manslaughter, and in the course and in furtherance of the attempt, or in immediate flight from the commission or attempt, he *intentionally* commits or attempts to commit an act *he knows to be* clearly dangerous to human life that *proximately* causes the death of an individual.⁶⁹

67. See *Lawson v. State*, 64 S.W.3d 396, 403 (Tex. Crim. App. 2001) (Meyers, J., dissenting). This anomaly in crime definition occurred through an understandable legislative oversight. Negligent homicide was a misdemeanor at the time that the felony murder statute in question was adopted. The legislature later elevated negligent homicide to a felony but did not notice that it needed to change the murder statute also. *Crump*, *supra* note 64, at 345.

68. See *Johnson v. State*, 4 S.W.3d 254, 256 (Tex. Crim. App. 1999). For a discussion of this issue, see *Crump*, *supra* note 64, at 345–46.

69. The treatment of an act as murder with nothing in the definition requiring any mens rea higher than negligence seems dubious at first glance. On the other hand, one can find policy reasons for this seeming anomaly. Child abuse often

Extra words in a jury charge cause confusion, of course, and in this instance it seems doubtful that the value of the extra words is worth it. Any definitional problems in the version quoted at the beginning of this Part seem minor compared to more common definitions of various kinds of crimes.⁷⁰

It should be added that both the proposed statute immediately above and the actual statute cited earlier resemble proposals by commentators such as Professor Guyora Binder⁷¹ for a revised modern felony murder statute that they consider defensible against the arguments of the critics. Professor Binder advocates negligence theory as a basis for felony murder. He has not recognized the actual statute above as conforming to his idea, but it fits his proposal well, at least in a general way. Arguably, however, the statute is better than a formula based purely upon negligence. This Article will explore the reasons in a later Part,⁷² after the development of further background.

B. *"Bad" Felony Murder Definition (Although "Bad" Is in the Eye of the Beholder, Too)*

The definition of felony murder in California is plainly unsatisfactory. Indeed, it is so deficient that at least one respected state supreme court justice has called for abolition of the California jurisprudence altogether and has appealed to the legislature to pass something that makes more sense.⁷³ The California felony murder rule is not even expressed in the statutes (except by the broadest kind of implication), and its nondefinition ap-

happens so that only the adult defendant is able to testify about it, and usually the explanation offered then is that the killing was accidental.

70. See *supra* note 58 and accompanying text.

71. See Binder, *supra* note 1, at 967 (stating that "felony murder liability is deserved for those who negligently cause death by attempting felonies inherently involving (1) violence or destruction and (2) an additional malign purpose independent of injury to the victim killed"). Binder's theory contains some additional elements, but those add little to the statute's requirement of risk of death. See also Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1121-24 (1997) (stating that the felony murder rule is negligence-related but opposing the rule).

72. See *infra* notes 84-90 and accompanying text.

73. See *People v. Howard*, 104 P.3d 107, 115 (Cal. 2005) (Brown, J., concurring and dissenting) (stating that the California doctrine should be "abrogate[d]" so as to "leave it to the Legislature" to define the crime "precisely").

pears to be the product of a legislative oversight.⁷⁴ The California Supreme Court has had to develop the state's felony murder rule by fits and starts, without legislative guidance. Not surprisingly, the California rule fails some of the tests for a good felony murder doctrine set out at the beginning of the preceding Part. For the reasons that follow, California's doctrine does not correlate as well as it might with moral blameworthiness, is clumsy in its application to the deterrence purpose, contains a large amount of ambiguity, and results in exonerating some bad actors on dubious grounds while convicting other bad actors who seem no worse.

The principal limitation upon the felony murder rule in California is the "inherently dangerous felony" requirement.⁷⁵ This concept differs sharply from the "clearly dangerous act" requirement in the state statute discussed above. In California, the relevant question is whether the felony "in the abstract" is inherently dangerous.⁷⁶ This formulation is subject to criticism because it divorces the definition of murder from the individual blameworthiness of the defendant. The defendant personally need not do anything dangerous other than commit the felony. Under this formulation, a dangerous felony coupled with an unpredictable accident qualifies.

But that is not all. The California court has had a great deal of trouble deciding precisely which felonies are "dangerous." For example, does a felon who commits his particular felony by illegally possessing a sawed-off shotgun, and who points the weapon directly at another person, commit murder if the weapon discharges and kills the victim? The issue, in California, boils down to whether a felon's possession of a sawed-off shotgun is "in the abstract . . . inherently dangerous."⁷⁷ One might think that the answer from a California court would be, "Yes, absolutely!" California presumably outlawed sawed-off shotguns for previously convicted felons precisely because such weapons are quite obviously dangerous. But the court's

74. See Crump, *supra* note 64, at 331–32 (detailing the history of enactment, which includes an apparently inadvertent legislative repeal of the felony murder doctrine followed by judicial implication of the doctrine as part of the broad concept of malice).

75. See *id.* at 334–40.

76. See *id.* at 335; see also *People v. Satchell*, 489 P.2d 1361, 1367 (Cal. 1971) (announcing this rule).

77. *Satchell*, 489 P.2d at 1367.

opinion did not take that (perhaps too straightforward) approach. Instead, the court reasoned that this particular felony could possibly be committed in ways that were not dangerous—for instance, if the felon kept the sawed-off shotgun unloaded and in a locked case all the time—and therefore the felony was not dangerous in the abstract. As an even more outlandish example, the court itself offered the possibility that the felon might keep his sawed-off shotgun (perhaps together with many others of differing shapes and sizes) “as a keepsake or curio.”⁷⁸ The trouble with this reasoning is that every felony, at least theoretically, is capable of being committed in “safe” ways, that is, in manners not dangerous to human life. A criminal can rob someone without using a weapon, and an arsonist can search the premises before committing the act of setting a fire. Thus, even these hardcore felonies can be carefully committed so that they pose little danger to human life. This reasoning ultimately leads to the conclusion that there are no inherently dangerous felonies, even though the California court has decreed that there are.⁷⁹ Not surprisingly, the list of felonies that the California court has found to be “inherently dangerous” looks completely arbitrary when compared with the list of felonies that it has found *not* to be “inherently dangerous”:

Felonies that have been held inherently dangerous to life include shooting at an inhabited dwelling, poisoning with intent to injure, arson of a motor vehicle, grossly negligent discharge of a firearm, manufacturing methamphetamine, kidnapping, and reckless or malicious possession of a destructive device.

Felonies that have been held *not* inherently dangerous to life include practicing medicine without a license under conditions creating a risk of great bodily harm, serious physical or mental illness, or death; false imprisonment by violence, menace, fraud, or deceit; possession of a concealable firearm by a convicted felon; possession of a sawed-off shotgun; escape; grand theft; conspiracy to possess methedrine; extortion; furnishing phencyclidine; and child endangerment or abuse.⁸⁰

78. *Id.* at 1371.

79. *See* *People v. Howard*, 104 P.3d 107, 111–12 (Cal. 2005) (summarizing those felonies the California court has found to be inherently dangerous and those it has found not to be).

80. *Id.* (citations omitted).

But why is recklessly possessing a destructive device “inherently dangerous” while intentional possession of a concealed weapon by a felon is not? Likewise, why is manufacturing methamphetamine inherently dangerous while furnishing phenylcyclidine is not? Furthermore, why is “grossly negligent discharge of a firearm” inherently dangerous, but “practicing medicine without a license under conditions creating a risk of great bodily harm, serious physical or mental illness, or death” is not? These distinctions have no apparent anchor in reality, and even worse, they disrespect the legislative language. Consequently, the California rule gives the appearance of a disconnect between moral blameworthiness and crime definition.⁸¹

The California formulation also seems to miss opportunities for deterrence. If you are a felon in possession of a sawed-off shotgun, for example, the act of pointing it directly at another person might be deterred. The idea of an inherently dangerous felony is so ambiguous that the state supreme court’s decisions about which felonies qualify lack coherence. The law remains unclear and probably will forever. Because of the apparently arbitrary lists quoted above, the California doctrine exonerates some truly bad actors while convicting similarly bad actors who may legitimately think that their conduct is less morally blameworthy. This circumstance, although a constant problem in criminal justice, ought to be minimized, because it tends to foster disrespect for the law.

We have not yet considered the California version of the merger rule, which also contains some surprising anomalies.⁸² All in all, California would do well to address the problem via legislation, perhaps of the type contained in Part II.A. There are other kinds of murder definitions that also seem inferior to a good felony murder rule. As this Article has shown, the MPC, for example, defines murder in situations involving neither intent nor knowledge, but only recklessness, and then “presumes” recklessness in situations involving felonies.⁸³ One can question whether this backdoor method of ostensibly abolishing the felony murder rule—despite actually preserving it through a presumption—introduces ambiguity and confusion

81. For a more detailed critique of the California rule, see Crump, *supra* note 64, at 334–40.

82. For a discussion of the California merger doctrine, see *id.* at 341–43.

83. See MODEL PENAL CODE § 210.2 (Official Draft 1980).

that outweigh any perceived disadvantages of keeping the felony murder rule but defining it better.

At this point, it may be valuable to consider modern proposals for negligence-related justifications of the felony murder rule and to compare them with the two approaches discussed in this Part. Professor Binder, for example, claims to have produced the “long-missing principled defense of the felony murder doctrine”⁸⁴ and explains his thesis as follows:

[F]elony murder liability is deserved for those who negligently cause death by attempting felonies inherently involving (1) violence or destruction and (2) an additional malign purpose independent of injury to the victim killed. How can merely negligent homicide deserve punishment as murder? Because the felon’s additional depraved purpose aggravates his culpability for causing death carelessly. To impose a foreseeable risk of death for such a purpose deserves severe punishment because it expresses a commitment to particularly reprehensible values. In defending felony murder liability as deserved in cases like those described above, I will be defending an *expressive* theory of culpability that assesses blame for harm on the basis of two dimensions of culpability: (1) the actor’s expectation of causing harm and (2) the moral worth of the ends for which the actor imposes this risk.⁸⁵

The three elements Professor Binder combines arguably correspond to an amalgamation of parts taken from the better statute quoted above (requiring an “act clearly dangerous to human life,” which encompasses Professor Binder’s negligence element, although it requires more)⁸⁶ and from the less satisfactory approach described above (requiring an “inherently dangerous felony,” which California has construed to correspond to his second and third elements—that is, felonies “inherently involving violence or destruction” and including an “additional malign purpose”).⁸⁷ Professor Binder’s theory is a useful contribution to the understanding of the much-criticized and often-caricatured doctrine called felony murder.

84. Binder, *supra* note 1, at 967.

85. *Id.*; see also Simons, *supra* note 71, at 1121–24 (arguing that the doctrine is negligence-related, but opposing the doctrine).

86. See TEX. PENAL CODE § 19.02(b)(3) (2008).

87. See Crump, *supra* note 64, at 334–40.

Nonetheless, the better statute quoted above,⁸⁸ which already exists, may arguably improve upon Professor Binder's formulation. Instead of requiring mere negligence, it imposes a higher standard by requiring objectively that the causal act be "clearly" dangerous. Furthermore, it does not call merely for negligence of a generalized sort. Instead, it requires that the lethal act be clearly dangerous "to human life." And the better statute is superior, one could argue, precisely because it omits Professor Binder's reference to the "inherent" dangerousness, violence, or destructiveness of the underlying felony, upon which Professor Binder would make liability depend. The policy underlying the element of an inherently violent felony is better covered instead by the requirement that the act be clearly dangerous to human life, which allows the statute to avoid the arbitrariness that inevitably accompanies the quixotic effort to classify felonies as inherently violent or destructive. As evidenced above, California has convincingly shown the potential messiness of this distinction,⁸⁹ and a few examples may further illustrate the point. Is a felony involving destruction of property inherently violent or destructive? What about a felony involving reckless (or drunk) driving? Abuse of a corpse? Sexual assault by fraud? The lists quoted above of the felonies California recognizes as inherently dangerous, and the felonies that supposedly are not inherently dangerous (and yet seem just as dangerous),⁹⁰ demonstrate how unsatisfactory this element is in actual adjudication.

And yet Professor Binder's theory may be fundamentally sound. His approval of a revised felony murder rule, designed to depend upon "two dimensions of culpability: (1) the actor's expectation of causing harm and (2) the moral worth of the ends for which the actor imposes this risk," seems to encapsulate a sensible way of defining liability in this controversial area. The point, however, is that a statute that focuses on the actor's conduct, requiring that it be clearly dangerous to human life and be tied to ends that have low moral worth (because the end is a felony), seems better than an approach that attempts to parse felonies for their "inherent" dangerousness.

88. See TEX. PENAL CODE § 19.02(b)(3).

89. See *People v. Howard*, 104 P.3d 107, 111–12 (Cal. 2005).

90. See *id.*

III. EVALUATING THE NEWER ARGUMENTS AGAINST THE FELONY MURDER RULE

A. *Restatements of Traditional Arguments*

In some instances, the arguments of today are the arguments of old. It is surprising still to read allegations by a few commentators that there are no rational arguments supporting the felony murder rule.⁹¹ These commentators may be tacitly concluding that the arguments sketched in Part I of this Article are unmeritorious or are insubstantial compared to the counterarguments that they perceive. If so, these critics would do better to explain why they reject the reasons offered in defense of the rule, rather than assert that there are no such rationales.

Another argument still sometimes made is that the felony murder rule disconnects criminal liability from blameworthiness.⁹² That conclusion, however, depends in large measure upon the type of felony murder rule at issue. If the version of felony murder under discussion were to state merely the rough and unpolished proposition that commission of any felony that results however unpredictably in a death is murder, cases may exist in which blameworthiness would be disconnected from criminal liability. But that version of the rule is today a caricature. At early common law, felonies generally were punishable by death, so the use of a rough rule without careful limits may not have made much difference.⁹³ Today, however, every jurist-

91. For a particularly dubious example, see Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 *BUFF. CRIM. L. REV.* 23, 53–56 (1997) (arguing that the rule “has received nearly universal scholarly condemnation” and suggesting that it may be retained because of public attitudes at variance with those of “experts”). Such sweeping statements, however, are no longer accurate and assume that the rule’s detractors have “expertise” that its scholarly supporters do not. For a more balanced but still unexplained example, see Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 *J. CONTEMP. LEGAL ISSUES* 237, 280–81 (1994) (classifying felony murder among “unfair doctrines” because although results matter, “they don’t matter that much or in that way”).

92. See Christopher Slobogin, *The Civilization of the Criminal Law*, 58 *VAND. L. REV.* 121, 145–46 & n.115 (2005) (finding that a “huge disagreement exists over the types of *mentes reae* that merit punishment” and citing various sources discussing the proposition).

93. See WAYNE R. LAFAVE, *CRIMINAL LAW* 744 & n.5 (4th ed. 2003).

diction imposes limits on the felony murder rule.⁹⁴ The requirement of “an act clearly dangerous to human life,” coupled with the commission of a felony, creates a clear link between liability and blameworthiness.⁹⁵ Thus, a well-written felony murder statute is far less vulnerable to this criticism. Even the California version of the rule, which includes a “dangerousness requirement,” links liability to blameworthiness, although in a less satisfactory manner.⁹⁶

B. *Newer Arguments Against the Rule*

Newer arguments against the rule seem to focus on the blameworthiness issue, but they contain more sophisticated reasoning than a mere assertion that the felony murder doctrine divorces liability from culpability. Perhaps the common philosophy in these newer arguments—an emphasis on blameworthiness—is not surprising, because correspondence to blameworthiness is an important value in crime definition, and it is a natural issue to arise in this context. First, one can argue that some versions of the felony murder rule are underinclusive—that is, they exonerate some individuals whose crimes seem at least as serious as the crimes of other individuals whom they convict.⁹⁷ The effect is an arguably inconsistent correspondence to blameworthiness. Second is the argument that some versions of the felony murder doctrine are overinclusive, producing unacceptable convictions of criminals whose crimes are based on conduct that is not seriously blameworthy.⁹⁸ Third, other argu-

94. See Crump, *supra* note 64, at 329–30.

95. See TEX. PENAL CODE § 19.02(b)(3) (2008).

96. See Crump, *supra* note 64, at 332–33.

97. See Tomkovicz, *supra* note 5, at 1467 (indicating that most jurisdictions follow the “merger” doctrine, “a restriction that precludes certain particularly dangerous felonies—the archetype is assault with a deadly weapon—from qualifying” for application of the felony murder rule).

98. Lord Macaulay offered the classic formulation of this criticism in his notes to the Indian Model Penal Code. LORD THOMAS BABINGTON MACAULAY, INTRODUCTORY REPORT UPON THE INDIAN PENAL CODE (1837), reprinted in 1 MISCELLANIES 666, 668–72 (1901) (also suggesting that “[i]t would be a less capricious . . . course to provide that every fiftieth or every hundredth thief selected by lot should be hanged, than to provide that every thief should be hanged who, while engaged in stealing, should meet with an unforeseen misfortune”); see also Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 123–24 (1990) (“The felony murder rule might be considered objectionable because it treats a robber who kills differently from a robber who does not kill, even if each robber ran precisely the same risk respecting death.”); Gerber,

ments invoke the concept of "moral luck," or the imposition of rewards or punishments through mechanisms that are primarily accidental, as opposed to those based on blameworthiness.⁹⁹ Each of these arguments can have validity if asserted against crude conceptions of the felony murder doctrine, or even against badly written actual statutes, but better versions of the felony murder doctrine can withstand these criticisms.

As noted above, one group of critics using the blameworthiness argument may contend that the felony murder rule is underinclusive.¹⁰⁰ The rule, these critics could claim, results in the convictions of some bad actors who are blameworthy, but fails to similarly convict some others who are at least as blameworthy.¹⁰¹ There are at least two answers to this claim. First, underinclusiveness is built into criminal justice. Simply by requiring proof beyond a reasonable doubt, we allow some bad actors to escape. The standard of proof is a different issue, of course, but every time words are se-

supra note 21, at 784 (suggesting that the felony murder rule takes unfortunate felons outside the scope of our general system of justice); Rudolph J. Gerber, *A System in Collapse: Appearance vs. Reality in Criminal Justice*, 12 ST. LOUIS U. PUB. L. REV. 225, 233–34 (1993) ("The rule has long been criticized as an exception to the otherwise universal principle of our criminal law which requires that guilt and punishment be proportionate to mens rea . . .") [hereinafter Gerber, *System in Collapse*]; Denise M. Oas, *The Felony Murder Rule Is Alive and Well in Missouri, But Should It Be?*, 57 UMKC L. REV. 85, 97 (1988) ("Compare the culpability of the following defendants: 1) an arsonist accidentally kills a bum asleep in an abandoned building; 2) an escaping robber causes the death of an innocent bystander by using that bystander as a body shield. While neither party intended the deaths, the arsonist was not aware of the bum, while the robber intentionally put the bystander at risk. . . . Individual justice would require that these defendants be treated differently since they are not equally culpable . . .").

99. See Gerber, *System in Collapse*, *supra* note 98, at 233–34 (A felony murderer's "intent, by definition short of homicidal, is then injected with homicidal motive not because of a corresponding intent but because of the external misfortune of a death"); Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, 49 LAW & CONTEMP. PROBS. 47, 64 (1986) ("The crucial problem of fortuity remains. Why ought we punish for an accident?"); Kimberly D. Kessler, Note, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2183, 2196–97 (1994) (advancing the claim that felons should not be punished for "chance occurrence[s]" beyond their control).

100. See, e.g., Michael T. Cahill, *Attempt, Reckless Homicide, and the Design of Criminal Law*, 78 U. COLO. L. REV. 879, 911–13, 937 & n.173 (2007) (advocating abolition of felony murder rule, but without specifying the version of the doctrine being considered; suggesting that basing liability on conduct without "culpability" may result in "underinclusiveness"; and advocating instead a crime of "attempted reckless homicide").

101. See *People v. Howard*, 104 P.3d 107, 111–12 (Cal. 2005) (summarizing those felonies California courts have found to be inherently dangerous and those they have found not to be).

lected to define a crime so as to confine the category and not blindly sweep in less blameworthy people, the law inevitably lets some blameworthy people escape. The solution to this problem is to undertake the clearest and best crime definition possible, not to throw out the entire category of crime because it does not and never will adequately cover every situation.

The second answer is both more important than and suggested by the first. The degree of underinclusiveness depends upon the particular version of the felony murder rule that the jurisdiction in question uses. The California Supreme Court, for example, has held that discharging a firearm into an occupied residence is a proper predicate felony for felony murder, if the bullet kills an individual inside.¹⁰² But strangely, a California court of appeals has held that the felony of discharging a firearm into an occupied vehicle is not a proper predicate for felony murder.¹⁰³ The court based its reasoning on the merger doctrine rather than the dangerous felony requirement, but the holding nevertheless seems anomalous in light of the conclusion that shooting into an occupied residence is a proper predicate. Between two otherwise similar killers, the individual shooting into the occupied residence who is convicted of felony murder may argue that it is not fair for another individual, who instead shoots into a vehicle, to be exonerated on the ground that shooting into an occupied vehicle is not a “dangerous” felony. One can question whether the critic’s apparent conclusion—that because one is exonerated, both should be exonerated—actually follows; nevertheless, the result is anomalous. In any event, the solution is easy. No other state should blindly follow the California jurisprudence, and California should revise its law. Thankfully, better written statutes, such as the one in Part II.A, above, requiring an act “clearly dangerous to human life,”¹⁰⁴ are not so dramatically underinclusive. The better crime definition is superior precisely because it ties liability to individual blameworthiness, and for this reason, it is less likely to exonerate the most serious conduct.

A more sophisticated criticism focuses not on underinclusiveness, but overinclusiveness. These commentators are con-

102. *People v. Hansen*, 885 P.2d 1022, 1026–27 (Cal. 1994) (in bank).

103. That is, it is not a proper predicate if the motive lacks an independent felonious purpose. See *People v. Chun*, 65 Cal. Rptr. 3d 738, 753 (Ct. App. 2007), *petition for review granted*, 173 P.3d 415 (Cal. 2007).

104. TEX. PENAL CODE § 19.02(b)(3) (2008).

cerned that the felony murder rule might make a murderer out of someone who has done virtually nothing that would perceptibly cause danger to a human life, but who has merely committed a garden-variety felony that produced a freak accident. For example, Professor Joshua Dressler, an eminent and objective scholar, criticizes the blameworthiness and condemnation arguments supporting the felony murder rule with the following example:

Consider two pickpockets, *P1* and *P2*. *P1* puts her hands in *V1*'s pocket and finds a wallet containing two hundred dollars. *P2* puts her hand in *V2*'s pocket and discovers a wallet with the same amount of money, but *V2* dies of shock from the experience. . . . [T]he culpability of *P1* and *P2* as to the thefts is identical. Therefore, as to the larcenies, they should be punished alike.

As for the social harm of the death, *P2* is no more culpable than *P1*, as the death was unforeseeable. It is true, of course, that *P2* caused a death, but in terms of *mens rea*, her culpability (as that of *P1*) is that of an intentional thief, and no more. Even if it were concluded that *P2* should pay some debt for the unforeseeable death, it surely violates ordinary concepts of just deserts to treat the unlucky pickpocket as deserving of punishment equal to that of an intentional, premeditated killer.¹⁰⁵

This criticism was leveled not at the felony murder rule generally, but at the argument that the rule is supported by condemnation-related considerations or reaffirmation of the value of human life. Still, the criticism depends upon questionable assumptions. First, it assumes that all crimes of any given category must be sentenced alike, without regard to lesser *mentes rea*e. The suggestion that the unlucky pickpocket faces a punishment "equal to that of an intentional premeditated killer" is dubious. Second and more importantly here, however, the criticism depends once again upon the version of the felony murder rule that the particular jurisdiction follows. The only way that Professor Dressler's example could result in a murder conviction is if one assumes that the jurisdiction applied the rawest and least defensible form of felony murder, namely, that death resulting from the commission of a felony is murder, without any limits or other requirements.

105. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 517-18 (3d ed. 2001).

But again, this primitive form of felony murder is a caricature, inasmuch as modern jurisdictions confine the felony murder rule.¹⁰⁶ Even the California approach requires at least that the defendant engage in a dangerous felony, although it does remain partially vulnerable to Professor Dressler's criticism. A robber who did nothing perceptibly dangerous to life could be considered a murderer if a freak accident caused a death, assuming there was no need to show proximate causation. The requirement of proximate causation, instead of mere but-for causation, addresses the issue directly by demanding a foreseeable cause.¹⁰⁷ Therefore, even with California's clumsy statute, either a dangerous felony approach or a requirement of proximate causation should produce an adjudication that Professor Dressler's hapless pickpocket is a criminal but not a murderer. And if the better statute set out in Part II.A is in force, the requirement of an act clearly dangerous to human life removes the problem almost entirely. The overinclusiveness argument thus has less force than it might appear, unless it is offered against an unrealistically crude hypothetical statute.

Another newer attack on the felony murder rule is a broadside, aimed at the entire rule. Commentators espousing this view invoke concepts of moral luck, and they argue that the felony murder rule violates these principles.¹⁰⁸ The basic concern of moral luck philosophy is to describe the conditions that may allow us to visit the consequences of accidental results on actors who had incomplete knowledge of the risks at issue.¹⁰⁹ For example, imagine that two equally astute stock speculators buy shares of two different companies with wildly disparate results, such that one receives a bonanza and the other holds a worthless asset. It seems appropriate to allow the successful investor to keep his gains and not require him to give half to the other investor, even if the result depends only on luck. Similarly, imagine that one robber points his pistol at the convenience store clerk and kills no one, while a second, equally competent robber points his pistol with the result that it accidentally discharges and kills the clerk. Is it morally acceptable

106. See Crump, *supra* note 64, at 329–30.

107. See BLACK'S LAW DICTIONARY 234 (8th ed. 2004).

108. See, e.g., Kadish, *supra* note 8, at 695–96 (calling felony murder liability "rationally indefensible").

109. See Meir Dan-Cohen, *Luck and Identity*, 9 THEORETICAL INQ. L. 1, 3 (2008).

to visit the consequences of the unintended result on the second robber by holding him guilty of murder?¹¹⁰

At some point, it may make sense to say, "This particular criminal was not engaged in actions that should result in a murder conviction, even though (or perhaps because) he was spectacularly unlucky." Professor Dressler's hypothetical pick-pocket who causes fatal fright to another person might evoke this reaction. He would not be convicted, however, under either of the statutes considered in this Article. On the other hand, if he engages in more risky behavior—conduct that anyone would recognize as likely to precipitate severe stress in a person known to be vulnerable—at some point it may be morally justified to say that the defendant has engaged in conduct that does justify the imposition upon him of the consequences of his actions. A requirement that the defendant must have engaged in an act clearly dangerous to human life arguably supplies that condition. The moral luck argument seems dubious if asserted against this better formulation of the rule, because the actor can consciously avoid conduct that is clearly dangerous to human life, and if he does not, his liability is related not just to his luck but to his relative blameworthiness as well.

In general, the hardest cases for the felony murder rule come about when there are multiple parties to the crime, and some, but not all, of the parties engage in acts clearly dangerous to human life. Consider some examples: A confederate shoots a clerk, to the surprise of the getaway car driver. A confederate accidentally kills a bystander several blocks away by a stray bullet during a gun battle. A police officer justifiably kills a confederate criminal who threatened the officer. Can another participant in the robbery, who provably was involved in the crime but who did not personally commit any of the dangerous acts described here, be convicted of murder?

Different jurisdictions have answered this question in different ways. The longstanding rule of *Commonwealth v. Redline*¹¹¹ precludes liability for the lawful death of a co-felon, largely on the

110. See, e.g., David Enoch, *Luck Between Morality, Law, and Justice*, 9 THEORETICAL INQ. L. 23, 23–24 (2008) (proposing that outcomes dependent upon luck should not be a factor in the law because "[t]here is no moral luck," and "[i]f there is no moral luck, there should be no legal luck").

111. 137 A.2d 472 (Pa. 1958). For discussion, see Crump & Crump, *supra* note 6, at 384–91.

ground that the result is not part of the criminal design. The death is not itself criminal, and therefore does not involve the other co-felon in blameworthiness for the death, or so the reasoning goes. At the opposite philosophical pole, there is the cone-of-violence argument, which asserts that one who participates in armed criminal conduct should anticipate that violence will escalate, and thus is the legal responsibility of all who set it in motion.¹¹² Perhaps the extreme example is one modern case¹¹³ in which the defendant's co-felon threatened to kill a police officer by raising his gun toward him; the co-felon was lawfully killed in turn by the officer, and the court upheld the defendant's conviction for murder although the defendant participated in only the robbery and not in the ultimate act that caused his co-felon's death.¹¹⁴ The defendant was in custody at the time of the shooting.¹¹⁵

There is appeal to the cone-of-violence theory. Certainly, one reason for designating armed robberies as serious crimes is the realization that escalation of violence in all directions can be anticipated. But perhaps the *Redline* result, which rejects this kind of liability, has appeal, too. And so the moral luck argument seems to gain its most traction in these multiple-party cases. Requiring a showing that the defendant himself *personally* engaged in an act clearly dangerous to human life would go a long way toward addressing the moral luck concern of the critics. This solution, however, might require reconsideration of well-established vicarious liability doctrines.

CONCLUSION

Almost all jurisdictions have retained the felony murder rule in some form, despite the many criticisms of the rule. Those law-making bodies that have abolished it have provided poor reasons for doing so. The persistence of the rule is not attributable merely to knee-jerk politicians or to its creation by common-law judges. Rather, its persistence reflects the sound rationales that support the felony murder rule. Chief among these rationales is that, despite the critics' arguments to the contrary, the felony murder doctrine often arguably does result in crime gradation that corre-

112. See, e.g., *State v. Canola*, 343 A.2d 110, 116 (N.J. Super. Ct. App. Div. 1975).

113. *State v. Sophophone*, 19 P.3d 70 (Kan. 2001).

114. *Id.* at 71-72.

115. *Id.*

sponds to blameworthiness. Also, the age-old deterrence argument may have some merit, and the critics' contentions that felons do not know the law and that accidents thus cannot be deterred do not withstand scrutiny. Felons know enough to figure out that they have bought much more trouble if their actions result in loss of human life, and the persistence of our law of negligence and strict liability—in both civil and criminal cases—evidences a belief that accidents are deterrable to some degree.

Comments denying that sound rationales exist for the felony murder rule ignore the literature. Modern arguments that the felony murder rule divorces the definition of murder from blameworthiness paint with too broad a brush, and generally ignore the cases in which the rule does result in linking blameworthiness to liability. This conclusion depends, however, upon the version of the felony murder doctrine under discussion.

There are better and worse definitions of felony murder. Too often the critics assume a law that produces a conviction for murder upon the mere coincidence of a felony and a death. But that version of the rule, if it ever existed, is as distant a memory as many other unjust laws. Every state applies limits and exceptions to the felony murder definition. How these are written determines the value of the critics' arguments. The California law, for example, focuses on the type of felony in the abstract, demanding that it conform to concepts of inherent dangerousness before it can serve as a predicate for a murder conviction. This limit is better than nothing, but it is more vulnerable than other formulations to the critics' argument that it divorces the definition of murder from blameworthiness. A better crime definition would tie liability to the defendant's individual blameworthiness. Requiring that the defendant actually commit an act clearly dangerous to human life, and that this act be what causes the death, produces a better statute. Careful critics might also demand, that the statute require that the defendant intentionally or knowingly commit the act (and the felony). These suggestions seem subject to the complaint that they "gild the lily,"¹¹⁶ or make something that already works

116. WILLIAM SHAKESPEARE, *THE LIFE AND DEATH OF KING JOHN* act 4, sc. 2, lines 11–12, 16 (1623), reprinted in WILLIAM SHAKESPEARE: *THE COMPLETE WORKS* 621 (Alfred Harbage ed., Viking Press 1977) ("To gild refined gold, to paint the lily, / To throw a perfume on the violet / . . . Is wasteful and ridiculous excess."). Despite technically being a misquotation of Shakespeare, the phrase "gilding the lily" has become the favored version.

more clumsy, but perhaps the critics can justifiably argue that these changes produce minor improvements.

A better-written felony murder statute links liability and blameworthiness more satisfactorily than other formulations. It also arguably avoids critics' complaints of underinclusiveness and overinclusiveness. By directly requiring blameworthy conduct from the defendant personally and not merely from the class of felons at issue, the better statute avoids criminalizing conduct that produces unforeseeably tragic results. Similarly, by eschewing California's anomalous "dangerous felonies" jurisprudence, and by focusing instead on the defendant's own actions, a better statute would minimize the degree to which it may acquit criminals more blameworthy than those it convicts. Furthermore, the better statute would be more consistent with the proper treatment of moral luck. It is far less offensive to convict someone for an occurrence, though unintended, that the actor's conduct was "clearly" in danger of causing.

The hardest cases remain those with multiple parties, that is, those involving group-committed felonies in which one actor does something particularly blameworthy, and a resulting unintended death is attributed to an arguably less blameworthy codefendant. The critics' argument that this result violates fair treatment of moral luck is understandable. But the cone-of-violence theory—the notion that if a person personally undertakes armed criminal activity, that person appreciates or should appreciate the likelihood of escalation—also is persuasive. Perhaps the argument of the critics should prove influential here, but in a way that still gives some weight to the cone-of-violence theory. The law could provide, for example, that no one can be convicted of felony murder by vicarious liability unless the defendant personally appreciated or should have appreciated the risk of the co-felon's clearly dangerous act.

Thus, with other minor changes, and with the selection of a better version of the felony murder rule, the felony murder doctrine should be considered on its merits. The doctrine serves important positive purposes. The critics can make some valid points by targeting only the clumsier versions, but their arguments are much less persuasive when considered against well-drafted formulations of the rule.

IMPERFECT MINIMALISM: UNANSWERED QUESTIONS
IN *Hall Street Associates, L.L.C. v. Mattel, Inc.*,
128 S. Ct. 1396 (2008)

Benjamin Franklin embodied hope in his question, “When will mankind be convinced, and agree to settle their differences by arbitration?”¹ Arbitration, however, received an icy welcome from the American judicial system. To counteract judicial hostility to arbitration,² Congress enacted the Federal Arbitration Act (FAA) in 1925.³ Although many disputes about the reach of the FAA center on a claim’s initial arbitrability, the circuits have split on whether the FAA’s post-arbitration judicial review provisions are open to expansion by contracting parties.⁴ Last Term, in *Hall Street Associates, L.L.C. v. Mattel, Inc.*,⁵ the Supreme Court held that sections 9–11 of the FAA provide the exclusive grounds for expedited judicial review of arbitration awards.⁶ In many respects, the Court produced a classic minimalist opinion. The entire opinion, along with the two dissents, spanned a mere ten pages, and the majority’s narrow

1. EDWIN D. MEAD, *THE PRINCIPLES OF THE FOUNDERS* 30–31 (1903).

2. Tom Cullinan, Note, *Contracting for an Expanded Scope of Judicial Review in Arbitration Agreements*, 51 *VAND. L. REV.* 395, 408–12 (1998); see *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 625 n.14 (1985); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 *VA. L. REV.* 265, 270–71 (1926).

3. Act of Feb. 12, 1925, ch. 213, 43 Stat. 883 (codified at 9 U.S.C. §§ 1–16 (2006)).

4. The First, Third, Fourth, Fifth, and Sixth Circuits have held that parties may contract for expanded judicial review. See *P.R. Tel. Co., Inc. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 31 (1st Cir. 2005); *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 288 (3d Cir. 2001); *Syncor Int’l Corp. v. McLeland*, No. 96-2261, 1997 WL 452245, at *6 (4th Cir. Aug. 11, 1997); *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995); *Jacada (Eur.), Ltd. v. Int’l Mktg. Strategies, Inc.*, 401 F.3d 701, 710 (6th Cir. 2005). The Ninth and Tenth Circuits have held that parties may not contract for expanded judicial review. See *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (9th Cir. 2003); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 (10th Cir. 2001). The Seventh and Eight Circuits have agreed with the latter position in dicta. See *Chi. Typographical Union No. 16 v. Chi. Sun-Times, Inc.*, 935 F.2d 1501, 1504–05 (7th Cir. 1991); *UHC Mgmt. Co. v. Computer Scis. Corp.*, 148 F.3d 992, 997–98 (8th Cir. 1998).

5. 128 S. Ct. 1396 (2008).

6. *Id.* at 1400.

holding avoided deciding potentially divisive issues. But the single issue the Court did resolve raised many new questions. Like Hercules struggling with the Hydra, lower courts now disagree on multiple questions created by the Court's overly narrow opinion. Consequently, *Hall Street* illustrates the danger of sacrificing clear guidance on the altar of minimalism.

Tenant Mattel leased property for a manufacturing site from landlord Hall Street.⁷ The lease contained a clause indemnifying Hall Street for any costs caused by Mattel's failure to follow environmental laws.⁸ In 1998, tests of the property's well water revealed high levels of trichloroethylene and other pollutants, and three years later, Mattel gave notice of intent to terminate the lease.⁹ Hall Street filed suit in federal court, seeking indemnification for the costs to clean up the polluted property.¹⁰

The parties proposed to submit the indemnification claim to arbitration.¹¹ The district court approved and entered the subsequent arbitration agreement as a court order.¹² The agreement provided that "[t]he Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."¹³ The arbitrator decided for Mattel,¹⁴ finding that the Oregon Drinking Water Quality Act (Water Act) dealt with human health rather than environmental contamination, and therefore did not trigger the indemnification clause.¹⁵

The district court vacated the award.¹⁶ Citing the parties' arbitration agreement that authorized judicial review for legal error, the court held that the failure to treat the Water Act as an

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* Hall Street also challenged Mattel's right to terminate the lease. *Id.* The district court found for Mattel, concluding that the notice of termination was valid. *Hall St. Assocs., L.L.C. v. Mattel, Inc. (Hall Street I)*, 145 F. Supp. 2d 1211, 1215 (D. Or. 2001).

11. *Hall Street*, 128 S. Ct. at 1400.

12. *Id.*

13. *Id.* at 1400–01.

14. *Id.* at 1401.

15. *Id.*

16. *Id.*

environmental law constituted legal error that justified vacating the award.¹⁷

The Ninth Circuit reversed.¹⁸ The court held that a recent circuit case, *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*,¹⁹ controlled the proceeding. Under *Kyocera*, “private parties may not contractually impose their own standard on the courts” because the FAA specifies “the exclusive standard by which federal courts may review an arbitrator’s decision.”²⁰ The court remanded with instructions to “confirm [the arbitrator’s] award, unless the district court determines that the award should be vacated on the grounds allowable under 9 U.S.C. § 10, or modified or corrected under the grounds allowable under 9 U.S.C. § 11.”²¹

On remand, the district court again held for Hall Street.²² This time, the court vacated the arbitration because the arbitrator’s “implausible” interpretation exceeded the arbitrator’s powers in violation of section 10.²³ The Ninth Circuit again reversed, holding that “[i]mplausibility is not a valid ground for avoiding an arbitration award.”²⁴

The Supreme Court affirmed and remanded for resolution of independent issues.²⁵ Writing for the majority, Justice Souter²⁶ held that “the text [of the FAA] compels a reading of the §§ 10 and 11 categories as exclusive.”²⁷ The Court’s analysis focused on whether “the FAA has textual features at odds” with allowing private parties to contract for expanded judicial review.²⁸ Examining the text, the Court found “nothing malleable about ‘must grant,’ which unequivocally tells courts to grant confir-

17. *Id.* On remand, the arbitrator accepted the Water Act as an environmental law and amended the decision to side with Hall Street. *Id.*

18. *Hall St. Assocs., L.L.C. v. Mattel Inc. (Hall Street II)*, 113 F. App’x 272, 273 (9th Cir. 2004).

19. 341 F.3d 987 (9th Cir. 2003).

20. *Hall Street II*, 113 F. App’x at 273 n.3 (quoting *Kyocera*, 341 F.3d at 994).

21. *Id.* at 273.

22. *Hall Street*, 128 S. Ct. at 1401.

23. *Id.* at 1401 n.1.

24. *Hall St. Assocs., L.L.C. v. Mattel Inc. (Hall Street III)*, 196 F. App’x 476, 477 (9th Cir. 2006).

25. *Hall Street*, 128 S. Ct. at 1407–08.

26. Chief Justice Roberts and Justices Thomas, Ginsburg, and Alito joined the opinion. Justice Scalia joined the opinion except for footnote 7. *Id.* at 1400 n.*.

27. *Hall Street*, 128 S. Ct. at 1404.

28. *Id.*

mation in all cases, except when one of the 'prescribed' exceptions applies."²⁹ Therefore, regardless of whether the holding would help or hurt the popularity of arbitration, "the statutory text gives us no business to expand the statutory grounds."³⁰

Examining the FAA provisions, the Court discerned "a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."³¹ The Court cautioned that "[a]ny other reading opens the door to the full-bore legal and evidentiary appeals that can 'rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process."³²

The Court rejected Hall Street's contention that "expandable judicial review authority has been accepted as the law since *Wilko v. Swan*."³³ Specifically, Hall Street had argued that the Supreme Court in *Wilko*³⁴ had recognized "'manifest disregard of the law' as a further ground for vacatur on top of those listed in § 10," and "if judges can add grounds to vacate (or modify), so can contracting parties."³⁵ The Court skeptically characterized the argument as a "leap from a supposed judicial expansion by interpretation to a private expansion by contract."³⁶ After describing three possible meanings of the "manifest disregard" standard,³⁷ the Court took no definitive position, saying only that "we see no reason to accord it the significance that Hall Street urges."³⁸

Finally, the Court emphasized that in holding sections 10 and 11 as the exclusive grounds for FAA review, "we do not pur-

29. *Id.* at 1405.

30. *Id.* at 1406.

31. *Id.* at 1405.

32. *Id.* (second alteration in original) (quoting *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003)).

33. *Id.* at 1403 (citation omitted).

34. *Wilko v. Swan*, 346 U.S. 427 (1953).

35. *Hall Street*, 128 S. Ct. at 1403.

36. *Id.* at 1404.

37. The Court speculated that "[m]aybe" the term created a new ground for review, "maybe" it just referred to the section 10 grounds collectively, or it "may have been" shorthand for just the two section 10 grounds that authorize vacatur when arbitrators "'were guilty of misconduct'" or "'exceeded their powers.'" *Id.* (quoting *Kyocera*, 341 F.3d at 997).

38. *Id.*

port to say that they exclude more searching review based on authority outside the statute as well."³⁹ Parties desiring review of arbitration enforcement "may contemplate enforcement under state statutory or common law . . . where judicial review of different scope is arguable."⁴⁰ The Court remanded to determine whether such outside authority existed, specifically "the District Court's authority to manage its cases under Federal Rules of Civil Procedure 16."⁴¹

Justice Stevens, joined by Justice Kennedy, dissented. Focusing on the "historical context and the broader purpose of the FAA," Justice Stevens emphasized that "§§ 10 and 11 are best understood as a shield meant to protect parties from hostile courts, not a sword with which to cut down parties' 'valid, irrevocable and enforceable' agreements to arbitrate their disputes subject to judicial review for errors of law."⁴²

Justice Breyer also dissented. He agreed with the majority and Justice Stevens that the FAA "does not *preclude* enforcement" of an agreement giving the court expanded review.⁴³ Because the agreement violated no public policy, statute, or rule, Justice Breyer would have affirmed the trial court's judgment.⁴⁴

Textual analysis and subsequent litigation reveal that the holding's simple clarity is but an illusion. By implicating without resolving potential disagreement, *Hall Street* creates at least four unanswered questions: (1) the current validity of the manifest disregard doctrine; (2) how a judge's expansion of judicial review should impact a private party's expansion through contract; (3) the viability of other avenues of judicial review outside the FAA; and (4) whether parties can still contract for expanded review by doing so within the text of the FAA.

First, the Court passed on the opportunity to clarify the manifest disregard standard of review. Lower courts have defined manifest disregard in multiple ways: a further ground for re-

39. *Id.* at 1406.

40. *Id.*

41. *Id.* at 1407.

42. *Id.* at 1409 (Stevens, J., dissenting) (quoting Federal Arbitration Act, 9 U.S.C. § 2 (2006)).

43. *Id.* 1410 (Breyer, J., dissenting).

44. *Id.*

view beyond section 10,⁴⁵ a reference to the section 10 grounds collectively without adding to them,⁴⁶ and shorthand for section 10(a)(3) and section 10(a)(4), which authorize vacatur when arbitrators were “guilty of misconduct” or “exceeded their powers.”⁴⁷ After explicitly acknowledging this confusion, the Court speculated that “maybe” each of those interpretations was possible, without clarifying which one was correct.⁴⁸

Perhaps the majority sought a broader agreement among the Justices by deciding on the narrowest possible ground.⁴⁹ For example, during oral argument, Justice Scalia defined the manifest disregard doctrine as an additional ground for judicial review under section 10 that is not listed in the text.⁵⁰ Yet Justice Scalia joined the *Hall Street* majority. It is conceivable that the Court refused to define manifest disregard in order to ensure the broadest possible agreement for its decision.⁵¹

Even in the brief time since *Hall Street*, the Court’s indecisive decision has already generated considerable confusion as “courts have begun to grapple with its implications for the ‘manifest dis-

45. See, e.g., *McCarthy v. Citigroup Global Mkts., Inc.*, 463 F.3d 87, 91 (1st Cir. 2006); *Hoelt v. MVL Group, Inc.*, 343 F.3d 57, 64 (2d Cir. 2003); *Prestige Ford v. Ford Dealer Computer Servs., Inc.*, 324 F.3d 391, 395–96 (5th Cir. 2003); *Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1017 (11th Cir. 1998).

46. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656 (1985) (Stevens, J., dissenting) (“Arbitration awards are only reviewable for manifest disregard of the law, 9 U.S.C. §§ 10, 207.”); *In re I/S Stavborg v. Nat’l Metal Converters, Inc.*, 500 F.2d 424, 431 (2d Cir. 1974).

47. See *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003).

48. See *Hall Street*, 128 S. Ct. at 1404.

49. See Cass Sunstein, Op-Ed., *The Minimalist*, L.A. TIMES, May 25, 2006, at B11 (quoting Chief Justice Roberts: “The broader the agreement among the justices, the more likely it is that the decision is on the narrowest possible ground.”).

50. Transcript of Oral Argument at 32, *Hall Street*, 128 S. Ct. 1396 (No. 06-989) (“Justice Scalia: What do you do about the fact that our opinions have said that there is another ground under 10, which is manifest miscarriage of justice? That’s not listed there.”). Other Justices appeared less settled over the manifest disregard standard. See *id.* at 30 (“Justice Ginsburg: What else is there besides the manifest whatever it is?”).

51. Despite the deliberate vagueness, the holding implicitly precludes Justice Scalia’s definition. *Hall Street* ruled that sections 10 and 11 list the exclusive grounds for vacatur under the FAA. *Hall Street*, 128 S. Ct. at 1404. If manifest disregard is another ground beyond the text of section 10, the *Hall Street* holding would not allow it. See notes 27–30 and accompanying text.

regard' doctrine."⁵² Some have concluded that the manifest disregard doctrine does not survive *Hall Street*.⁵³ Other courts believe manifest disregard remains a valid ground for vacatur when "reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA."⁵⁴ Similarly, legal practitioners are unsure of the validity of the manifest disregard doctrine post-*Hall Street*.⁵⁵ Because such inconclusive speculations waste considerable resources in courts across the nation, a minimalist Court should discuss in its "narrow" holdings only the doctrinal disagreements it is ready to decide.

Second, in order to avoid nailing down the manifest disregard doctrine, the Court misconstrued how expansion of judicial review by judges should affect private party expansion. *Hall Street* argued that because judges have expanded their grounds for review, the parties should also be able to contract for increased review.⁵⁶ The Court dismissed this argument by pointing out the substantial leap from expansion through judicial interpretation (possibly acceptable) to expansion through private contracting (explicitly rejected).⁵⁷ The Court's own leap is flawed, however, because the latter—expansion by private parties—is more palatable to the history and purpose of the FAA.⁵⁸ The strong congressional commands of "must grant"⁵⁹ restricted judges from "roam[ing] unbridled in their oversight of arbitral awards" that parties clearly intended to be final.⁶⁰ Ironically, judges now

52. *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 94 (2d Cir. 2008).

53. *See Ramos-Santiago v. United Parcel Serv.*, 524 F.3d 120, 124 n.3 (1st Cir. 2008); *Robert Lewis Rosen Assocs., Ltd. v. Webb*, 566 F. Supp. 2d 228, 233 (S.D.N.Y. 2008); *Prime Therapeutics LLC v. Omnicare, Inc.*, 555 F. Supp. 2d 993, 999 (D. Minn. 2008).

54. *Stolt-Nielsen*, 548 F.3d at 94; *see Mastec N. Am., Inc. v. MSE Power Sys., Inc.*, 581 F. Supp. 2d 321, 325 (N.D.N.Y. 2008); *Chase Bank USA, N.A. v. Hale*, 859 N.Y.S.2d 342, 349 (2008).

55. *See Thomas E.L. Dewey & Kara Siegel, Room for Error: 'Hall Street' and the shrinking scope of judicial review of arbitral awards*, N.Y.L.J., May 15, 2008, at 23 (explaining that *Hall Street* "appeared to question the validity" of the "manifest disregard" standard).

56. *See Hall Street*, 128 S. Ct. at 1403.

57. *Id.* at 1404.

58. Congress enacted the FAA to prevent *judicial* meddling with the ability of private parties to arbitrate their claims. *See Advest Inc. v. McCarthy*, 914 F.2d 6, 8 (1st Cir. 1990); *see also supra* note 2.

59. Federal Arbitration Act, 9 U.S.C. § 9 (2006).

60. *Advest*, 914 F.2d at 8.

wield the FAA to frustrate the uncontested contractual intent of the parties.

A third unresolved question is the viability of authority beyond the FAA to expand judicial review. The Court acknowledged that parties wanting review of arbitration awards are not limited to the FAA.⁶¹ The Court stated that although sections 10 and 11 are the “exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well.”⁶² Thus, parties wanting review of arbitration awards are not limited to the FAA. The Court specifically mentions “enforcement under state statutory or common law” where a different scope of judicial review may be possible.⁶³

This presumably open policy is problematic for two reasons. First, it directly contradicts the decision’s own efficiency rationale. Rather than “fighting the text,” the Court discerned “a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway.”⁶⁴ If the Court is really concerned about opening “the door to full-bore legal and evidentiary appeals”⁶⁵ that make arbitration “merely a prelude to a more cumbersome and time-consuming judicial review process,”⁶⁶ it appears inconsistent to “decid[e] nothing about other possible avenues for judicial enforcement of arbitration awards.”⁶⁷

In addition, this permissive policy questions the scope of the FAA’s preemption power. Just one month earlier, the Supreme Court in *Preston v. Ferrer*⁶⁸ re-emphasized that the FAA supersedes any state law impacting a claim’s arbitrability.⁶⁹

61. *Hall Street*, 128 S. Ct. at 1406.

62. *Id.*

63. *Id.*

64. *Id.* at 1405.

65. *Id.*

66. *Id.* (quoting *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003)).

67. *Id.* at 1406.

68. 128 S. Ct. 978 (2008).

69. *See id.* at 981 (“[W]hen parties agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA.”); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (stating that the FAA “withdrew the power of the states to

Now, in *Hall Street*, the Justices' unanimous language allowing different review from other avenues⁷⁰ implies that the FAA does not preempt the field of judicial review, despite its clear preemption elsewhere.⁷¹

One final question *Hall Street* leaves unanswered is whether parties can still contract for expansive review, including legal error, by doing so within the text of section 10. Although *Hall Street* prohibits supplementing the statutory grounds of the FAA, nothing prohibits future parties from carefully restricting the arbitrator's powers to exclude misinterpretations of the law. Sophisticated parties have already begun to include limiting clauses that declare "[t]he arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal . . . for any such error."⁷² An arbitrator exceeding his powers is an explicit ground for vacatur under section 10.⁷³ Post-*Hall Street*, such contractual language has successfully ensured increased judicial review under nearly identical state statutes.⁷⁴ Although

require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration").

70. See *Hall Street*, 128 S. Ct. at 1406; *id.* at 1410 (Stevens, J., dissenting); *id.* at 1410 (Breyer, J., dissenting).

71. For preemption purposes, the Supreme Court has created a distinction between substantive and procedural provisions of the FAA. See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 n.6 (1989) ("While we have held that the FAA's 'substantive' provisions—§§ 1 and 2—are applicable in state as well as federal court, we have never held that §§ 3 and 4, which by their terms appear to apply only to proceedings in federal court, are nonetheless applicable in state court." (citations omitted)). Lower courts have split on where sections 10 and 11 fall along this spectrum. Compare *Trombetta v. Raymond James Fin. Servs., Inc.*, 907 A.2d 550, 567–68 (Pa. Super. Ct. 2006), with *M & L Power Servs., Inc. v. Am. Networks Int'l*, 44 F. Supp. 2d 134, 139–42 (D.R.I. 1999). Given *Hall Street's* national policy for finality within sections 9, 10, and 11, the provisions should arguably be substantive in order to preempt any state law to the contrary.

72. *Cable Connection, Inc. v. DIRECTV, Inc.*, 190 P.3d 586, 589 (Cal. 2008) (first alteration in original) (internal quotation marks omitted).

73. Federal Arbitration Act, 9 U.S.C. § 10 (2006). Under different situations, courts have held that legal error does not constitute exceeding the arbitrator's powers. See, e.g., *Kyocera*, 341 F.3d at 997; *Employers Ins. of Wausau v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 933 F.2d 1481, 1486 (9th Cir. 1991); *French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902, 906 (9th Cir. 1986). None of these cases involved a limiting clause in the arbitration agreement where the parties restricted the arbitrator's power to exclude legal error. See *Kyocera*, 341 F.3d at 1002; *French*, 784 F.2d at 904.

74. See *Cable Connection*, 190 P.3d at 591–99, 604.

this exception could swallow the rule of limited judicial review, this section 10 loophole complies with the text of *Hall Street*⁷⁵ and the FAA⁷⁶ while upholding the congressional intent of the statute.⁷⁷

Hall Street highlights many limitations of a minimalist jurisprudence. The Supreme Court in *Hall Street* issued a narrow holding that painstakingly avoided divisive issues.⁷⁸ Yet by implicating without resolving disagreement, the overly narrow decision created multiple questions in place of the one resolved. As lower courts have already begun to struggle with the decision, *Hall Street* provides empirical support for the pre-empirical hypothesis that doubts “overall costs in the legal and political systems will be minimized by a Supreme Court that decides cases as narrowly and shallowly as reasonably possible.”⁷⁹

Even ardent proponents of minimalism acknowledge that the philosophy is less appropriate under certain circumstances.⁸⁰ Minimalism is particularly dangerous in the realm of arbitration, where predictability and finality are especially important. A narrow holding, riddled with unanswered questions, might generate consensus among the Justices, but it does so at the price of uncertainty among lower courts and private parties.

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75. See *Hall Street*, 128 S. Ct. at 1404–05.

76. 9 U.S.C. § 9 (“[T]he court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.”).

77. See *supra* note 2.

78. See Sunstein, *supra* note 49 (quoting Chief Justice Roberts as saying, “If it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more.”).

79. Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 2006 (2005).

80. Prolific advocate Professor Cass Sunstein conceded that minimalism is not “generally or always the right path. When planning is important, minimalism is hazardous; when minimalism imposes high decisional burdens on others, the argument for minimalism is weakened.” Cass R. Sunstein, *Testing Minimalism: A Reply*, 104 MICH. L. REV. 123, 128 (2005). In fact, Professor Sunstein defines “an identifiable class of cases” where minimalism is most appropriate: cases where America is morally divided, the Court does not know the right answer, and society would profit from continued debate. *Id.* None of these factors is particularly salient here.

“WHOLLY FOREIGN TO THE FIRST AMENDMENT”:
THE DEMISE OF CAMPAIGN FINANCE’S EQUALIZING
RATIONALE IN *Davis v. Federal Election
Commission*, 128 S. Ct. 2759 (2008)

Since the Supreme Court handed down its seminal campaign finance opinion, *Buckley v. Valeo*,¹ more than three decades ago, campaign contributions and expenditures have been widely accepted as a type of political speech entitled to varying degrees of First Amendment protection.² Under *Buckley*, the only government interest sufficient to justify regulating campaign finance was “the prevention of corruption and the appearance of corruption.”³ State actors could easily invoke this fear of quid pro quo corruption with regard to contribution restrictions, but limits on campaign expenditures proved much harder to justify. Searching for an interest more closely related to the regulation of campaign expenditures, litigants and legal scholars alike have articulated an “equalizing” interest—essentially maintaining that the government has an interest in ensuring that participants have equal opportunities of expression in the political arena.⁴ Clearly,

1. 424 U.S. 1 (1976) (per curiam).

2. See generally MARTIN H. REDISH, MONEY TALKS: SPEECH, ECONOMIC POWER, AND THE VALUES OF DEMOCRACY 122–28 (2001). But see *Randall v. Sorrell*, 548 U.S. 230, 276–78 (2006) (Stevens, J., dissenting); *Buckley*, 424 U.S. at 263 (White, J., concurring in part and dissenting in part).

3. *Buckley*, 424 U.S. at 25 (per curiam).

4. There are numerous equalizing theories, all of which are based on the general principle that preventing quid pro quo corruption is not the only interest sufficient to justify campaign finance regulation. See, e.g., Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1211 (1994) (“I believe that [*Buckley*] must be overruled in order to permit adoption of a system of campaign finance that guarantees equal electoral funds for all voters.”); Gene R. Nichol, *Money, Equality, and the Regulation of Campaign Finance*, 6 CONST. COMMENT. 319, 328 (1989) (“[T]he governmental interest undergirding both contribution and expenditure limitations is not only an acceptable, but often a compelling public concern.”); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390 (1994); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 637 (1982) (“Limiting the amount that wealthy interests may spend to publicize their views enhances the self-expression of individual citizens who lack wealth, furthering the values of freedom of speech.”). For a proposal similar to the regulations implemented in Section 319, see Joel L. Fleishman

were equalizing to become entrenched as an accepted rationale, a significant bulwark restricting campaign finance regulation would be swept away. Perhaps recognizing the danger of opening the Pandora's box of equalizing interests, the Court has thus far declined the invitation to supplement its "corruption" standard. Nevertheless, from the mid-1980s onward the Court appeared amenable to stretching the anticorruption rationale almost beyond recognition, at times implicitly acknowledging an equalizing interest in campaign finance jurisprudence.⁵ Last Term, however, in *Davis v. Federal Election Commission*,⁶ a divided Court struck down the "Millionaires' Amendment" of the Bipartisan Campaign Reform Act of 2002 (BCRA),⁷ unequivocally rejecting the governmental interest in "leveling the playing-field" and holding that the statute's asymmetrical contribution caps and disclosure regulations violated the First Amendment by unduly burdening political expression. The Court split over whether equalizing the political opportunities of candidates was a legitimate government interest or an unjustifiable infringement on campaign speech. By strongly articulating a clear rejection of the equalizing doctrine, the majority took a significant step in breaking from its earlier, deferential campaign finance jurisprudence. Furthermore, the reaffirmation of *Buckley's* anticorruption goal as the sole state interest capable of prevailing on a First Amendment challenge will have broad implications for the continued viability of corporate campaign finance regulation, and also works to undermine contribution limits generally.

Enacted in 2002, BCRA Section 319—popularly known as the "Millionaires' Amendment"—provided for asymmetrical campaign finance regulations under limited circumstances during a House of Representatives electoral race.⁸ Under Section 319(a), when a candidate's "opposition personal funds

& Pope McCorkle, *Level-Up Rather Than Level-Down: Towards a New Theory of Campaign Finance Reform*, 1 J.L. & POL. 211, 231 (1984) (proposing a system of "public subsidization to establish a floor of wealth for candidates but no overall ceiling on expenditures from private sources of support").

5. See *infra* notes 41–55 and accompanying text.

6. 128 S. Ct. 2759 (2008).

7. Pub. L. No. 107-155, § 319, 116 Stat. 81, 109 (codified at 2 U.S.C. § 441a-1 (2006)).

8. Section 319 of BCRA is codified at 2 U.S.C. § 441a-1 as § 315A of the Federal Election Campaign Act of 1971 (FECA). In keeping with the usage of the parties and the Court in *Davis*, this Comment will refer to the Millionaires' Amendment as Section 319. See *Davis*, 128 S. Ct. at 2766 n.3.

account” (OPFA)—basically the amount of personal funds he expends during the campaign⁹—exceeded \$350,000, his opponent could take advantage of dramatically less-restrictive contribution limits up to the amount of the self-financed candidate’s aggregate expenditures.¹⁰ For example, although the self-financed candidate would remain subject to contribution caps of \$2,300 per individual, his opponent would then be free to accept treble that amount, even from individuals who had already reached their regular aggregate contribution cap of \$42,700.¹¹ Section 319(a) also permitted candidates facing self-financed opponents to benefit from unlimited coordinated expenditures from their parties.¹² Section 319(b) mandated that a candidate exceeding the \$350,000 OPFA mark comply with additional detailed disclosure requirements.¹³ Unwitting candidates who failed to file the disclosure forms could be subject to substantial civil sanctions.¹⁴

In March 2006, Jack Davis filed his statement of candidacy with the FEC, declaring his intent to run as the Democratic candidate for New York’s 26th Congressional District.¹⁵ Complying with BCRA Section 319(b), Davis declared that he planned to spend \$1 million of his own funds to finance the campaign, well above the amount for triggering the Millionaires’ Amendment. As he approached Section 319(a)’s \$350,000 threshold in June 2006, Davis filed suit against the FEC in the United States District Court for the District of Columbia, facially challenging Sections 319(a) and (b) of BCRA as violative of the First

9. The OPFA also takes into account some aspects of fundraising. *See id.* at 2766.

10. *See* 2 U.S.C. § 441a-1(a) (2006).

11. *Davis*, 128 S. Ct. at 2766.

12. 2 U.S.C. § 441a-1(a)(1)(C).

13. 2 U.S.C. § 441a-1(b). Within fifteen days of declaring his candidacy, a candidate would be required to disclose the amount of personal funds he planned to expend in excess of \$350,000; within twenty-four hours of obligating himself to breach the \$350,000 threshold, a candidate would be required to file an initial notification; and within twenty-four hours of making each additional expenditure of \$10,000 he would be required to file an additional notification. § 441a-1(b)(1)(B)–(D).

14. *See Davis*, 128 S. Ct. at 2767; 2 U.S.C. § 437g(a)(5)(A) (2006) (“If the Commission believes that a violation of this Act . . . has been committed, a conciliation agreement . . . may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty [not to exceed the greater of \$5,000 or any contribution or expenditure involved in the violation].”).

15. *Davis*, 128 S. Ct. at 2767.

Amendment and the equal protection component of the Fifth Amendment's Due Process Clause.¹⁶ Both parties filed motions for summary judgment. The district court rejected Davis's motion for summary judgment and granted the FEC's,¹⁷ dismissing Davis's contention that Section 319 imposed a burden on the political speech rights of self-financed candidates. The three-judge panel upheld the statute on the grounds that "[i]t places no restrictions on a candidate's ability to spend unlimited amounts of his personal wealth to communicate his message to voters."¹⁸ In fact, the district court lauded Section 319 for preserving the right of all candidates to have the opportunity to "enhance [their] participation in the political marketplace" by "correcting a potential imbalance in resources available to each candidate."¹⁹ Noting that Davis had chosen to finance his own campaign in spite of the Millionaires' Amendment, the district court concluded that he had thus failed to demonstrate that his speech had been limited in any way by the prospect of financial benefit to his political adversaries.²⁰ Davis then appealed to the United States Supreme Court via BCRA's statutory provision for direct appeal.²¹

Writing for a majority of five, Justice Alito²² reversed the judgment of the district court, holding that Section 319's asymmetrical contribution caps and disclosure requirements impermissibly burdened Davis's First Amendment rights.²³ The Court invoked *Buckley's* unequivocal rejection of any limits on a candidate's expenditures in support of his own campaign, recalling that "a cap on personal expenditures imposes 'a substantial,' 'clea[r]' and 'direc[t]' restraint" on the right to uninhibited political expression.²⁴ Analogizing, the Court concluded that although Section 319(a) did not actually cap a candidate's personal expenditures, "it impose[d] an unprecedented penalty on any candidate who

16. *Davis v. FEC*, 501 F. Supp. 2d 22, 27–28 (D.D.C. 2007).

17. *Id.* at 34.

18. *Id.* at 29.

19. *Id.*

20. *Id.* at 36.

21. *See Davis*, 128 S. Ct. at 2768.

22. Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas joined Justice Alito's opinion for the Court.

23. *See Davis*, 128 S. Ct. at 2775.

24. *Id.* at 2771 (alterations in original).

robustly exercises that First Amendment right.”²⁵ In the zero-sum game of political campaigning, Section 319(a) substantially burdened constitutionally protected rights of political expression by providing significant fundraising advantages to the opponents of self-financed candidates. Thus, the Court maintained, strict scrutiny was appropriate; Section 319 must be shown to have furthered a compelling state interest.²⁶ The ensuing First Amendment analysis focused heavily on the asserted state interest in leveling the playing field.²⁷ The importance of “level[ing] electoral opportunities for candidates of different personal wealth,”²⁸ the government contended, outweighed any burden on a candidate’s right to employ personal funds “vigorously and tirelessly to advocate his own election.”²⁹ Expressing undisguised distaste for the “ominous implications”³⁰ of the equalizing argument, the Court maintained that no precedent supported equalization as an interest sufficiently compelling to justify burdening campaign speech.³¹ Furthermore, the scope of the government’s asserted interest in equalizing electoral opportunities, the Court noted, is virtually limitless. In a world where candidates enjoy disparate natural advantages—from wealth to celebrity status—leveling electoral opportunities puts the state in the position of “making . . . judgments about which strengths should be permitted to contribute to the outcome of an election.”³² Finally, the Court rejected the government’s justification

25. *Id.*

26. *Id.* at 2772 (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986)).

27. The Court quickly addressed and dismissed the notion that Section 319(a) furthered the government’s anticorruption interest, noting that heavy reliance on personal funds actually reduces the threat of corruption by removing the danger of undue influence. *See id.* at 2773; *see also* *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 440–41 (2001) (stating that corruption is “understood not only as *quid pro quo* agreements, but also as undue influence on an officeholder’s judgment, and the appearance of such influence” (citation omitted)).

28. *Davis*, 128 S. Ct. at 2773 (quoting Brief for Appellee at 34, *Davis*, No. 07-320 (2008)).

29. *Id.* at 2771 (quoting *Buckley v. Valeo*, 424 U.S. 1, 52–53 (1976) (per curiam)).

30. *Id.* at 2773.

31. *See id.* The Court extensively invoked non-binding precedent, including Justice Thomas’s dissent in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting), Justice Thomas’s concurrence in *Randall v. Sorrell*, 548 U.S. 230, 268 (2006) (Thomas, J., concurring in the judgment), and Justice Kennedy’s dissent in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 705 (1990) (Kennedy, J., dissenting).

32. *Davis*, 128 S. Ct. at 2774. For further discussion of non-monetary factors that may result in “inequality,” see Lillian R. BeVier, *Campaign Finance Reform: Specious*

that Section 319(a) merely “ameliorates the deleterious effects” of the contribution caps, suggesting that Congress address the “untoward consequences” of the campaign finance framework by raising or even eliminating contribution limits.³³

Briefly addressing Davis’s challenge to Section 319(b)’s disclosure requirements, the Court recognized the burden that such regulations may impose, subjecting the state’s proffered justifications to “exacting scrutiny.”³⁴ Because the disclosure provision at issue here existed simply to further the now-unconstitutional provisions of Section 319(a), the Court concluded that “the burden imposed . . . cannot be justified.”³⁵

Justice Stevens, joined in part by Justices Souter, Ginsburg, and Breyer, concurred in part and dissented in part. Justice Stevens reluctantly acknowledged that *Buckley*’s protection of campaign expenditures remained on solid ground, but argued that, even under *Buckley*, “the purposes of [Section 319] surely justify its effects.”³⁶ Calling for *Buckley*’s overruling, he firmly rejected the proposition that anticorruption interests are the only adequate justification for campaign finance regulations, asserting that “[m]inimizing the effect of concentrated wealth on our political process” is a legitimate governmental interest.³⁷ The other dissenters distinguished their views from those of Justice Stevens only to the extent that they were unwilling to reconsider *Buckley*’s continued vitality.³⁸

The Court’s division in *Davis* turned on a fundamental disagreement over which state interests justify campaign finance regulation. Whereas Justice Stevens and the dissenters insisted that the state has a compelling interest in equalizing electoral opportunities, the majority brusquely dismissed such a notion, reaffirming that the prevention of corruption and the appearance of

Arguments, Intractable Dilemmas, 94 COLUM. L. REV. 1258, 1268 (1994) (efforts to equalize “wealth disparities” have the effect of elevating the importance of non-wealth disparities).

33. *Davis*, 128 S. Ct. at 2774. The “untoward consequences” that the government invoked were the conflicts between contribution limits preventing less-affluent candidates from raising adequate funds and the lack of expenditure caps allowing richer candidates to expend unlimited amounts of personal funds. *Id.*

34. *Id.* at 2775.

35. *Id.*

36. *Id.* at 2780 (Stevens, J., concurring in part and dissenting in part).

37. *Id.* at 2781.

38. *See id.* at 2782–83 (Ginsburg, J., concurring in part and dissenting in part).

corruption was the only acceptable state interest.³⁹ The majority's contention that "[o]ur prior decisions . . . provide no support for the proposition that [equalizing] is a legitimate government objective,"⁴⁰ however, understates *Davis's* dramatic impact on campaign finance law. Despite the Court's nominal adherence to the anticorruption standard, its campaign finance jurisprudence throughout the 1990s and into the 2000s often demonstrated a deferential acceptance of what appeared to be state interests in equalizing or mitigating the impact of funds on political campaigns. *Davis's* clear condemnation of the equalizing doctrine is therefore notable for reviving the First Amendment interests implicated by campaign finance regulation and calls into question the continued viability of campaign finance statutes regulating corporate funds and even contribution limits generally.

Although the *Buckley* Court rejected "the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections,"⁴¹ the equalizing argument regularly resurfaced in various forms as the Court's campaign finance jurisprudence developed, often in the context of corporate political involvement. Two years after *Buckley*, in *First National Bank of Boston v. Bellotti*,⁴² the Court struck down a Massachusetts criminal statute prohibiting corporations from making contributions or expenditures to influence votes on most referendum proposals.⁴³ Although the Court dismissed the state's rationale that "corporations are wealthy and powerful and their views may drown out other points of view," its conclusion was based primarily on the lack of evidentiary support for the state's contentions.⁴⁴ Nevertheless, the Court was particularly alarmed that the statute's suppression of speech "suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people,"⁴⁵ a con-

39. *Id.* at 2773–74 (majority opinion).

40. *Id.* at 2773.

41. *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam).

42. 435 U.S. 765 (1978).

43. The statute prohibited a wide spectrum of business corporations from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." *Id.* at 768 n.2.

44. *Id.* at 789; see also *id.* at 791 n.30.

45. *Id.* at 785. Justice White, dissenting, denied that the statute's interest was one of "equalizing the resources of opposing candidates"; rather, it was one of

cern that would play a central role in the outcome of *Davis* three decades later.

The Court's 1986 opinion in *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*⁴⁶ was not as friendly to corporate participants in campaigns. In this case, the Court curiously invoked Justice Holmes's "market place of political ideas" metaphor to craft a justification for limiting certain political speech, expressing the concern that a corporation's vast amount of funds reflects the "economically motivated decisions of investors" rather than popular support for the institution's ideology.⁴⁷ Although the Court ultimately dismissed the FEC's enforcement proceeding in *MCFL*, its dicta describing a disconnect between corporate wealth and popular support indicated the Court's willingness to go beyond *Buckley's* anticorruption interest in favor of neutralizing the vague "unfair advantage" of wealth in the political arena. More importantly, *MCFL* provided the groundwork for *Austin v. Michigan State Chamber of Commerce*,⁴⁸ a 1990 decision expanding the definition of "corruption" to include "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."⁴⁹ The majority in *Austin* denied that it was endorsing an equalizing rationale,⁵⁰ maintaining that it was merely approving the state's interest in ensuring that expenditures accurately reflect "actual public support."⁵¹ In like vein, at least one scholar has minimized *Austin's* equalizing undertones,⁵² but the Court's in-

preventing institutional wealth (made possible by "special advantages extended by the State") from incurring "an unfair advantage in the political process." *Id.* at 809 (White, J., dissenting).

46. 479 U.S. 238 (1986).

47. *Id.* at 257-58.

48. 494 U.S. 652 (1990).

49. *Id.* at 660.

50. *See id.*

51. *Id.*

52. *See, e.g.,* Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 *CAP. U. L. REV.* 381, 396 (1992) (disputing the notion that "the upholding of the ban on corporate independent expenditures in *MCFL* and *Austin* [was] based on a wholesale acceptance of equality"). Professor Lowenstein distinguished "equality of inputs" from "equality of outputs." Under his theory, equality of inputs—"the idea that each person should have an equal opportunity to influence the campaign debate"—is an acceptable government interest, but equality of outputs—"a debate in which each side has a reasonably equal chance to present its case to the public"—is not. *See id.* at 393-97. *But see*

sistence that private funds reflect public support suggests that the *Buckley* anticorruption language was simply used to mask *Austin's* true egalitarian visage.⁵³ In dissent, for example, Justice Kennedy stridently decried determining who are the “favored participants in the electoral process” and appealed to “fundamental principles of neutrality for all political speech.”⁵⁴ Furthermore, any notion that *Austin's* broad definition of “corruption” would impact only corporate political actors has been disproved by Justice Stevens’s *Davis* dissent, in which he expressly cited *Austin* to support his proposition that the Court has a long history of recognizing the government’s interest in reducing the impact of wealth on elections.⁵⁵

By the time the Court handed down its second landmark campaign finance case—*McConnell v. FEC*⁵⁶—in 2003, *Buckley's* once-limited recognition of acceptable state interests had eroded to an almost unrecognizable deference to a myriad of interests, including a clearly recognizable equalizing justification.⁵⁷ In his concurrence in *Nixon v. Shrink Missouri Government PAC*, for example, Justice Breyer acknowledged the governmental interest in “democratiz[ing] the influence that money itself may bring to bear upon the electoral process.”⁵⁸ As far as *Buckley's* rejection of equalizing interests, Justice Breyer easily dismissed the weight of precedent, asserting that “those words cannot be taken liter-

Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 SUP. CT. REV. 105, 109 (“This is simply a repackaging of the equalization goal.”); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1369 n.1 (1994) (asserting that the Court in *Austin* “defined ‘corruption’ in a way that made it essentially equivalent to inequality”).

53. See Bradley A. Smith, *The John Roberts Salvage Company: After McConnell, a New Court Looks to Repair the Constitution*, 68 OHIO ST. L.J. 891, 907–08 (2007) (“For years, *Buckley* has required reformers, who favor reform for egalitarian reasons, to couch their legal arguments in terms of corruption.”); see also Jill E. Fisch, *Frankenstein’s Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 WM. & MARY L. REV. 587, 628 (1991) (“[T]he rationale for the Court’s holding . . . boils down to a determination that eliminating corporate speech will tend to level the playing field . . .”).

54. *Austin*, 494 U.S. at 700, 701 (Kennedy, J., dissenting).

55. See *Davis v. FEC*, 128 S. Ct. 2759, 2781 (Stevens, J., concurring in part and dissenting in part).

56. 540 U.S. 93 (2003). A controversial case, *McConnell* upheld the constitutionality of many of BCRA’s provisions.

57. See Richard L. Hasen, *Buckley Is Dead, Long Live Buckley*, 153 U. PA. L. REV. 31, 32 (2004) (arguing that, under the guise of its anticorruption rationale, the Court has been limiting the role of money in politics to “promote greater political equality”).

58. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring).

ally.”⁵⁹ The changing character of the Court in recent years, however, has led to notably less deference to state and federal entities in the campaign finance arena.⁶⁰ Furthering that trend, *Davis’s* rejection of the state’s interest in equalizing political opportunities marks a resounding victory for “the vigorous exercise of the right to use personal funds to finance campaign speech.”⁶¹ But beyond ensuring the sanctity of personal expenditures in electoral races, *Davis* has also called into question the vitality of numerous other aspects of campaign finance reform, including *Austin’s* “corporate form” corruption, and has threatened to destabilize contribution limits in general.

The *Davis* opinion significantly undermined the fundamental premises of restrictions on corporate political expression. Whatever *Austin* stood for,⁶² it clearly maintained that the effects of corporate political expenditures are “corrosive and distorting” because they have little correlation to public support. The funds amassed by such institutions are “a function of [their] success in the economic marketplace”⁶³ and do not reflect the actual popularity of the ideas espoused. Under the broad premises of *Austin’s* reasoning, however, Jack Davis’s expenditures would clearly have an identically corrosive and distorting effect on the political arena. Davis’s money came from business; in 1964 he founded I Squared R Element Co., a successful enterprise that eventually grew to be the largest manufacturer of silicon carbide heating elements in the United States.⁶⁴ In *Austin*, the Court upheld a statute forbidding a state chamber of commerce from making an innocuous independent expenditure in the form of a local newspaper advertisement.⁶⁵ In contrast, Davis spent a total of \$3.4 million in his 2004 and 2006 campaigns, primarily of his own funds.⁶⁶ The concerns raised by immense

59. *Id.* at 401–02.

60. See e.g., *FEC v. Wis. Right to Life, Inc.*, 127 S. Ct. 2652 (2007); *Randall v. Sorrell*, 548 U.S. 230 (2006).

61. *Davis*, 128 S. Ct. at 2772.

62. See *supra* notes 48–55 and accompanying text.

63. *FEC v. Mass. Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, 259 (1986).

64. I Squared R Element Co., Inc.—About Us, http://www.isquaredrelement.com/about_us.html (last visited Apr. 26, 2009).

65. *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 656 (1990); see also Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 73–74 (1997) (further discussing the proposed ad at issue in *Austin*).

66. *Davis*, 128 S. Ct. at 2767.

aggregations of corporate wealth in *Austin* are equally applicable to the immense aggregations of individual wealth in *Davis*. Jack Davis's personal funds are just as much "a function of [his] success in the economic marketplace"⁶⁷ as is a corporation's treasury. Similarly, his funds better reflect "economically motivated decisions"⁶⁸ than popular support for his political agenda. Therefore, in affirming Davis's right to make political expenditures, the Court made clear that it is not the government's place to ensure that everyone has an equal opportunity to expound a political position,⁶⁹ even if the campaign withdrawal of participants (or at least candidates) is an outgrowth of the economic marketplace. The *Davis* majority also vindicated Justice Kennedy's vigorous dissent in *Austin* criticizing the practice of "altering political debate by muting the impact of certain speakers."⁷⁰ By recognizing the "unprecedented penalty" imposed on self-financed candidates, the Court in *Davis* dealt a blow to the justifications underpinning *Austin*'s stringent regulation of corporate political involvement.

The demise of the Millionaires' Amendment suggests that contribution limits, too, may now be standing on weaker ground. When faced with the government's argument that Section 319(a) merely rectified the "deleterious effects" of a regulatory system that imposes onerous contribution limits in conjunction with unlimited personal expenditures, Justice Alito pointedly noted that these effects were a direct result of *Buckley*'s original treatment of the Federal Election Campaign Act (FECA).⁷¹ Perhaps, Justice Alito suggested, the solution lies in decreasing, rather than increasing, the stringency of regulation.⁷² Not only did the Mil-

67. *MCFL*, 479 U.S. at 259.

68. *Id.* at 258.

69. See Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 667 (1997) ("The norm in political speech is negative liberty: freedom of exchange, against a backdrop of unequal distribution of resources . . .").

70. *Austin*, 494 U.S. at 704 (Kennedy, J., dissenting).

71. See *Davis*, 128 S. Ct. at 2774.

72. See *id.* ("If the normally applicable limits on individual contributions and coordinated party contributions are seriously distorting the electoral process, if they are feeding a 'public perception that wealthy people can buy seats in Congress,' . . . and if those limits are not needed in order to combat corruption, then the obvious remedy is to raise or eliminate those limits."). For an argument that eliminating contribution caps and heightening disclosure requirements would adequately deter corruption, see Sullivan, *supra* note 69, at 688-90 ("With contri-

lionaires' Amendment seek to equalize political opportunities—a proposal soundly rejected by the Court—but it hinted at congressional ambivalence toward the original anticorruption rationale itself. In fact, since *Austin* transformed the definition of the word, “corruption” appears to be a mere talisman, emptied of its original meaning.⁷³ Further, even FECA’s original provisions reflected congressional concern “that voters are unduly influenced by . . . the sheer volume of information communicated by wealthy candidates.”⁷⁴ It thus appears that equalizing interests—whether flying their true colors or waving an anticorruption banner—have been quietly in play since the inception of the *Buckley* saga.

In the Millionaires' Amendment, however, equalizing interests brazenly trumped anticorruption by implicitly acknowledging that BCRA’s baseline contribution cap could be significantly relaxed without implicating fears of corruption. Under BCRA, Congress determined that a contribution cap of \$2,300 was necessary to battle corruption and the appearance thereof, but the Millionaires' Amendment represented willingness to sacrifice BCRA’s anticorruption interest in favor of equalizing the funds available to candidates. How does one candidate’s expending significant amounts of personal funds make his non-self-financed opponent immune to the temptation of quid pro quo corruption? After all, whether a candidate will be corrupted by a \$6,900 contribution is unrelated to his opponent’s personal expenditures.

The constitutionality of contribution restrictions can no longer be taken for granted. Even though contribution limits “require less compelling justification than restrictions on independent spending,” they must be closely drawn to address a “sufficiently important interest.”⁷⁵ How closely drawn the restrictions must be is often subject to significant deference. In a recent case, for example, the Court reiterated that it has “no scalpel to probe

butions fully disclosed . . . , voters would be empowered to penalize candidates whose responsiveness to large contributors they deemed excessive.”)

73. See Smith, *supra* note 53, at 900–01.

74. James A. Gardener, Note, *Protecting the Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. CHI. L. REV. 892, 918 (1984).

75. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 387 (2000) (quoting *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 259–60 (1986)); *id.* at 388 (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam)); see also *FEC v. Beaumont*, 539 U.S. 146, 161 (2003) (“[R]estrictions on political contributions have been treated as merely ‘marginal’ speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression.”).

whether, say, a \$2,000 contribution ceiling might not serve as well as \$1,000.”⁷⁶ Through the Millionaires’ Amendment, however, Congress itself indicated that a \$6,900 contribution cap does serve as well as one at \$2,300; neither implicates corruption concerns.⁷⁷ Because the \$6,900 cap does not raise the specter of corruption, then, it is unclear how the government can turn to anticorruption to justify the \$2,300 cap. Absent its anticorruption rationale, BCRA’s contribution limit appears to rest solely on the judiciary’s long-standing deference to legislative judgment in the campaign finance arena. Whether *Davis* is a step toward the demise of this deference remains to be seen.

The majority’s decision in *Davis* constructed another barrier between First Amendment rights and the push to confine them through campaign finance regulation. In contrast to the era of ever-expanding governmental authority to police political expression, *Davis* is a considerable victory in the recent effort to rein in unbridled regulation of campaign finance. Not only has *Davis* reasserted *Buckley*’s long-neglected declaration that equalizing interests are “wholly foreign to the First Amendment,”⁷⁸ it has laid a much-needed foundation upon which to construct new constitutional challenges to numerous facets of campaign finance regulation.

Samuel Gedge

76. *Randall v. Sorrell*, 548 U.S. 230, 247 (2006) (quoting *Buckley*, 424 U.S. at 30).

77. Justice Alito raised a similar issue during the oral argument, asking, “[W]hy would Mr. Davis be subject to potential corruption if he got \$2,300—\$2,301 from a— from a contributor, but his opponent in exactly the same race would not be exposed to corruption if he got \$6,900?” Transcript of Oral Argument at 45, *Davis*, 128 S. Ct. 2759 (No. 07-320).

78. *Davis*, 128 S. Ct. at 2773 (quoting *Buckley*, 424 U.S. at 49).

SQUARING THE CIRCLE: RECONCILING CLEAR
STATUTORY TEXT WITH CONTRADICTIONARY
STATUTORY PURPOSE IN *United States v. Whitley*,
529 F.3d 150 (2d Cir. 2008)

Since the Supreme Court struck down the New Jersey Hate Crime Statute in *Apprendi v. New Jersey*,¹ federal courts have increasingly resisted mandatory sentencing regimes. From *Apprendi* to *Booker*² to *Kimbrough*³ and *Gall*,⁴ the courts have progressively increased their own discretion at the expense of uniform systems established by Congress. In *United States v. Whitley*,⁵ the Second Circuit continued this trend by depending on judges to ensure equity and uniformity in sentencing enhancements for using firearms under 18 U.S.C. § 924(c). Although prior cases focused on constitutional claims, the *Whitley* court tackled a challenge of statutory interpretation. Confronting a statute containing plain text that starkly departed from Congress's apparent intent, the Second Circuit rejected the intentionalism of other circuits, choosing instead fidelity to the words that Congress chose, however improvidently. Unfortunately, the opinion failed to acknowledge the resulting "absurdity" that will result from straightforward application of the statute because of its confident reliance on judges to implement congressional intent on a discretionary basis. Instead of pretending that Congress did not err in drafting the statute, the Second Circuit should have attacked the legal chimera head-on, remaining loyal to the text as much as possible but alerting Congress that it had created a dilemma and should amend the statute. Rather than assuming that Congress and the courts are walled-off from one another, the *Whitley* court should have encouraged a dialogue between the two.

In November 2004, Latie Whitley robbed a Bronx delicatessen, threatening employees with a firearm and emptying the cash reg-

1. 530 U.S. 466 (2000).

2. *United States v. Booker*, 543 U.S. 220 (2005).

3. *Kimbrough v. United States*, 128 S. Ct. 558 (2007).

4. *Gall v. United States*, 128 S. Ct. 586 (2007).

5. 529 F.3d 150 (2d Cir. 2008).

ister. During the robbery, the gun accidentally fired, wounding Whitley in the face.⁶ He was subsequently indicted on three counts. Count One charged Whitley with the robbery in violation of the Hobbs Act, which criminalizes “obstruct[ing], delay[ing], or affect[ing] commerce . . . by robbery or extortion.”⁷ Count Two charged Whitley with using, carrying, or possessing a firearm “during and in relation to any crime of violence or drug trafficking crime” under § 924(c)(1)(A).⁸ Count Three charged Whitley as an armed career criminal for illegally possessing a firearm after three convictions for violent felonies or serious narcotics offenses under § 924(e)(1).⁹ Whitley was convicted of all counts at trial.¹⁰

The district court sentenced Whitley to imprisonment for 282 months on both the robbery and armed career criminal counts, followed by a mandatory consecutive term of 120 months for discharging a firearm.¹¹ The district court believed § 924(c)(1)(A)¹²

6. *Id.* at 151.

7. Hobbs Act, 18 U.S.C. § 1951 (2006).

8. 18 U.S.C. § 924(c)(1)(A) (2006).

9. 18 U.S.C. § 924(e)(1) (2006).

10. *Whitley*, 529 F.3d at 152.

11. *Id.*

12. The statute states:

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

- (i) be sentenced to a term of imprisonment of not less than 5 years;
- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
- (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A). After outlining additional penalties for certain types of weapons, such as assault rifles, machineguns, and silenced weapons, the section concludes by stating:

Notwithstanding any other provision of law . . . no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

18 U.S.C. § 924(c)(1)(D)(ii).

required this sentence.¹³ The Second Circuit reversed, holding that the statute did not require the mandatory ten-year consecutive sentence, and remanded for resentencing.¹⁴

Writing for the panel, Judge Jon O. Newman found that the consecutive mandatory sentence violated the opening clause of 18 U.S.C. § 924(c).¹⁵ The court of appeals held that because Count Three—the armed career criminal violation—subjected Whitley to a fifteen-year mandatory minimum sentence, “a greater minimum sentence [was] otherwise provided by this subsection or by any other provision of law,” thereby invoking the “except” clause and exempting Whitley from the requirement of a consecutive sentence.¹⁶ Rather than discuss the affirmative merits of its very literal reading of the statute, the court instead addressed the four specific objections raised by the government.

First, the government argued that the “except” clause should suspend an otherwise applicable § 924(c)(1)(A) sentence only when a greater minimum *consecutive* sentence applies for using a firearm in furtherance of an underlying crime. For example, 18 U.S.C. § 924(c)(1)(A)(iii) subjected Whitley to a ten-year consecutive sentence for discharging a firearm.¹⁷ The “except” clause exempted him from the five-year consecutive sentence he would also be subject to under 18 U.S.C. § 924(c)(1)(A)(i) for possessing the gun, a logically precedent requirement for discharging it.¹⁸ Similarly, had Whitley discharged a machinegun instead of a handgun—which results in a thirty-year consecutive sentence under § 924(c)(1)(B)(ii)—he would be exempt from the lesser ten-year sentence.¹⁹ But because Whitley’s twenty-three-year sentence arose from § 1951 and § 924(e), under which punishments do *not* run consecutively, the “except” clause should have no effect, and the district court correctly tacked on the ten-year sentence for discharging the gun. In short, the government’s interpretation implied that a sentence under § 924(c)(1)(A) is “excepted” only when the longer sen-

13. *Whitley*, 529 F.3d at 151.

14. *Id.* at 158.

15. *Id.* at 153 (quoting 18 U.S.C. § 924(c)(1)(A)).

16. *Id.*

17. *Id.*

18. *Id.*

19. 18 U.S.C. § 924(c)(1)(B)(ii).

tence triggering the “except” language also runs consecutively because the statute provides for consecutive sentences. Rejecting this argument with a single paragraph, the court accurately observed that “[t]he flaw in the Government’s argument, of course, is that the word ‘consecutive’ does not appear in the text of the ‘except’ clause.”²⁰

Second, the government pointed to the statute’s design.²¹ The 1998 amendment to § 924(c)(1)(A) separated an undivided subsection into individual numbered segments.²² Congress added the “except” clause, the government argued, solely to ensure that the newly-divided segments functioned in harmony: defendants would not be exposed to liability under multiple sections of § 924(c)(1)(A) for the same offense.²³ The court noted—tersely but correctly—that “if linking the various provisions of subsection (c)(1) together was the sole purpose of the ‘except’ clause, the clause would have ended with the phrase ‘provided by this subsection,’ and the phrase ‘or by any other provision of law’ would have been unnecessary.”²⁴

Third, the government argued that relieving Whitley of the ten-year sentence would be contrary to congressional intent.²⁵ Noting that the argument was “[o]f arguably greater force” than the two previously advanced,²⁶ the court briefly reviewed the history of amendments to § 924(c). Conceding that the most obvious purpose of the amendment was to reverse the Supreme Court’s very narrow interpretation of the statute’s previous version in *United States v. Bailey*,²⁷ the court nevertheless stated, “we do not regard it as inconsistent with that purpose for Congress . . . also to have made a reasoned judgment that where a defendant is exposed to two minimum sentences . . . only the higher minimum should apply.”²⁸

20. *Whitley*, 529 F.3d at 153.

21. *Id.*

22. *Id.* at 154.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. 516 U.S. 137, 144 (1995) (holding that the language in the previous version of § 924(c)(1)(A), prohibiting “use” of a firearm during a crime of violence, did not illegalize possession but only “active employment” of a gun).

28. *Whitley*, 529 F.3d at 155.

Finally, the government argued that the court's interpretation of the "except" clause would give rise to illogical results.²⁹ Specifically, felons who committed lesser underlying crimes would face ultimately higher sentences than those whose base crimes carried a minimum sentence high enough to subsume the § 924(c) penalty through the "except clause." For example, a defendant who brandished a firearm while possessing 500 grams of cocaine would be subject to consecutive mandatory minimum sentences of seven years for the firearm and five years for the narcotics, whereas a defendant who brandished a firearm while possessing five kilograms would face only the mandatory ten-year minimum for the drugs.³⁰ The Second Circuit responded that courts would not be obliged to effect this absurdity, but could, in the aftermath of *Booker* and consistent with the sentencing factors of 18 U.S.C. § 3553(a), sentence above the minimum when necessary to avoid this inconsistency and to ensure justice.³¹ Notably, the court never denied that its interpretation would occasionally produce odd results.³²

The literal application of the "except" clause is unsatisfying in two main respects. First, it contorts a commonsense understanding of congressional intent through an overly simplistic textualism. Second, it pays tribute to textualism with one hand while taking back with the other, relying on unmoored future judicial discretion to remedy the potentially illogical results that its narrow interpretation produces. *Whitley* is only one of several recent circuit court decisions straining to reconcile the irreconcilable text and intent of the latest amendment to § 924(c).³³ The resulting circuit split neatly illustrates the tension between literalism and intentionalism, and the futility of the enterprise recommends a third way. Courts should employ a "dialogic" approach that increases explicit communication

29. *Id.*

30. *Id.*

31. *Id.*

32. See *United States v. Williams*, No. 07-2436-cr, slip op. at 16 (2d Cir. Mar. 5, 2009) (reaffirming the holding of *Whitley* where a defendant's mandatory sentence for crack cocaine trafficking exceeded the additional mandatory sentence for firearms possession, and holding that "this purported anomaly results from what, in our view, is a plain reading of the statutory text").

33. See, e.g., *United States v. Studifin*, 240 F.3d 415 (4th Cir. 2001); *United States v. Jolivet*, 257 F.3d 581 (6th Cir. 2001); *United States v. Alaniz*, 235 F.3d 386 (8th Cir. 2000).

from the judiciary to Congress, imitating practices commonly used to deal with constitutional issues.

It is well established that the first resort of statutory interpretation is to the plain language of the law,³⁴ and the plain text of the statute does seem to support the court's holding. In general, "[i]t is beyond [the] province [of the courts] to rescue Congress from its drafting errors, and to provide for what [the court] might think, perhaps along with some Members of Congress, is the preferred result."³⁵ The government's arguments in *Whitley* required either ignoring words in the statute—specifically, the language "or any other provision of law"—or adding words that are not there by narrowing the sweeping language of the "except" clause to "consecutive" sentences only. The Second Circuit, however, relied too heavily on the aphorism that Congress "says in a statute what it means and means in a statute what it says"³⁶ when it concluded that Congress intended to exclude from the application of § 924(c) those facing heavier sentences for underlying crimes.³⁷ The court conceded that the 1998 amendments to § 924(c) were obviously enacted to reverse the *Bailey* decision.³⁸ Although divining congressional intent after the fact can be an alchemic and uncertain process, there is myriad evidence in the legislative history that the only purposes of the amendment were to reverse *Bailey* and to treat criminals who use guns while committing their crimes more harshly than those who do not.³⁹ There is no mention in the his-

34. *Caminetti v. United States*, 242 U.S. 470 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.").

35. *United States v. Granderson*, 511 U.S. 39, 68 (1994) (Kennedy, J., concurring).

36. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992).

37. *United States v. Whitley*, 529 F.3d 150, 155 (2d Cir. 2008).

38. *Id.*

39. Enacted in 1968 as part of the 90th Congress's Omnibus Crime Control and Safe Streets Act, 18 U.S.C. § 924 was originally written very narrowly, providing that whoever "ships, transports, or receives a firearm in interstate or foreign commerce" with an intent to commit certain crimes was subject to enhanced punishment. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, 233 (1968). The statute was subsequently amended in 1971, 1984, 1986, 1990, 1993, and 1994.

tory of the intent to exempt a huge class of offenders from the strictures of § 924(c). Indeed, such a purpose undermines the entire point of stacking firearms enhancements. That Congress would radically undermine § 924(c) in the same moment it was working specifically to reverse a Supreme Court decision that weakened the provision is unlikely.

Perhaps more disconcerting is the court's conclusion that discretionary sentencing by judges pursuant to the factors of § 3553(a) would suffice to implement the purpose of Congress. Far from being comforting, this remedy amounts to a tacit admission of the potential inadequacy of the court's interpretation of the statute and, in the name of achieving congressional aims, contrives a solution that Congress sought to preclude. First, it is empirically unclear that the proposed solution will oc-

Following that last amendment, § 924(c) was an undivided subsection providing for mandatory consecutive sentences for anyone who "uses or carries a firearm" during a crime of violence or drug trafficking crime. 18 U.S.C. § 924(c)(1) (1994), amended by Pub.L. No. 105-386. In 1995 the Supreme Court construed that version of the statute narrowly, holding that "'use' of a firearm under § 924(c)(1) requires more than a showing of mere possession." *United States v. Bailey*, 516 U.S. 137, 144 (1995). Congress immediately attempted to redraft the statute. Though it ultimately took a year and several proposals to amend § 924(c), the language in each and every proposal was virtually identical to that ultimately adopted, including the "except" clause. S. 1612, 104th Cong. (1996); S. 191, 105th Cong. (1998) (enacted).

In opening Judiciary Committee hearings on the proposals, Senator Mike DeWine was clear that the offenders targeted by the statute "need to have very, very severe sentences, [and] that those sentences need to be enhanced if they do, in fact, commit the crime with a gun." *Violent and Drug Trafficking Crimes: The Bailey Decision's Effect on Prosecutions Under Section 924(c): Hearing Before the S. Comm. on the Judiciary*, 104 Cong. 2 (1998) (statement of Sen. Mike DeWine, Member, S. Comm. on the Judiciary). In explaining the purpose of the legislation, Senator Jesse Helms was explicit: "[v]iolent felons who possess firearms are more dangerous than those who don't." *Id.* at 3 (statement of Sen. Jesse Helms, Member, S. Comm. on the Judiciary). Senator Joseph Biden was equally clear: "We don't want people committing crimes, but if we have a choice, we want to penalize the person who thinks they may or may not need a gun, but nonetheless has it in their possession when they commit a crime—we want to punish that person more than the person that doesn't." *Id.* at 10 (statement of Sen. Joseph Biden, Member, S. Comm. on the Judiciary).

Even those who opposed the legislation recognized its clear intent to tack an additional sentence for the firearm onto that for the underlying crime. For example, David Zlotnick, a law professor and former Assistant U.S. Attorney, expressed reservations that "rural defendants who commit exactly the same crime as their counterparts in the city, but have a gun in their house, will likely receive additional mandatory time for the exact same crime." *Id.* at 32 (statement of David Zlotnick, Assoc. Professor, Roger Williams Univ. Sch. of Law).

cur. According to a 1991 study of mandatory minimum sentencing, the Second Circuit is among the most lenient in the nation, with judges sentencing above statutorily required minimums in only 49% of cases.⁴⁰ Further, that study was conducted in an era of even less judicial discretion before *United States v. Booker* rendered the Sentencing Guidelines advisory.⁴¹ There is little reason to believe that a result of the current, less-regimented system is to increase the willingness of judges to sentence defendants to long terms of incarceration.

Second, the entire purpose of mandatory minimums is to reduce judicial discretion. As the U.S. Sentencing Commission put it, “[m]andatory minimums employ a structure that allows a shifting of discretion and control over the implementation of sentencing policies from courts to prosecutors.”⁴² The Second Circuit’s interpretation of § 924(c) reverses Congress’s decision, arrogating to district judges the responsibility of deciding when to apply the stacking effect Congress intended with § 924(c). If the test for absurdity is whether an interpretation of a statute is “plainly at variance with the policy of the legislation as a whole,”⁴³ as the Supreme Court has urged, then *Whitley*’s solution of relying on judges to adjust sentences on an ad hoc, case-by-case basis is itself “absurd.”⁴⁴

Whitley applies the most uncompromisingly textual analysis of any circuit to consider the new § 924(c). Before *Whitley*, the Fourth, Sixth, and Eighth Circuits expressly rejected so literal a reading of the “except” clause.⁴⁵ Instead, they focused on the design of the provision, emphasizing its conversion from an undivided section into several subparts and attributing the existence of the “except” clause to its simplest explanation. It was

40. U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 31 (1991) [hereinafter SENTENCING COMMISSION SPECIAL REPORT].

41. 543 U.S. 220 (2005).

42. SENTENCING COMMISSION SPECIAL REPORT, *supra* note 40, at 48.

43. *Ozawa v. United States*, 260 U.S. 178, 194 (1922).

44. The descriptive claim that judges can, in fact, avoid illogical sentences by imposing a higher sentence equivalent to that which would be required absent the “except” clause is certainly true. The absurdity is in the normative conclusion that ad hoc judicial evaluation is consistent with congressional intent in passing a statute designed to preclude that kind of discretion.

45. *See, e.g.*, *United States v. Studifin*, 240 F.3d 415 (4th Cir. 2001); *United States v. Jolivet*, 257 F.3d 581 (6th Cir. 2001); *United States v. Alaniz*, 235 F.3d 386 (8th Cir. 2000).

necessary “to link the remaining prefatory language in (c)(1)(A) to each sentence length set forth in subdivisions (c)(1)(B) and (c)(1)(C).”⁴⁶ Each decision reached essentially the same conclusion that the government proposed in *Whitley*. The Eighth Circuit in *United States v. Alaniz* described it thus: “Subdivision (c)(1)(A)’s ‘greater minimum sentence’ clause refers only to the firearm-related conduct proscribed either by § 924(c)(1) or ‘by any other provision of law.’”⁴⁷ In adopting the reasoning of *Alaniz* a year later, the Fourth Circuit in *United States v. Studifin*⁴⁸ went further, focusing not merely on the crime but also on the way in which the drafting of the “except” clause was intended to affect sentences. The court read “the language as simply reserving the possibility that another statute or provision might impose a greater minimum consecutive sentencing scheme for a § 924(c) violation, and not as negating the possibility of consecutive sentencing.”⁴⁹ When the Sixth Circuit confronted the issue in *United States v. Jolivette*, it extensively cited both *Studifin* and *Alaniz*, concluding that where a statute does not provide a mandatory minimum, “the sentences in those subsections do not fall within § 924(c)(1)(A)’s reference to ‘any other provision of law.’”⁵⁰ In short, the Second Circuit stands alone in reading the “except” clause so literally.

The reasoning of these circuits is subject to valid criticism. As the *Whitley* court noted, fixing the “design” problem requires only the first portion of the “except” clause:⁵¹ “[e]xcept to the extent that a greater minimum sentence is otherwise provided by this subsection.”⁵² The words that follow, “provided by this subsection or any other provision of law,”⁵³ are not only unnecessary to fix the design problem but also compel a broader exception than every circuit—other than the Second—attributes to the provision. Although it is troubling to think that fidelity to Congress’s intent requires inserting words into a facially clear statute (to echo the *Whitley* court’s criticisms of the govern-

46. *Alaniz*, 235 F.3d at 389; see also *Jolivette*, 257 F.3d at 587; *Studifin*, 240 F.3d at 423.

47. *Alaniz*, 235 F.3d at 389.

48. 240 F.3d at 423.

49. *Id.*

50. 257 F.3d at 587.

51. *United States v. Whitley*, 529 F.3d 150, 154 (2d Cir. 2008).

52. 18 U.S.C. § 924(c)(1)(A) (2006).

53. 18 U.S.C. § 924(c)(1)(A) (emphasis added).

ment's argument that the exception applies to consecutive sentences alone), it is no less disturbing to reach the same conclusion by ignoring terms that are actually present, as other circuits addressing the question have done.⁵⁴

These competing approaches to the interpretation of the "except" clause illustrate the two major styles of statutory interpretation: intentionalism in the majority view and textualism in *Whitley*. Both interpretations have their shortcomings. To bring the statute into accord with congressional intent, the majority view essentially cherry-picks those aspects of the "except" clause that it wishes to follow, virtually omitting its application to "any other provision of law." This analysis creates problems of granting the judiciary authority to ignore what Congress has set down. The textualist approach in *Whitley*, however, leaves untouched a problematic statute that, although clear on its face, no one thinks is quite so clear in its application. So although the Fourth, Sixth, and Eighth Circuits were indeed distorting the text of the statute, at least they were doing so to bend it to the contours that Congress intended. In many respects, the two problems are opposite sides of the same coin. Professor John Manning described one of the chief problems of intentionalism, especially as reflected in the absurdity doctrine, that it "is triggered by the conclusion that Congress could not conceivably have intended the results otherwise compelled by a clear statutory text."⁵⁵ In *Whitley*, the court came to the equally problematic and implausible conclusion that Congress could not conceivably have intended any result other than that compelled by the statutory text.⁵⁶

There is a third way. It is possible to divine a reasonably accurate impression of congressional intent, looking at the legislative history according to a model such as that adopted by Justice Samuel Alito and Chief Judge Frank Easterbrook: "as a persuasive source of information . . . rather than as an authoritative source of law."⁵⁷ But this still leaves the court in the un-

54. Cf. *Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004) ("Where there are two ways to read the text—either attorney is surplusage, in which case the text is plain; or attorney is nonsurplusage . . . in which case the text is ambiguous—applying the rule against surplusage is, absent other indications, inappropriate. We should prefer the plain meaning since that approach respects the words of Congress.").

55. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2431 (2003).

56. *United States v. Whitley*, 529 F.3d 150, 154 (2d Cir. 2008).

57. Elliott M. Davis, Note, *The Newer Textualism: Justice Alito's Statutory Interpretation*, 30 HARV. J.L. & PUB. POL'Y 983, 1002 (2007).

satisfactory position of having to choose “persuasive . . . information” over clear law.⁵⁸ In a case of irreconcilable conflict between text and intent, like *Whitney*, legislative history should serve a much better purpose than a justification for the court to edit the statute as it sees fit. It can provide a means for judges “not [only to] apply the law, but [to] participate in a law-making conversation.”⁵⁹

When striking down statutes on constitutional grounds, courts frequently “suggest repairs that would make the statute constitutional.”⁶⁰ There is no reason to limit this dialogic approach to cases in which a statute has been struck down entirely; it can apply to cases of interpretation as well. Indeed, one might view a flat refusal to enforce a law as less offensive than continuing to enforce a law out of accord with Congress’s intention. Professor Amanda Frost has suggested allowing the Supreme Court to have essentially an interlocutory appeal to Congress in cases requiring interpretation of ambiguous statutes.⁶¹ Although that formal an approach raises its own set of issues, especially in regard to a criminal statute like § 924(c), there is no reason that Congress’s involvement with its statutes should end the day a bill is passed. In a case like *Whitley*, and in all cases involving criminal sentences, the court ultimately has limited powers to cure the ills of a poorly written statute. There is no middle ground between a strict application of the legislative history, which ties judges’ hands to the mandatory consecutive minimums, and strict application of the text, which, in cases of those serious offenders Congress most wished to punish, leaves the severity of sentences in the dubious control of the § 3553(a) factors. Congress, by contrast, has a much more expansive toolbox, ranging from the mere deletion of a few words to bring the statute in accord with the current majority view, to wholesale redrafting after hearings and learned commentary—a technique the legislature has not hesitated to employ with § 924(c) in the past.

Consistent with *Whitley*’s commendable restraint in adhering to the text of the statute, it would therefore be far better for a

58. *Id.*

59. Katherine R. Tromble, *Humpty Dumpty on Mens Rea Standards: A Proposed Methodology for Interpretation*, 52 VAND. L. REV. 521, 547 (1999).

60. *Id.* at 548.

61. Amanda Frost, *Certifying Questions to Congress*, 101 NW. U. L. REV. 1, 6 (2007).

court to be equally deferential to Congress in selecting a remedy for the error. In 1930, Justice George Sutherland expressed this idea for a unanimous Court:

It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the lawmaker himself, turn out to be mischievous, absurd or otherwise objectionable. But in such case the remedy lies with the lawmaking authority, and not with the courts.⁶²

There are examples of the Supreme Court calling for Congress to remedy unintended consequences through legislation. In addressing a question of sovereign immunity, Justice Thurgood Marshall wrote in 1988 that "Congress is in the best position to provide guidance for the . . . inquiry into whether absolute immunity is warranted in a particular context. Legislated standards governing the immunity of federal employees involved in state-law tort actions would be useful."⁶³ In this case, because sentences should, at least in part, reflect a community sense of the evil of a particular crime, it is particularly important that courts defer to the democratic judgment of Congress. Similarly, in interpreting the Armed Career Criminal Act in January 2009, Justice Samuel Alito wrote a concurrence in which he described that although he was "sympathetic to the majority's efforts to provide a workable interpretation," he wrote separately "to emphasize that only Congress can rescue the federal courts from the mire into which ACCA's draftsmanship and [prior cases] have pushed us."⁶⁴

Lower courts dealing with § 924(c) should be similarly outspoken. The Second, Fourth, Sixth, and Eighth Circuits all reached unsatisfactory results without explicitly announcing that there was anything unsatisfactory about the statute itself. Why? Before her elevation to the Supreme Court, Justice Ruth Bader Ginsburg wrote that lower courts "are not shy about identifying the deficiencies in legislation. The problem has been that, too often,

62. *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930).

63. *Westfall v. Erwin*, 484 U.S. 292, 300 (1988).

64. *Chambers v. United States*, 129 S. Ct. 687, 694 (2009) (Alito, J., concurring in the judgment).

no one in Congress hears the plea.”⁶⁵ Although judicial pleas falling on deaf congressional ears certainly may be a problem, to mangle statutes in interpretation or apply them unblinkingly and literally to produce absurd results is a double evil. When a court, as in *Whitley*, implausibly holds that Congress meant what the statute says, even the most attentive Members of Congress remain uninformed of the problem and the courts lose credibility. Either approach—contorting the statute to accord with intent or strictly applying the text and concluding that intent and text must be aligned—carries the same problem: It “relieves Congress of accountability.”⁶⁶

The Supreme Court may step in and address § 924(c) soon. If it takes the case, it is by no means clear that the Court will reach the same conclusion as *Whitley*. Since that case was decided, the Court has been kinder than the Second Circuit to the looser interpretation of § 924(c) urged by the government in *Whitley*. In dictum in *Greenlaw v. United States*, decided one week after *Whitley*, Justice Ginsburg noted that “any sentence for violating § 924(c), moreover, must run consecutively to ‘any other term of imprisonment,’ including any other conviction under § 924(c).”⁶⁷ This “reading into the statute” of a requirement that a sentence run consecutively if it is to invoke the “except” clause of § 924(c)(A)(1) is precisely what the government urged in *Whitley* and reaches the same result that all circuits have reached except the Second Circuit. As the Second Circuit noted in *Whitley*, however, the Supreme Court has also encouraged the courts to give literal reading to § 924.⁶⁸ The Court’s past pronouncements, then, illustrate the same divided loyalty to text and intent that created the circuit split. Ultimately, the Supreme Court may employ another canon to break the stalemate: the rule of lenity. In *Whitley*, the court did not explicitly invoke the

65. Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1429 (1987).

66. Manning, *supra* note 55, at 2472.

67. *Greenlaw v. United States*, 128 S. Ct. 2559 (2008) (reversing a court of appeals for finding error sua sponte in a sentence that did not include enhanced penalties for multiple convictions entered in the same judgment when the government had not cross-appealed the issue).

68. See *United States v. Whitley*, 529 F.3d 150, 156 (2d Cir. 2008) (citing *United States v. Rodriguez*, 128 S. Ct. 1783, 1788 (2008) (holding that interpreting the statute to add qualifying language not actually written is “not faithful to the statutory text”)).

rule of lenity but hinted that it might be tipping the scales.⁶⁹ For example, the court noted that it was “aware of no decision rejecting the literal meaning of statutory language *to the detriment of a criminal defendant.*”⁷⁰ This is one of three instances when the Second Circuit obliquely hinted at the rule of lenity.⁷¹ Caught, like the Second Circuit, between the literal text of § 924(c) and the obvious intention behind it, the Supreme Court might be more willing than the Second Circuit to invoke the rule of lenity explicitly.

Whitley demonstrates why congressional statutes should not be read with such rigidity. Courts of course can and should apply the text of the statute as written whenever possible. Any other approach leads courts into a maze of mirrors in which “congressional intent” ends up merely reflecting the views of jurists. Textualism need not, however, require treating legislative history as if it does not exist or positing a non-existent correlation between text and intent. Applying the text with no regard for what Congress intended that text to do creates an interstitial legal space in problematic cases described by Judge Henry Friendly in the title of a 1963 article as *The Gap in Lawmaking—Judges Who Can’t and Legislators Who Won’t*.⁷² Judge Friendly is right; judges cannot legislate. They can, however, speak up. Judges should be textualist whenever possible and vocal when textualism compels results discordant with likely statutory aims. Few are better situated to alert Congress of its failure to craft laws that achieve their goals than judges who strive to be faithful to text.

David Denton

69. See, e.g., *id.* at 151.

70. *Id.* at 156 (emphasis added).

71. See *id.*; *id.* at 151 (“This criminal appeal presents the unusual situation in which the literal meaning of a sentencing statute has been disregarded *to the detriment of a defendant.*” (emphasis added)); *id.* at 154 (“Passing the objection that *even a grammatical imperfection would be a dubious basis for adding a ten-year consecutive sentence contrary to the plain wording of a statute,* we fail to see any grammatical problem at all” (emphasis added)).

72. Henry J. Friendly, *The Gap in Lawmaking—Judges Who Can’t and Legislators Who Won’t*, 63 COLUM. L. REV. 787 (1963).