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COMMENTS AND NOTES

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EMBRYO ETHICS: JUSTICE AND NASCENT HUMAN LIFE

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I. INTRODUCTION

If we were to contemplate killing mentally retarded infants to obtain transplantable organs, no one would characterize the controversy that would erupt as a debate "about organ transplantation." The dispute would properly be characterized as a debate about the ethics of killing retarded children to harvest their vital organs. The issue could not be resolved by considering how many gravely ill non-retarded people could be saved by extracting a heart, two kidneys, a liver, etc. from each retarded child. The threshold question would be whether it is unjust to relegate a certain class of human beings—the retarded—to the status of objects that can be killed and dissected to benefit others.

By the same token, we should not be speaking in terms of a debate "about embryonic stem cell research." No one would object to the use of embryonic stem cells in biomedical research or therapy if they could be harvested without killing or harming the embryos from whom they were obtained. Nor would anyone object to using such cells if they could be obtained from embryos lost in spontaneous abortions. The point of

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controversy is the ethics of deliberately destroying human embryos for the purpose of harvesting their stem cells. The threshold question is whether it is unjust to kill members of a certain class of human beings—those in the embryonic stage of development—to benefit others.

But are human embryos human beings?

I will here state my reasons for sharing the view that human embryos are indeed human beings, and, as such, deserve what some call "full moral respect." I will, in addition, respond to some of the arguments advanced by people who reject this view.

II. EMBRYONIC HUMAN BEINGS

A human embryo is not something different in kind from a human being, like a rock, or potato, or rhinoceros. A human embryo is a whole living member of the species *Homo sapiens* in the earliest stage of his or her natural development. Unless severely damaged, or denied or deprived of a suitable environment, an embryonic human being will, by directing its own integral organic functioning, develop himself or herself to the next more mature developmental stage, i.e., the fetal stage. The embryonic, fetal, infant, child, and adolescent stages are stages in the development of a determinate and enduring entity—a human being—who comes into existence as a single cell organism (zygote) and develops, if all goes well, into adulthood many years later.[1]

Just as fertilization, if successful, generates a human embryo, cloning produces the same result by combining what is normally combined and activated in fertilization, that is, the full genetic code plus the ovular cytoplasm. Fertilization produces a new and complete, though immature, human organism. The same is true of successful cloning, i.e., somatic cell nuclear transfer (SCNT). Cloned embryos, therefore, ought to be treated as having the same moral status, whatever that might be, as other human embryos.

Human embryos, whether created by the union of gametes or cloning, possess the epigenetic primordia for self-directed growth into adulthood, with their determinateness and identity fully intact. The adult human being that is now you or me is the same human being who, at an earlier stage of his or her life, was an adolescent, and before that a

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[1] A human embryo (like a human being in the fetal, infant, child, or adolescent stage) is not properly classified as a "pre-human" organism with the mere potential to become a human being. No human embryologist or textbook in human embryology known to me presents, accepts, or remotely contemplates such a view. The testimony of all leading embryology textbooks is that a human embryo is—already and not merely potentially—a human being. His or her potential, assuming a sufficient measure of good health and a suitable environment, is to develop by an internally directed process of growth through the further stages of maturity on the continuum that is his or her life.

child, an infant, a fetus, and an embryo.[2] Even in the embryonic stage, you and I were undeniably whole, living members of the species *Homo sapiens*. We were then, as we are now, distinct and complete—though in the beginning we were, of course, immature—human organisms. We were not mere parts of other organisms.

Consider the case of ordinary sexual reproduction. Plainly, the gametes whose union brings into existence the embryo are not whole or distinct organisms. They are functionally (and not merely genetically) identifiable as *parts* of the male or female (potential) parents. Each has only half the genetic material needed to guide the development of an immature human being toward full maturity. They are destined either to combine with an oocyte or spermatozoon to generate a new and distinct organism, or simply die. Even when fertilization occurs, they do not survive; rather, their genetic material enters into the composition of a new organism.

But none of this is true of the human embryo, from the zygote and blastula stages onward. The combining of the chromosomes of the spermatozoon and of the oocyte generates what every authority in human embryology identifies as a new, distinct, and enduring organism. Whether produced by fertilization, Somatic Cell Nuclear Transfer (SCNT), or some other cloning technique, the human embryo possesses all of the genetic material needed to inform and organize its growth. The direction of its growth *is not extrinsically determined*, but is in accord with the genetic information *within* it.[3] Moreover, unless deprived of a suitable environment, or prevented by accident or disease, the embryo is actively developing itself to maturity. Thus, it not only possesses all of the necessary organizational information for maturation, but it has an *active disposition* to develop itself using that information. The human

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[2] Thus, "recollecting (at her birth) his appreciation of Louise Brown as one or two cells in his petri dish, [Robert] Edwards [said]: 'She was beautiful then and she is beautiful now.'" John Finnis, *Some Fundamental Evils in Generating Human Embryos by Cloning*, *in* ETICA DELLA RICERCA BIOLOGIA 116 (Cosimo Marco Mazzoni ed.) (quoting ROBERT EDWARDS & PATRICK STEPTOE, A MATTER OF LIFE: THE STORY OF A MEDICAL BREAKTHROUGH 111 (1981)). Edwards and his co-author accurately describe the embryo as "a microscopic human being—one in its very earliest stages of development." EDWARDS & STEPTOE, *supra*, at 83. They say that the human being in the embryonic stage of development is "passing through a critical period in its life of great exploration: it becomes magnificently organised, switching on its own biochemistry, increasing in size, and preparing itself quickly for implantation in the womb." *Id.* at 97.

[3] The first one or two divisions, in the first thirty-six hours, occur under the direction of the messenger RNA acquired from the oocyte, and thereafter the cleavages are guided by the embryo's DNA. *See* SCOTT GILBERT, DEVELOPMENTAL BIOLOGY 366 (7th ed. 2003); *see also* RONAN O'RAHILLY & FABIOLA MUELLER, HUMAN EMBRYOLOGY & TERATOLOGY 38 (3d ed. 2001). Still, these cleavages do not occur if the embryo's nucleus is not present, and so the nuclear genes also control these early changes.

embryo is, then, a whole (though immature) and distinct human organism—a human being.

If the embryo were not a complete organism, then what could it be? Unlike the spermatozoa and the oocytes, it is not merely a part of a larger organism, namely, the mother or the father. Nor is it a disordered growth such as a hydatidiform mole or teratoma. (Such entities lack the internal resources actively to develop themselves to the next more mature stage of the life of a human being. The direction of their growth is not towards human maturity.) Perhaps someone will say that the early embryo is an intermediate form, something which regularly emerges into a whole (though immature) human organism, but is not one yet. But what could cause the emergence of the whole human organism, and cause it with regularity? It is clear that from the zygote stage forward, the major development of this organism is *controlled and directed from within*, that is, by the organism itself. So, after the embryo comes into being, no event, or series of events, occur which could be construed as the production of a new organism; that is, nothing extrinsic to the developing organism itself acts on it to produce a new character or new direction in development.

III. DO CLONED HUMAN EMBRYOS DESERVE RESPECT?

But does this mean that the human embryo is a human being deserving full moral respect such that it may not legitimately be used as a mere means to benefit others? To deny that embryonic human beings deserve full respect, one must suppose that not every whole living human being deserves full respect. To do that, one must hold that those human beings who deserve full respect deserve it not by virtue of the *kind of entity they are*, but, rather, by virtue of some acquired characteristic that some human beings (or human beings at some stages) have and others do not have, and which some human beings have in greater degree than others.[4]

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[4] A possible alternative, though one finding little support in current discussions, would be to argue that what I am, or you are, is not a human organism at all, but rather a nonbodily consciousness, or spirit, merely inhabiting or somehow "associated with" a body. The problem with this argument is that it is clear that we are bodily entities or organisms, albeit of a particular type, namely, organisms of a rational nature. A living thing that performs bodily actions is an organism, a bodily entity. But it is immediately obvious in the case of the human individual that it is the same subject that perceives, walks, and talks (which are bodily actions), and that understands, deliberates, and makes choices—what everyone, including anyone who denies he is an organism, refers to as "I." It must be the same entity that perceives these words on a page, for example, and understands them. Thus, what each of us refers to as "I" is identically the physical organism that is the subject both of bodily actions, such as perceiving and walking, and of mental activities, such as understanding and choosing. Therefore, you and I are physical organisms, rather than consciousnesses that merely inhabit or are "associated with" physical organisms. *See* Patrick Lee, *Human Beings are Animals*, *in* NATURAL LAW AND MORAL INQUIRY 135-51

In my judgment, this position is untenable. It is clear that one need not be *actually* conscious, reasoning, deliberating, making choices, etc., in order to be a human being who deserves full moral respect, for plainly people who are asleep or in reversible comas deserve such respect. So, if one denied that human beings are intrinsically valuable in virtue of what they are, but required an additional attribute, the additional attribute would have to be a capacity of some sort, and, obviously a capacity for certain mental functions. Of course, human beings in the embryonic, fetal, and early infant stages lack immediately exercisable capacities for mental functions characteristically carried out (though intermittently) by most (not all—consider cases of the severely retarded and comatose) human beings at later stages of maturity. Still, they possess in radical (root) form these very capacities. Precisely by virtue of *the kind of entity they are*, they are from the beginning actively developing themselves to the stages at which these capacities will (if all goes well) be immediately exercisable. In this critical respect, they are quite unlike cats and dogs—even fully mature members of those species. As humans, they are members of a natural kind—the human species—whose embryonic, fetal, and infant members, if not prevented by some extrinsic cause, develop in due course and by intrinsic self-direction the immediately exercisable capacities for characteristically human mental functions. Each new human being comes into existence possessing the internal resources to develop immediately exercisable characteristically human mental capacities—and only the adverse effects *of other causes* will prevent their full development. In this sense, even human beings in the embryonic, fetal, and infant stages have the *basic natural* capacity for characteristically human mental functions.

We can, therefore, distinguish two senses of the "capacity" (or what is sometimes referred to as the "potentiality") for mental functions: an immediately exercisable one, and a basic natural capacity, which develops over time. On what basis can one require, for the recognition of full moral respect the first sort of capacity, which is an attribute that human beings acquire (if at all) only in the course of development (and may lose before dying), and that some will have in greater degree than others, and not the second, which is possessed by human beings as such? I can think of no good reason or non-arbitrary justification for this position.

By contrast, there are good reasons to hold that the second type of capacity is the ground for full moral respect. First, someone entertaining the view that one deserves full moral respect only if one has immediately exercisable capacities for mental functions should realize that the

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(Robert P. George ed. 1998). So, plainly we came to be when the physical organism we are came to be; we once were embryos, then fetuses, then infants, and so on.

developing human being does not reach a level of maturity at which he or she can perform a type of mental act that other animals do not perform—even animals such as dogs and cats—until at least several months after birth. A six-week old baby lacks the *immediately exercisable* capacity to perform characteristically human mental functions. So, if full moral respect were due only to those who possess immediately exercisable capacities for characteristically human mental functions, it would follow that six-week old infants do not deserve full moral respect.[5] If one further takes the position that beings (including human beings) deserving less than full moral respect may legitimately be dismembered for the sake of research to benefit those who are thought to deserve full moral respect, then one is logically committed to the view that, subject to parental approval, the body parts of human infants, as well as those of human embryos and fetuses, should be fair game for scientific experimentation.

Second, the difference between these two types of capacity is merely a difference between stages along a continuum. The proximate, or immediately exercisable, capacity for mental functions is only the development of an underlying potentiality that the human being possesses simply by virtue of the kind of entity it is. The capacities for reasoning, deliberating, and making choices are gradually developed, or brought towards maturation, through gestation, childhood, adolescence, and so on. But the difference between a being that deserves full moral respect and a being that does not, and can therefore legitimately be dismembered as a means of benefiting others, cannot consist only in the fact that, while both have some capacity, one has *more* of it than the other. A mere *quantitative* difference (having more or less of the same feature, such as the development of a basic natural capacity) cannot, by itself, be a justificatory basis for treating different entities in *radically* different ways. Between the ovum and the thousands of approaching sperm, on the one hand, and the embryonic human being, on the other, there *is* a clear difference in kind. But between the embryonic human being and that same human being at any later stage of its maturation, there is only a difference in degree of development.[6]

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[5] Unsentimental believers that full moral respect is due only to those human beings who possess immediately exercisable capacities for characteristically human mental functions do not hesitate to draw the inference that young infants do not deserve full moral respect. *See, e.g.*, Peter Singer, *Killing Babies is Not Always Wrong*, THE SPECTATOR, Sept. 16, 1995, at 20-22.

[6] Michael Gazzaniga has suggested that the embryo is to the human being what a Home Depot store is to a house, i.e., a collection of unintegrated components. According to Dr. Gazzaniga:

> [I]t is a truism that the blastocyst has the potential to be a human being. Yet at that stage of development it is simply a clump of cells. . . . An analogy might be what one sees when walking into a Home Depot. There

Third, being a whole human organism (whether immature or not) is an either/or matter—a thing either is or is not a whole human being.[7] But the acquired qualities that could be proposed as criteria for personhood come in varying and continuous degrees: there are an infinite number of degrees of the relevant developed abilities or dispositions, such as for self-consciousness, intelligence, or rationality. So, if human beings were worthy of full moral respect only because of such qualities, and not in virtue of the kind of being they are, then, since such qualities come in varying degrees, no account could be given of why basic rights are not possessed by human beings in varying degrees. The proposition that all human beings are created equal would be relegated to the status of a superstition. For example, if basic rights were possessed by virtue of developed self-consciousness, then, since some people are more self-conscious than others (that is, have developed that capacity to a greater extent than others), some people would be greater in dignity than others, and the rights of the superiors would trump those of the inferiors where the interests of the superiors could be advanced at the cost of the inferiors. This conclusion would follow no matter which of the acquired qualities generally proposed as qualifying some human beings (or human beings at some developmental stages) for full respect were selected. Clearly, developed self-consciousness, or desires, or capacities for deliberation and choice, are arbitrarily selected degrees of development of capacities that all human beings possess in (at least) radical form from the coming into being of the organism until his or her death. So, it cannot be the case that *some* human beings, *and not others*, are intrinsically valuable by virtue of a certain degree of development. Rather, human beings are intrinsically valuable (in the way that enables us to ascribe to them equality and basic rights) *by virtue of what* (i.e., the *kind of being*) they are; and *all* human beings—not just some, and certainly not just those who have advanced sufficiently along the developmental path as to be able to exercise their capacities for characteristically human mental functions—are intrinsically valuable.

> are the parts and potential for at least 30 homes. But if there is a fire at Home Depot, the headline isn't 30 homes burn down. It's Home Depot burns down.

Metaphor of the Week, 295 SCI. 1637 (2002) (quoting Michael Gazzaniga). Dr. Gazzaniga gives away the game, however, in conceding, as he must, that the term "blastocyst" refers to a stage of development in the life of a determinate, enduring, integrated, and, indeed, self-integrating entity. If an analogy to a Home Depot is to be drawn, it is the gametes (or the materials used to generate an embryo by a process of cloning), not the embryo, that constitute the "parts and potential."

[7] This is not to deny that there will likely be borderline cases in which it will be difficult to say whether a particular being is or is not a human being, or does or does not possess a rational nature.

Since human beings are intrinsically valuable and deserving of full moral respect by virtue of what they are, it follows that they are intrinsically valuable from the point at which they come into being. Even in the embryonic stage of our lives, each of us was a human being and, as such, worthy of concern and protection. Embryonic human beings, whether brought into existence by union of gametes, SCNT, or other cloning technologies, should be accorded the status of inviolability recognized for human beings in other developmental stages.

IV. POTENTIALITY: GAMETES, SOMATIC CELLS, AND EMBRYOS

I wish to turn now to arguments that have been advanced in the course of the President's Council's deliberations in an effort to cast doubt on the proposition that human embryos deserve to be accorded such status.

People who argue that human beings in the embryonic stage do not deserve the level of respect accorded to human beings at more mature stages of development point out that the five or six-day-old embryo is very small—smaller than the period at the end of a sentence on a printed page. The embryo looks nothing like what we ordinarily think of as a human being. It has not yet developed a brain—so it does not exhibit the human capacity for rationality. Indeed, it has no consciousness or awareness of any sort. It is not even sentient. Of course, people who deny that human embryos are human beings entitled to respect as such acknowledge that the entities in question possess a human genome. They point out, however, that the same is true of ordinary somatic cells (such as the skin cells), enormous numbers of which each of us rubs or washes off our bodies on any given day. Plainly these cells are not human beings; nobody supposes that there is anything wrong with destroying them or using them in scientific research.

What can be said in reply to these points and arguments? To claims about the size and appearance of the embryo, I would say that it merely begs the question about the humanity and rights of the embryo to say that it does not resemble (in size, shape, etc.) human beings in later stages of development. The five-day old embryo looks exactly like what human beings look like at five days old. Each of us looked like that during the embryonic stage of our lives. The morally relevant consideration is not appearance; rather, it is the fact that from the beginning the embryo possesses the epigenetic primordia for self-directed growth and maturation through the stages of human development from the embryonic, through the fetal, infant, child, and adolescent stages, and into adulthood with its distinctness, unity, determinateness, and identity fully intact. As such, the embryo is a whole, living member of the species *Homo sapiens* which is already—and not merely potentially—himself or herself to the next more mature stage

along the continuum of development of a determinate and enduring human life.

The point was illustrated rather vividly at the second meeting of the President's Council at which we had a presentation by, and discussion with, Dr. Irving L. Weissman, chairman of the committee of the National Academy of Sciences that drafted the Academy's own report on human cloning.[8] Dr. Weissman, one of the nation's most distinguished research scientists and a leader in the field of adult stem cell research, personally favors funding of embryonic research as well as cloning for research purposes.[9] He was with us, however, to answer *scientific* questions, and (as he made very clear) not to offer opinions on ethics, a subject matter in which he claims no particular expertise. He was very candid with us, and informative. I was curious to know whether Dr. Weissman would concede that the term "embryo" or "blastocyst" refers to a certain very early *stage of development in a human being's life*, or whether he would insist that the embryo or blastocyst is analogous to a sperm cell, ovum, or skin cell.[10] I asked Dr. Weissman if in referring to the "blastocyst" he meant "a stage in the development of a determinate organism."[11] "Yes," he said.[12] I then inquired whether the chairman of the President's Council, Dr. Leon Kass, who was presiding at the meeting, was, at an earlier stage of his development, an adolescent, and before that an infant.[13] "That is right," Dr. Weissman replied.[14] We then got to the heart of the matter: "Before that *Dr. Kass was in the blastocyst stage*?"[15] "For sure," Dr. Weissman replied.[16]

In defending research involving the destruction of human embryos, Ronald Bailey, a science writer for *Reason* magazine, has developed the analogy between embryos and somatic cells in light of the possibility of human cloning.[17] Bailey claims that every cell in the human body has as

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8 *National Academy of Sciences Report (Weissman): Transcript of Second Meeting of President's Council on Bioethics*, Feb. 13, 2002, Sess. 2, ¶ 294, *at* http://bioethics.gov/transcripts/feb02/feb13session2.html.

9 *Id.* at ¶ 362.

10 Precisely because such cells are not complete human organisms, but are merely parts of the complete human organisms—the human beings—whose sperm, ova, or skin they are, in speaking of them no one would say that we are referring to a stage of development.

11 *National Academy of Sciences Report*, *supra* note 8, at ¶ 324.

12 *Id.* at ¶ 325.

13 *Id.* at ¶¶ 336-49.

14 *Id.* at ¶ 350.

15 *Id.* at ¶ 351.

16 *Id.* at ¶ 352.

17 Ronald Bailey, *Are Stem Cells Babies?*, REASON ONLINE ¶ 7 (July 11, 2001), *at* http://www.reason.com/rb/rb071101.shtml.

much potential for development as any human embryo.[18] Embryos, therefore, have no greater dignity or higher moral status than ordinary somatic cells.[19] Bailey observes that each cell in the human body possesses the entire DNA code; each has become specialized (as muscle, skin, etc.) by most of that code being turned *off*.[20] In cloning, those portions of the code previously de-activated are re-activated. So, Bailey says, quoting Australian bioethicist Julian Savulescu: "[i]f all our cells could be persons, then we cannot appeal to the fact that an embryo could be a person to justify the special treatment we give it."[21] Since plainly we are not prepared to regard all of our cells as human beings, Bailey argues, we shouldn't regard embryos as human beings.

Bailey's analogy, however, between somatic cells and human embryos collapses under scrutiny. The somatic cell is something from which (together with other causes) a new organism can be generated; it is certainly not, however, a distinct organism. A human embryo, by contrast, already is a distinct, self-developing, complete (though immature) human organism.

Bailey suggests that the somatic cell and the embryo are on the same level because both have the "potential" to develop to a mature human being. The kind of "potentiality" possessed by somatic cells that might be used in cloning differs profoundly, however, from the potentiality of the embryo. In the case of somatic cells, each has a potential only in the sense that something can be done to it so that its constituents (its DNA molecules) enter into a distinct whole human organism, which is a human being, a person. In the case of the embryo, by contrast, he or she already is actively—indeed dynamically—developing himself or herself to the further stages of maturity of the distinct organism—the human being—he or she already is. True, the whole genetic code is present in each somatic cell, and this code can be used for guidance of the growth of a new entire organism. But, this point does nothing to show that its potentiality is the same as that of a human embryo. When the nucleus of an ovum is removed, and a somatic cell is inserted into the remainder of the ovum and given an electric stimulus, this does more than merely place the somatic cell in an environment hospitable to its continuing maturation and development. Indeed, it generates a wholly distinct, self-integrating, entirely new organism—indeed, it generates an embryo. The entity—the embryo—brought into being by this process, is quite radically different from the constituents that entered into its generation.

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18 *Id.* at ¶ 9.

19 *Id.* at ¶ 16.

20 *Id.* at ¶ 10.

21 *Id.* at ¶ 16.

Somatic cells, in the context of cloning, then, are analogous not to embryos, but to the gametes whose union results in the generation of a distinct, self-integrating, new organism in the case of ordinary sexual reproduction. Sperm cells and ova are not distinct, complete, self-integrating human organisms; they are, properly speaking, parts of human organisms—the men and women whose gametes they are. Their union can generate a new organism, an entity that is not merely part of another organism. That organism was never, however, a sperm cell or an ovum, nor would a person who was brought into being as an embryo by a process of cloning have been once a somatic cell. All adult human beings, as my exchange with Dr. Weissman made clear, were once embryos, just as they were once children, and before that infants, and before that fetuses. But none of them—none of us—were ever sperm cells, or ova, or somatic cells. To destroy an ovum or a skin cell whose constituents might have been used to generate a new and distinct human organism is not to destroy a new and distinct human organism—for no such organism exists or ever existed. But, in line with Dr. Weissman's logic, if one were to call to mind any particular human being, and were one to imagine that someone were to have destroyed that human being during the embryonic stage of his or her existence and development, then it could only have been *that* particular human being who would have been destroyed.

V. PERSONHOOD AND THE BRAIN

Now, some people try to resist the force of this conclusion. For example, Michael Gazzaniga has suggested that the human person comes into being only with the development of a brain, and that prior to that point we have a human organism, but one lacking the dignity and rights of a person.[22] Human beings in the earliest stages of development may, therefore, legitimately be treated as we would treat organs available for transplantation (assuming, as with transplantable organs, that proper consent for their use was given, etc.). In developing his case, Dr. Gazzaniga observes that modern medicine treats the death of the brain as the death of the person—authorizing the harvesting of organs from the remains of the person, even if some physical systems are still functioning. So, the argument goes, if a human being is no longer a person with rights once the brain has died, then surely a human being is not yet a person prior to the development of the brain.

This argument suffers, however, from a damning defect. Under prevailing law and medical practice, the rationale for "brain death" is not

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[22] *Ethical Issues in Clonal Reproduction: Transcript of First Meeting of President's Council on Bioethics*, Jan. 18, 2002, Sess. 5 ¶ 39, *at* http://bioethics.gov/transcripts/jan02/jan18session5.html.

that a brain-dead body is a living human organism but no longer a person. Rather, brain death is accepted because the irreversible collapse of the brain destroys the capacity for self-directed integral organic functioning of human beings who have matured to the stage at which the brain performs the key role in integrating the organism. What is left is no longer a unitary organism at all. By contrast, although an embryo has not yet developed a brain, its capacity to do so is inherent and developing, just as the capacity of an infant to develop its brain sufficiently for it to actually *think* is inherent and developing. Moreover, the embryo is clearly exercising self-directed integral organic functioning, and so *is* a unitary organism, and, because of the kind and orientation of this functioning, is clearly a *human* organism.

Unlike a corpse—which is merely the remains of what was once a human organism but is now dead, even if particular systems may be mechanically sustained—a human being in the embryonic stage of development is a complete, unified, self-integrating human organism. It is not dead, but very much alive. A factor, or factors, other than the brain make possible its self-integration and organic functioning. Its future lies ahead of it, unless it is cut off or not permitted to develop its inherent capacities. Thus it is that I and other defenders of embryonic human life insist that the embryo is not a "potential life," but is rather a life *with potential*. It is a potential *adult*, in the same way that fetuses, infants, children, and adolescents are potential adults. It has the potential for agency, just as fetuses, infants, and small children do. But, like human beings in the fetal, infant, child, and adolescent stages, human beings in the embryonic stage are already, and not merely potentially, *human beings*. All of these stages are (as Dr. Weissman made clear in conceding that Dr. Kass was once in a blastocyst stage) developmental stages in the life of a being who comes into existence as a single cell human organism and develops, if all goes well, into adulthood by a gradual and gapless process over many years. An embryo (or fetus or infant) is not something distinct from a human being; it is a human being at the earliest stage of its development.

VI. TWINNING

Some have claimed that the phenomenon of monozygotic twinning shows that the embryo in the first several days of its gestation is not a human individual. The suggestion is that as long as twinning can occur, what exists is not yet a unitary human being, but only a mass of cells—each cell is totipotent and allegedly independent of the others.

It is true that, if a cell or group of cells is detached from the whole at an early stage of embryonic development, then what is detached can sometimes become a distinct organism and has the potential to develop to maturity as distinct from the embryo from which it was detached (this

is the meaning of "totipotent"). But this does nothing to show that, before detachment, the cells within the human embryo constituted only an incidental mass. Consider the parallel case of division of a flatworm. Parts of a flatworm have the potential to become a whole flatworm when isolated from the present whole of which they are part. Yet no one would suggest that, prior to the division of a flatworm to produce two whole flatworms, the original flatworm was not a unitary individual. Likewise, at the early stages of human embryonic development, before specialization by the cells has progressed very far, the cells or groups of cells can become whole organisms if they are divided and have an appropriate environment after the division. But that fact does not in the least indicate that, prior to such an extrinsic division, the embryo is other than a unitary, self-integrating, actively developing human organism. It certainly does not show that the embryo is a mere "clump of cells."

In the first two weeks, the cells of the developing embryonic human being already manifest a degree of specialization or differentiation. From the very beginning, even at the two-cell stage, the cells differ in the cytoplasm received from the original ovum. Also, they are differentiated by their position within the embryo. In mammals, even in the unfertilized ovum, there is already an "animal" pole (from which the nervous system and eyes develop) and a "vegetal" pole (from which the future "lower" organs and the gut develop).[23] After the initial cleavage, the cell coming from the "animal" pole is probably the primordium of the nervous system and the other senses, and the cell coming from the "vegetal" pole is probably the primordium of the digestive system.[24] Moreover, the relative position of a cell from the very beginning (that is, from the first cleavage) has an impact on its functioning. Monozygotic twinning usually occurs at the blastocyst stage, in which there clearly is a differentiation of the inner cell mass and the trophoblast that surrounds it (from which the placenta develops).[25]

The orientation and timing of the cleavages are species specific, and are therefore genetically determined, that is, determined from within. Even at the two-cell stage, the embryo begins synthesizing a glycoprotein called "E-cadherin" or "uvomorulin," which will be instrumental in the compaction process at the 8-cell stage, the process in which the blastomeres (individual cells of the embryo at the blastocyst stage) join tightly together, flattening and developing an inside-outside

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[23] WERNER A. MULLER, DEVELOPMENTAL BIOLOGY 12 (1997); *see also* GILBERT, *supra* note 3, at 380-81; O'RAHILLY & MUELLER, *supra* note 3, at 38-39.

[24] MULLER, *supra* note 23, at 12.

[25] O'RAHILLY & MUELLER, *supra* note 3, at 39.

polarity.[26] And there is still more evidence, but the point is that, from the zygote stage forward, the embryo is not only maintaining homeostasis but is internally integrating various processes to direct them in an overall growth pattern toward maturity.[27]

However, the clearest evidence that the embryo in the first two weeks is not a mere mass of cells but is a unitary organism is this: *if the individual cells within the embryo before twinning were each independent of the others, there would be no reason that each would not regularly develop on its own. Instead, these allegedly independent, non-communicating cells regularly function together to develop into a single, more mature member of the human species.* This fact shows that interaction is taking place between the cells from the very beginning (even within the zona pellucida, before implantation), restraining them from individually developing as whole organisms and directing each of them to function as a relevant part of a single, whole organism continuous with the zygote. Thus, prior to an extrinsic division of the cells of the embryo, these cells together *do* constitute a single organism. So, the fact of twinning does not show that the embryo is a mere incidental mass of cells. Rather, the evidence clearly indicates that the human embryo, from the zygote stage forward, is a unitary, human organism.

VII. MISCARRIAGES AND MOURNING

A different argument suggests that, since people frequently do not grieve, or do not grieve intensely, for the loss of an embryo early in pregnancy, as they do for the loss of a fetus late in pregnancy or of a newborn, we are warranted in concluding that the early embryo is not a human being worthy of full moral respect.

The absence of grieving is sometimes a result of ignorance about the facts of embryogenesis and intrauterine human development. If people are told (as they still are in some places) that there simply is no human being until "quickening"—a view which is preposterous in light of the embryological facts—then they are likely not to grieve (or not to grieve intensely) at an early miscarriage. But people who are better informed, and women in particular, very often *do* grieve even when a miscarriage occurs early in pregnancy.

Granted, some people informed about many of the embryological facts are nevertheless indifferent to early miscarriages, but this is often due to a reductionist view according to which embryonic human beings

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[26] *Id.* at 38-39; *see also* GILBERT, *supra* note 3, at 74; WILLIAM LARSEN ET AL., HUMAN EMBRYOLOGY 18-21 (3d ed. 2001); KEITH MOORE & T.V.N. PERSAUD, THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY 37 (7th ed. 2003).

[27] GILBERT, *supra* note 3, at 25-26 nn. 167 & 221; O'RAHILLY & MUELLER, *supra* note 3, at 38-39.

are misdescribed as mere "clumps of cells," "masses of tissue," etc. The emotional attitude one has toward early miscarriages is typically, and for the most part, an effect of what one thinks—rightly or wrongly—about the humanity of the embryo. Hence, it is circular reasoning to use the indifference of people who deny that human beings in the embryonic stage deserve full moral respect as an argument for not according such respect.

Moreover, the fact that people typically grieve less in the case of a miscarriage than they do in the case of an infant's death is partly explained by the simple facts that they do not actually see the baby, hold the child in their arms, talk to him or her, and so on. The process of emotional bonding is typically completed after the child is born—sometimes, and in some cultures, months after the child is born. However, a child's right not to be killed plainly does not depend on whether the child's parents or anyone else has formed an emotional bond with him or her. Every year—perhaps every day—people die for whom others do not grieve. This does not mean that they lacked the status of human beings who were worthy of full moral respect. It is simply a mistake to conclude from the fact that people do not grieve, or that they grieve less, at early miscarriage that the embryo has less dignity or worth than human beings at later stages of development.

VIII. NATURAL EMBRYO LOSS

Now let us turn to yet another argument advanced by those who favor research involving the destruction of human embryos. Some people conclude that embryonic human beings are not worthy of full moral respect because a high percentage of embryos formed in natural pregnancies fail to implant or spontaneously abort. The inference is, I believe, fallacious.

It is worth noting first, as the standard embryology texts point out, that many of these unsuccessful pregnancies are actually due to failures or defects in the process of fertilization.[28] As a result, what is lost in many cases is not a human embryo. For example, a defect in fertilization resulting from the penetration of an ovum by two or more sperm may give rise not to an embryo but to a hydatidiform mole. To be a complete human organism (a human being), the entity must have the epigenetic primordia for a functioning brain and nervous system, though a chromosomal defect might prevent development to maximum functioning (in which case it would be a human being, though handicapped). If fertilization is defective, then what will develop is not an organism with the active capacity for self-directed development as a whole living human being, but rather a disordered growth.

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[28] O'RAHILLY & MUELLER, *supra* note 3.

Second, the argument here rests upon a variant of the naturalistic fallacy. It supposes that what happens in "nature," i.e., with predictable frequency without the intervention of human agency, must be morally acceptable when deliberately caused. Since embryonic death in early miscarriages happens with predictable frequency without the intervention of human agency, the argument goes, we are warranted in concluding that the deliberate destruction of human beings in the embryonic stage is morally acceptable.

The unsoundness of such reasoning can easily be brought into focus by considering the fact that, historically, the infant mortality rate has been very high. (Sadly, there are some places where it is high even today.) If the reasoning under review here were sound, it would show that human infants in such circumstances could not be full human beings possessing a basic right not to be killed for the benefit of others. But that, of course, is surely wrong. The argument is a *non sequitur*.[29]

IX. ACORNS AND EMBRYOS

In a recent essay in the *New England Journal of Medicine*, Michael Sandel has challenged the position I am defending here. Sandel claims that human embryos are in fact different *in kind* from human beings at later developmental stages. At the core of Sandel's argument is an analogy:

> [A]lthough every oak tree was once an acorn, it does not follow that acorns are oak trees, or that I should treat the loss of an acorn eaten by a squirrel in my front yard as the same kind of loss as the death of an oak tree felled by a storm. Despite their developmental continuity, acorns and oak trees are different kinds of things.[30]

So Sandel maintains that, just as acorns are not oak trees, embryos are not human beings.

But this argument collapses under scrutiny.

As Sandel concedes, we value human beings precisely because of the *kind* of entities they are. Indeed, that is why we consider all human beings to be equal in basic dignity and human rights. By contrast, we value oak trees because of certain accidental attributes they have, such as their magnificence—a certain grandeur that has taken perhaps seventy-five or a hundred years to achieve. If oak trees were valuable in virtue of the *kind* of entity they are, then it would follow that it is just as

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[29] If I am correct in arguing that human beings in the embryonic stage have the same right not to be killed as human beings at later developmental stages, does that mean that justice requires a society to punish embryo-killing as harshly as it punishes, say, the killing of teenagers? I think the answer to this question is "no." A number of factors going beyond the basic question of equal right to life of the deceased may legitimately be taken into account in determining the appropriate punishment for different types of homicide.

[30] Michael J. Sandel, *Embryo Ethics – The Moral Logic of Stem-Cell Research*, 351 NEW ENG. J. MED. 207, 208 (July 15, 2004).

unfortunate to lose an acorn as an oak tree (though our emotional reaction to the two different kinds of loss might, for a variety of possible reasons, nevertheless differ). Sandel's purported analogy works only if he disregards the key proposition asserted by opponents of embryo-killing, namely, *that all human beings, irrespective of age, size, stage of development, or condition of dependency, possess equal and intrinsic dignity by virtue of what (i.e., the kind) of entity they are, not in virtue of any accidental characteristics, which can come and go, and which are present in human beings in varying degrees.* Oak trees and acorns are not equally valuable, because the basis for their value is not *what* they are (i.e., the kind of entity they are), but precisely those accidental characteristics by which they differ from acorns (in particular, the magnificence that comes only with maturity).

Professor Sandel's argument begins to go awry with his choice of analogates. The acorn is analogous to the embryo and the oak tree (he says) is analogous to . . . the "human being." But in view of the developmental continuity that science fully establishes, and Sandel concedes, the proper analogate of the oak tree is the *mature* human being, viz., the adult. Of course, Sandel's analogy has its force because we really do feel a sense of loss when a mature oak is felled. But while it is true that we do not feel the same sense of loss at the destruction of an acorn, it is also true that we do not feel the same sense of loss at the destruction of an oak *sapling*. (Indeed, our reaction to the destruction of a sapling is much more like our reaction to the destruction of an acorn than it is like our reaction to the destruction of a mature oak.) But clearly the oak tree does not differ in kind from the oak sapling. This shows that we value oak trees not because of the kind of entity they are, but rather because of their magnificence. Neither acorns nor saplings are magnificent, so we do not experience a sense of loss when they are destroyed.

But the basis for our valuing human beings is profoundly different. We most certainly do not consider that especially magnificent human beings—such as Michael Jordan or Albert Einstein—are of greater *fundamental and inherent* worth and dignity than human beings who are physically frail or mentally impaired. We would not tolerate the killing of a retarded child or a person suffering from, say, brain cancer in order to harvest transplantable organs to save Jordan or Einstein.

And we do not tolerate the killing of infants, which on Sandel's analogy would be analogous to the oak saplings at whose destruction we feel no particular sense of loss. Managers of oak forests freely kill saplings, just as they might destroy acorns, to ensure the health of the more mature trees. No one regrets this, or gives it a second thought. This is precisely because we do not value members of the oak species—as we value human beings—because of the kind of entity they are. If we

did value oaks for the kind of entity they are, and not for their magnificence, then we would likely feel a sense of loss at the destruction of saplings, and it would be reasonable to feel a similar sense of loss at the destruction of acorns. Conversely, if we valued human beings in a way analogous to that in which we value oak trees, then we would have no reason to object to killing human infants or even mature human beings who were severely "defective." Sandel's defense of embryo-killing on the basis of an analogy between embryos and acorns collapses the moment one brings into focus the profound difference between the basis on which we value oak trees, and the basis on which we ascribe intrinsic value and dignity to human beings.

Secondly, Sandel's argument relies on an equivocation on the terms "oak tree" and "human being." Of course, as Sandel says, acorns are not oak trees—if by "oak tree" one means a mature member of the oak species. By the same token, a sapling is not an "oak tree" if that is what one means. But if by "oak tree" (or "oak") one means simply any member of the species, then an acorn (or a sapling) is an oak tree—they are identical substances, differing only in maturity or stage of natural development.

Similarly, no one claims that embryos are mature human beings, that is, adults. But human embryos are human beings, that is, complete, though immature, members of the human species. Embryos are human individuals at an early stage of their development, just as adolescents, toddlers, infants, and fetuses are human individuals at various developmental stages. So to say, as Sandel does, that embryos and human beings are different kinds of things is true only if one focuses exclusively on the accidental characteristics—size, degree of development, and so on. But the central question is, precisely, should we focus only on the accidental characteristics by which embryonic human beings differ from mature human beings, or should we rather recognize their essential nature (that is, what they are)?

Sandel's claim that human embryos are not human beings, or as he says at one point not "full human beings," or are merely "potential human life," simply cannot be squared with the facts of human embryogenesis and developmental biology. Perhaps having these facts in mind, Sandel sometimes seems to consider that, though human embryos are human beings as a matter of biological fact (for example, he says that an oak tree once was an acorn, which, by analogy, would mean that more mature human beings once were embryos), they are not persons. According to this position, which has been famously promoted by Peter Singer, although we once were human embryos, we were not persons at that time and were not entitled to the respect and protection against lethal violence due to persons. And when did we become persons? Sandel, like Singer, says that the important difference between

human embryos and persons is that persons are, not only sentient, but "capable of experience and consciousness," and therefore "make higher claims" on us than beings who lack such capacities.

But personhood is not an accidental characteristic, that is, a characteristic which one acquires at some point after he exists and may lose at another point. Being a person is being an individual who has the basic natural capacity to shape his or her life (by reason and free choice)—even though that natural capacity may not be immediately exercisable (as when someone is in a coma) or may take months or years to become immediately exercisable (as with a human infant, fetus, or embryo). If not just sentience, but also being "capable of experience and consciousness" were required to be a person, then it would follow that infants and the comatose would be not be persons either. Being a person, then, is not a result of acquired accidental attributes, but is being a certain type of individual, an individual with a rational nature. But human beings are individuals with a rational nature at every stage of their existence. We come into being as individuals with a rational nature, and we do not cease being such individuals until we cease to be (by dying). We did not acquire a rational nature by achieving sentience or the immediately exercisable capacity for rational inquiry and deliberation. We were individuals with a rational nature even during the early childhood, infant, fetal, and embryonic stages of our lives. If we are persons now, we were persons then. We were never "human nonpersons."

X. THE IRRELEVANCE OF THE THEOLOGY OF "ENSOULMENT"

Some might worry that my arguments have been a carefully disguised theology of "ensoulment." None of what I have had to say, however, has anything to do with "ensoulment" or whether an embryo who dies will have spiritual remains in the form of an immaterial soul. That is an interesting *theological* question that is irrelevant to the *moral* debate and the question of *public policy*. For what it is worth, I should point out that the Catholic Church does not try to draw *scientific* inferences about the humanity or distinctness of the human embryo from *theological* propositions about ensoulment. In fact, it works the other way around. Someone who wanted to talk the Pope into declaring something that the Church has up to this point never declared, namely, that the human embryo is "ensouled," would have to prove his point by marshaling (among other things) the scientific facts. The *theological* conclusion would be drawn on the basis of (among other things) the findings of *science* about the self-integration, distinctness, unity, determinateness, etc. of the developing embryo. So things work *exactly the opposite* of the way some advocates of embryo-destructive research

who think they know what the Catholic Church says about "ensoulment," imagine they work.

XI. CONCLUSION

For the reasons I have set forth, I believe that law and public policy should proceed on the basis of full moral respect for human beings irrespective of age, size, stage of development, or condition of dependency. As I see it, justice requires no less. In the context of the debate over cloning, it requires, in my opinion, a ban on the production of embryos, whether by SCNT or other processes, for research that harms them or results in their destruction. Embryonic human beings, no less than human beings at other developmental stages, should be treated as subjects of moral respect and human rights, not as objects that may be damaged or destroyed for the benefit of others.

JUDICIAL USURPATION AND SEXUAL LIBERATION: COURTS AND THE ABOLITION OF MARRIAGE

*Robert P. George**

Judicial power can be used, and has been used, for both good and ill. In a basically just democratic republic, however, judicial power should never be exercised—even for desirable ends—lawlessly. Judges are not legislators. The legitimacy of their decisions, particularly those decisions that displace legislative judgments, depends entirely on the truth of the judicial claim that the court was authorized by law to settle the matter. Where this claim is false, a judicial edict is not redeemed by its good consequences. For any such edict constitutes a usurpation of the just authority of the people to govern themselves through the constitutional procedures of deliberative democracy. Decisions in which the courts usurp the authority of the people are not merely incorrect, they are themselves unconstitutional and unjust.

There were, and are, scholars and statesmen who believe that courts should not be granted the power to invalidate legislation in the name of the Constitution. In reaction to Chief Justice John Marshall's opinion in the 1803 case of *Marbury v. Madison*,[1] Thomas Jefferson warned that judicial review would lead to a form of despotism.[2] It is worth remembering that the power of judicial review is nowhere mentioned in the Constitution. The courts themselves have claimed the power based on inferences drawn from the Constitution's identification of itself as supreme law, and the nature of the judicial office.[3] But even if we credit these inferences, as I am inclined to do, it must be said that early supporters of judicial review, including Chief Justice Marshall himself, did not imagine that the federal and state courts would exercise the sweeping powers they have come to exercise today. Jefferson and the critics were, it must be conceded, more prescient.

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1 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

2 *See* Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *in* 11 WRITINGS OF THOMAS JEFFERSON 311-13 (Albert E. Bergh ed.) (1905) (criticizing claims by the judiciary of authority to bind the other branches of government in matters of constitutional interpretation which would "mak[e] the judiciary a despotic branch").

3 *See Marbury*, 5 U.S. at 148.

As for Marshall's ruling in *Marbury*,[4] a good case can be made that the power he actually claimed for the courts was quite limited. Remember, what the Supreme Court decided in that case was that the Court itself was forbidden by the Constitution to exercise original jurisdiction putatively conferred upon it by the Judiciary Act of 1789.[5] Marshall reasoned that the Constitution, in Article III, fixed the Court's original jurisdiction, and Congress was powerless under the Constitution to expand it.[6] According to the contemporary constitutional scholar Robert Lowry Clinton, all this meant was that the Court was relying on its own interpretation of the Constitution in deciding what *it* could and could not do within its own sphere.[7] This was entirely consistent with it recognizing a like power of the other branches of government to interpret the Constitution for themselves in deciding what *they* could and could not do in carrying out their constitutional functions.[8]

However that may be, the power of the judiciary has expanded massively. This expansion began slowly. Even if we read *Marbury* more broadly than Professor Clinton reads it, treating it as a case in which the Justices presumed to tell the Congress what it could and could not do, it would be another fifty-four years before the Supreme Court would do it again. And it could not have chosen a worse occasion. In 1856, Chief Justice Roger Brooke Taney handed down an opinion for the Court in the case of *Dred Scott v. Sandford*.[9] That opinion, which among other things declared even free blacks to be non-citizens, and Congress to be powerless to restrict slavery in the federal territories, intensified the debate over slavery and dramatically increased the prospects for civil war.[10]

Dred Scott was a classic case of judicial usurpation. Without constitutional warrant, the Justices manufactured a right to hold property in slaves that the Constitution nowhere mentioned or could reasonably be construed as implying. Of course, Chief Justice Taney and those who joined him in the majority depicted their decision as a blow for constitutional rights and individual freedoms.[11] They were protecting the minority (slaveholders) against the tyranny of a moralistic majority who would deprive them of their property rights. Of course, the reality was that the Justices were exercising what in a later case would be called

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4 *Id.* at 180.

5 *Id.* at 174.

6 *See id.* at 138.

7 *See generally* ROBERT LOWRY CLINTON, MARBURY V. MADISON AND JUDICIAL REVIEW (1991).

8 *See id.*

9 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

10 *See id.*

11 *See id.*

"raw judicial power"[12] to settle a morally charged debate over a divisive social issue in the way they personally favored. It took a civil war and constitutional amendments (particularly the 14th Amendment), made possible by the Union's victory, to reverse *Dred Scott v. Sandford*.

The *Dred Scott* decision is a horrible blight on the judicial record. We should remember, though, that while it stands as an example of judicial activism in defiance of the Constitution, it is also possible for judges to dishonor the Constitution by refusing to act on its requirements. Judges who are more devoted to a cause than to the Constitution can, and sometimes do, go wrong by letting stand what should have been struck down. In the 1896 case of *Plessy v. Ferguson*,[13] for example, legally sanctioned racial segregation was upheld by the Supreme Court despite the 14th Amendment's promise of equality. *Plessy* was the case in which the Justices announced their infamous "separate but equal" doctrine,[14] a doctrine that was a sham from the start, and could only have been. Separate facilities for blacks in the South were then, and had always been, inferior in quality. Indeed, the whole point of segregation was to embody and reinforce an ideology of white supremacy that was utterly incompatible with the principles of the Declaration of Independence and the 14th Amendment to the Constitution. The maintenance of a regime of systematic inequality was the object, point, and goal of segregation. As Justice John Harlan wrote in dissent, segregation should have been declared unlawful because the Constitution of the United States is colorblind and recognizes no castes.[15]

Although more than half a century would pass before the Supreme Court got around to correcting its error in *Plessy* in the 1954 case of *Brown v. Board of Education*,[16] that did not prevent the Court from repeating the usurpations that brought it to shame in the *Dred Scott* case. The 1905 case of *Lochner v. New York*[17] concerned a duly enacted New York statute limiting to sixty the number of hours per week that the owner of a bakery could require or permit his employees to work. Industrial bakeries are tough places to work, even now. They were tougher—a lot tougher—then. Workers were at risk of pulmonary disease from breathing in the flour dust, and in constant jeopardy of being burned by hot ovens, especially when tired and less than fully alert. The New York state legislature sought to protect workers against

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12 Roe v. Wade, 410 U.S. 113, 222 (1973) (White, J., dissenting).

13 Plessy v. Ferguson, 163 U.S. 537 (1896).

14 *Id.* at 544.

15 *Id.* at 559 (Harlan, J., dissenting).

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

17 Lochner v. New York, 198 U.S. 45 (1905).

exploitation and abuse by limiting working hours, but the Supreme Court said "no."[18]

Citing an individual right to "freedom of contract" purportedly implied by the Due Process Clause of the 14th Amendment, the Justices struck down the law as an unconstitutional interference by the state in private contractual relations between employers and employees.[19] The Court justified its action with a story not dissimilar to the one it told in *Dred Scott*.[20] Again, it claimed to be protecting the minority (owners) against the tyranny of the democratic majority. It was striking a blow for individual civil rights and liberties. It was restricting government to the sphere of public business, and getting it out of private relations between competent adults, namely, owners and workers.

The truth, of course, is that it was substituting its own laissez-faire philosophy of the morality of economic relations for the contrary judgment of the people of New York acting through their elected representatives in the state legislature. On the controversial moral question of what constituted authentic freedom and what amounted to exploitation, unelected and democratically unaccountable judges, purporting to act in the name of the Constitution, simply seized decision-making power.[21] Under the pretext of preventing the majority from imposing its morality on the minority, the Court imposed its own morality on the people of New York and the nation.

Just as *Dred Scott* fell, *Lochner* would eventually fall. It would be brought down not by a civil war, but by an enormously popular president fighting a great depression. Under the pressure of President Franklin Roosevelt's plan to pack the Supreme Court, the Justices in 1937 repudiated the *Lochner* decision, and got out of the business of blocking state and federal social welfare and worker protection legislation. *Lochner* itself was relegated to ignominy, as *Dred Scott* had been. Indeed, the term "Lochnerizing" was invented as a label for judicial rulings that usurped democratic law-making authority and imposed upon society the will of unelected judges under the pretext of giving effect to constitutional guarantees of liberty.

For many years, the Court took great care to avoid the appearance of Lochnerizing. In 1965, for example, when the Justices in a set-up case called *Griswold v. Connecticut*[22] struck down a state law against contraceptives in the name of an unwritten "right to marital privacy," Justice William O. Douglas explicitly denied that he was appealing to

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18 *Id.*

19 *Id.* at 57.

20 *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

21 *See Lochner*, 198 U.S. at 54-55.

22 Griswold v. Connecticut, 381 U.S. 479 (1965).

the principle of *Lochner*.[23] Indeed, to avoid invoking *Lochner*'s claim of a so-called "substantive due process" right in the 14th Amendment, Justice Douglas went so far as to say that he had discovered the right to privacy in "penumbras, formed by emanations" of a panoply of Bill of Rights guarantees that seem to have something to do with protecting privacy, such as the Third Amendment, which prohibits the government from quartering soldiers in private homes in peace time, and the Fourth Amendment, which forbids unreasonable searches and seizures.[24]

Griswold, though plainly usurpative, was not an unpopular decision. The Connecticut statute it invalidated was rarely enforced and the public cared little about it. The significance of the statute was mainly symbolic, and the debate about it was a symbolic struggle. The powerful forces favoring a liberalization of sexual mores in the 1960s viewed the repeal of such laws—by whatever means necessary—as essential to discrediting traditional Judeo-Christian norms about the meaning and significance of human sexuality. But the Court was careful to avoid justifying the invalidation of the law by appealing to sexual liberation or individual rights of any kind. On the contrary, Justice Douglas's opinion defends the putative right to marital privacy as necessary to preserve and protect the institution of marriage. In Justice Douglas's account of the matter, it was not for the sake of "sexual freedom" that the Justices were striking down the law, but rather to protect the honored and valued institution of marriage from damaging intrusions by the state.[25] It's not about individualism, you see, it's about defending marriage. Otherwise uninformed readers of the opinion might be forgiven for inferring mistakenly that the ultraliberal Justice William O. Douglas was in fact an archconservative on issues of marriage and the family. They would certainly have been justified in predicting—wrongly, as it would turn out—that Justice Douglas, and those Justices joining his opinion, would never want to see the *Griswold* decision used to break down traditional sexual mores or facilitate non-marital sexual conduct.

A mere seven years later, however, in the case of *Eisenstadt v. Baird*,[26] the Court seemed to forget everything it had said about marriage in the *Griswold* decision, and abruptly extended the putative constitutional right to use contraceptives to nonmarried persons. A year after that, the Justices, citing *Griswold* and *Eisenstadt*, handed down

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[23] *Id.* at 482.

[24] *Id.* at 484; U.S. CONST. amend. III; U.S. CONST. amend. IV.

[25] *Griswold*, 381 U.S. at 485-86.

[26] Eisenstadt v. Baird, 405 U.S. 438, 454 (1972).

their decision legalizing abortion in *Roe v. Wade*,[27] and the culture war began.

The *Roe* decision was pure Lochnerizing. *Roe* did for the cause of abortion what *Lochner* had done for laissez-faire economics, and what *Dred Scott* had done in the cause of slavery. The Justices intervened in a large scale moral debate over a divisive issue of social policy, short circuiting democratic deliberation and imposing on the nation a resolution lacking any justification in the text, logic, structure, or original understanding of the Constitution. Indeed, Justice Harry Blackmun, writing for the majority, abandoned *Griswold*'s metaphysics of "penumbras formed by emanations" and grounded the putative constitutional right to feticide in the Due Process Clause of the 14th Amendment,[28] just where the *Lochner* court had claimed to discover the putative right to freedom of contract. It was in *Roe* that dissenting Justice Byron R. White described the Court's ruling as an "act of raw judicial power."[29]

Having succeeded in establishing a national regime of abortion-on-demand by judicial fiat in *Roe*, the cultural left continued working through the courts to get its way on matters of social policy on which it faced significant popular resistance. Chief among these areas was the domain of sexual morality. Where state laws embodied norms associated with traditional Judeo-Christian beliefs about sexuality, marriage, and the family, left-wing activist groups brought litigation claiming that the laws violated Fourteenth Amendment guarantees of due process and equal protection, and First and Fourteenth Amendment prohibitions on laws respecting an establishment of religion. The key battleground became the issue of homosexual conduct. Initially, the question was whether it could be legally prohibited, as it long had been by laws in the states. Eventually, the question became whether homosexual relationships, and the sexual conduct around which such relationships are integrated, must be accorded marital or quasi-marital status under state and federal law.

In 1986, the Supreme Court heard a challenge to Georgia's law forbidding sodomy in a case called *Bowers v. Hardwick*.[30] Michael Hardwick had been observed engaging in an act of homosexual sodomy by a police officer who had lawfully entered Hardwick's home to serve a summons in a matter not involving a sexual offense.[31] Left-wing activist groups treated Hardwick's case as an opportunity to win the invalidation

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

28 *Id.* at 158.

29 *Id.* at 222 (White, J., dissenting).

30 Bowers v. Hardwick, 478 U.S. 186 (1986).

31 *Id.* at 188.

of sodomy laws by extending the logic of the Court's "right to privacy" decisions. This time, however, they failed. In a five to four decision written by Justice White, the Court upheld Georgia's sodomy statute as applied to homosexual sodomy.[32] The Justices declined to rule one way or the other on the question of heterosexual sodomy, which the majority said was not before the Court.[33]

The *Bowers* decision stood until 2003 when it was reversed in the case of *Lawrence v. Texas*,[34] a case which set the stage for the current cultural and political showdown over the nature, definition, and meaning of marriage. In *Lawrence*, the Court held that state laws forbidding homosexual sodomy lacked a rational basis and were therefore nothing more than invasions of the rights of consenting adults to engage in the type of sexual relations they preferred.[35] Writing for the majority, Justice Anthony Kennedy claimed that such laws are insults to the dignity of homosexual persons.[36] As such, they are, he insisted, constitutionally invalid under the doctrine of privacy, whose centerpiece was the *Roe* decision.[37]

Justice Kennedy went out of his way to say that the Court's ruling in *Lawrence* did not affect the issue of same-sex marriage or whether the states and federal government were under an obligation to give official recognition to same-sex relationships or grant benefits to same-sex couples.[38] Writing in dissent, however, Justice Antonin Scalia said bluntly: "Do not believe it."[39] The *Lawrence* decision, Justice Scalia warned, eliminated the structure of constitutional law under which it could be constitutionally legitimate for lawmakers to recognize any meaningful distinctions between homosexual and heterosexual conduct and relationships.[40]

On this point, many enthusiastic supporters of the *Lawrence* decision and the cause of same-sex "marriage" agreed with Justice Scalia. They saw the decision as having implications far beyond the invalidation of sodomy laws. Noting the sweeping breadth of Justice Kennedy's opinion for the Court, despite his representations that the Justices were not addressing the marriage issue, they viewed the decision as a virtual invitation to press for the judicial invalidation of state marriage laws that treat marriage as the union of a man and a

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32 *Id.* at 196.

33 *Id.* at 198.

34 Lawrence v. Texas, 123 S. Ct. 2472 (2003).

35 *Id.* at 2483-84.

36 *Id.* at 2484.

37 *Id.*

38 *Id.*

39 *Id.* at 2498 (Scalia, J., dissenting).

40 *Id.*

woman. Indeed, there was already litigation on this subject going forward in the states—it had begun in Hawaii in the early 1990s, where a state supreme court ruling invalidating the Hawaii marriage laws[41] was overturned by a state constitutional amendment. *Lawrence* turned out to be a new and powerful weapon to propel the movement forward and embolden state court judges who were inclined to rule that laws treating marriage as the union of a man and a woman lacked a rational basis and were therefore invalid.

The boldest of the bold were four liberal Massachusetts Supreme Judicial Court justices who ruled in *Goodridge v. Massachusetts Department of Public Health*[42] that the Commonwealth's restriction of marriage to male-female unions was a violation of the state constitution. The state legislature requested an advisory opinion from the justices about whether a scheme of civil unions, akin to the one put into place a couple of years earlier by the Vermont state legislature when that state's Supreme Court had issued a similar ruling, would suffice. However, the four Massachusetts justices, over dissents by the three justices who dissented in the original case, said "[t]he answer to the question is 'no,'" civil unions will not do.[43] And so same-sex marriage was imposed by unelected and electorally unaccountable judges on the people of Massachusetts.

How are defenders of marriage as traditionally understood to respond to these developments? First, I believe, it is important to make it clear that what is going on in the state and federal courts is Lochnerizing on a massive scale. *Lawrence* and *Goodridge* are not *Brown v. Board of Education*.[44] They are not *Loving v. Virginia*,[45] which invalidated laws forbidding interracial marriages.[46] Contrary to the claims of their supporters, *Lawrence* and *Goodridge* do not vindicate principles of equality. Rather, they impose a particular set of cultural leftist doctrines about the nature, meaning, and moral significance of sexuality and marriage. What they create is not equality or neutrality; it is, rather, a regime of law and public policy that embodies these sectarian doctrines. They shift the meaning of marriage *for everyone*. They do not expand eligibility for marriage, as supporters sometimes claim; rather, they *redefine* the institution and, strictly speaking, abolish

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41 Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

42 Goodridge v. Mass. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

43 Opinions of the Justices to the Senate, 802 N.E.2d 565, 572 (Mass. 2003).

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

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

46 Attempts by supporters of "same-sex marriage" to draw an analogy between laws treating marriage as the union of a man and a woman and laws forbidding interracial marriages cannot be sustained. ROBERT P. GEORGE, THE CLASH OF ORTHODOXIES 88-89 (2001).

it. The idea long embodied in our law of marriage as the one-flesh union of spouses consummated, actualized, and integrated around acts fulfilling the behavioral conditions of procreation, acts which are the biological foundation of the comprehensive, multi-level sharing of life that marriage is, literally is abolished.[47] The link between marriage and procreation and the nurturance and education of children in a familial context uniquely apt to serve their welfare is finally and decisively severed. And all of this is done without democratic deliberation or the resolution of disputed questions by the people acting through their elected representatives.

So there is a double wrong and a double loss. There is a crime with two victims: the first and obvious victim is the institution of marriage itself; the second is the system of deliberative democracy. But there will likely be a third victim: namely, federalism. For some same-sex partners "married" in Massachusetts will, in the nature of things, move to Indiana, and West Virginia, and North Dakota, and South Carolina, and Arizona. They will demand that these states accord "full faith and credit" to the legal acts of Massachusetts by honoring Massachusetts marriage licenses. These states will at least initially try to resist, invoking their own laws and the federal Defense of Marriage Act; but they will eventually lose. Liberal judges are determined to spread their gospel of sexual liberationism. They will strike down state and federal laws protecting the power of states to refuse to recognize out-of-state same-sex "marriages." They will stress the importance of the portability of marriage across state lines, and the need for people to be able to structure their lives on the assumption that if they are married in Massachusetts, they do not suddenly become unmarried when they visit Mississippi or move to Michigan.

Given what has become the entrenched understanding of the authority of courts exercising the power of judicial review, there is no alternative, in my judgment, to amending the Constitution of the United States to protect marriage. The Massachusetts state legislature has made an initial move towards amending the state constitution to overturn *Goodridge*, but the outcome is uncertain, and the process of amending the Constitution of the Commonwealth of Massachusetts is lengthy and arduous. Even if the pro-marriage forces in Massachusetts ultimately succeed, liberal judges in other states are not far behind their colleagues on the Supreme Judicial Court of Massachusetts. And hovering over the entire scene, like a sword of Damocles, is the Supreme Court of the United States which could, at any time, act on what Justice Scalia has rightly identified as the logic of the *Lawrence* decision to

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[47] *See* Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301-20 (1995).

invalidate state marriage laws across the board. You may think: "They would never do that." Well, I would echo Justice Scalia: "Do not believe it."[48] They would. And if they are not preempted by a *federal* constitutional amendment on marriage, they will. They will, that is, unless the state courts get there first, leaving to the Supreme Court of the United States only the mopping up job of invalidating the federal Defense of Marriage Act and requiring states to give "full faith and credit" to out-of-state same-sex "marriages."

Supporters of marriage are not of a single mind about what a federal amendment to protect marriage should accomplish. In my judgment, the best approach is that embodied in the Federal Marriage Amendment (FMA) that has been proposed in the United States Senate by Wayne Allard[49] and in the House of Representatives by Marilyn Musgrave.[50] That proposed amendment defines marriage in the United States as the union of a man and a woman; preserves the principle of democratic self-government on the issue of civil unions, domestic partnerships, and other schemes under which some of the incidents of marriage may be allocated to non-married persons; and respects principles of federalism under which family law is primarily the province of the states rather than the national government. Some conservative critics of the FMA fault the proposed amendment for failing to ban civil unions and domestic partnerships. I myself oppose such schemes, but I do not think it is necessary or politically feasible to attempt to deal with this issue at the federal constitutional level. So long as marriage is protected by an understanding—implicit in the terms of the FMA—that states may not create "faux marriages" by predicating rights, benefits, privileges, and immunities on the existence, recognition, or presumption of sexual conduct or relationships between unmarried persons, I am content to leave the question of civil unions and domestic partnerships to the people of the states acting through the processes of deliberative democracy.

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[48] *See* Lawrence v. Texas, 123 S. Ct. 2472, 2498 (2003) (Scalia, J., dissenting).

[49] S.J. Res. 40, 108th Cong. (2004) (defeated in the Senate by 50-48 vote on July 14, 2004).

[50] H.J. Res. 56, 108th Cong. (2003).

MISGUIDED CHRISTIAN ATTEMPTS TO SERVE GOD USING THE FEAR OF MAN

Louis W. Hensler III[*]

I. INTRODUCTION

This article grew out of the confirmation hearings of Attorney General John Ashcroft. As I listened to speaker after speaker question how then Senator Ashcroft, as a man of strongly-held religious belief, could serve as the nation's chief law enforcement officer, I reacted with outrage—this was religious bigotry, pure and simple. But as I continued to listen, I detected something beside bigotry in the voices of some of the speakers—something that sounded like genuine fear.[1] Of course, "fear is a common symptom of ignorance and bigotry," I told myself. Mulling these thoughts, I walked into our university library building where I experienced something like an epiphany—there, blazoned over the entrance to the library was our university motto, "Christian Leadership to Change the World." I had seen this motto many times, but for the first time, I thought of that motto from the perspective of "the world," a world that sees no need for and has no desire of being "changed" by Christian leadership. A motto that had before seemed benignly inspirational now sounded almost threatening.

That experience prompted me to reexamine Scripture and come to the following conclusions. The Bible teaches that people should fear and seek to please God, and should not fear and seek to please other people. Therefore, from a biblical perspective, human law that tempts people to fear and seek to please other people is to be avoided, and I believe that

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[*] My resume will provide some important insight into my perspective. Before receiving my J.D. from the University of Chicago Law School in 1988, I obtained a B.A. in 1985 from Bob Jones University. Now I am an Assistant Professor at Regent University School of Law. In other words, I am a member of the "religious right." I wish to thank Anita Hughes, Joseph Creed, Samuel Bray, Deborah Hargreaves, and Regent University for their assistance and support and my colleagues at Regent University School of Law for many helpful discussions, and especially Jeffrey Brauch, Lynne Kohm, Scott Pryor, and Craig Stern for helpful comments, some highly critical, on earlier drafts.

[1] Professor David Smolin voiced the fear of the non-believer: "Are Christians attempting to resurrect Christendom? If Christendom were ever reestablished, would some sort of inquisition or crusade follow? For many Jews, Muslims, and secularized Americans, the Moral Majority and the Christian Coalition resurrect painful memories of persecution, intolerance, and wars of religion." David M. Smolin, *A House Divided? Anabaptist and Lutheran Perspectives on the Sword, in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 382-83 (Michael W. McConnell et al. eds., 2001).

any attempt to promote public morality through human government does just that.

Christians have viewed human government in two[2] fundamentally different ways. All Christians share the hope and assurance as reflected in the Lord's Prayer that the Father's "Kingdom" would "come"—that His will would be "done on earth," as it is done in heaven.[3] But there is a fundamental divide within Christianity between those who "hope that the world can and will be brought progressively under the reign of God, in large part through the involvement of Christians in all spheres of life, including politics,"[4] and those who believe that such a reign of God through human politics is impossible or unnecessary. The former see part of the mission of Christ's church as "grasping and using political and military power" to "serve the ends of God and justice, and that right and might can be joined in this world."[5] The latter eschew political power believing that Jesus Christ will impose His own Kingdom and does not need and has not asked believers to create it through force.[6]

Christians since the time of Constantine, the very moment that Christians achieved any significant political influence in this world, have sought to influence culture through state coercion. As David Smolin put it, "Christendom embodied the hope that an entire civilization, including the sword, including government, including force and war, can be Christian, even though Christians worship a Lord who declined a political kingdom and went to die on the cross."[7] This temptation to serve God by employing the fear of man may stem from a misreading of biblical passages that describe human governors as God's "ministers" or "servants." Such passages can be read as mandates or warrants of authority from God to human government to "do good" in general—to punish evil, to praise good, in short, to further God's purposes on earth.

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[2] Actually, Christian views on the subject have splintered in much more than two directions. In an exceptionally enlightening essay, Professor Robert F. Cochran, Jr. discusses H. Richard Neibuhr's five Christian traditions classified by their view of the relationship between the Christian and culture. *See* Robert F. Cochran, Jr., *Christian Traditions, Culture, and Law*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 1, at 242. For present purposes, I believe that those various views can be grouped into two fundamental "camps"—those who seek to claim the culture for Jesus Christ, and those who seek to withstand the pressure of the culture until Jesus Christ comes. Adopting the terminology used by Professor Cochran in his essay, I would place "synthesists," "conversionists," and "culturalists" within the former camp, and "separatists" and "dualists" in the latter.

[3] *Matthew* 6:9-13. This and all other references to the Bible are to the King James Version.

[4] Smolin, *supra* note 1, at 381.

[5] *Id.* at 381-82.

[6] *See generally id.*

[7] *Id.* at 371.

But I propose that such biblical passages exhorting Christians to submit to governors as God's ministers merely apply a broader biblical theme: believers are admonished to submit to human authority generally. Children should submit to parents, wives to husbands, slaves to masters, and all to the government. Followers of Christ and His apostles must submit to those in power because all power comes from God, who, in His providence, can and does use all things, even misguided human authority, to accomplish His divine purposes.

But the mere man who would use coercion to accomplish God's purposes in the lives of other men would usurp the role of God. God has never commanded or authorized believers to seize human government to accomplish His purposes. Man's power over man might be a tool for good in God's hands, but in fallible human hands, even Christian hands, human power naturally tends toward oppression. Only a perfect man could be completely trusted with authority over others, and the Christian believes that there has been only one perfect Man—the perfect King Jesus. Perhaps the two simple rules—"keep your promises" and "keep your hands to yourself"—are as close to "love thy neighbor as thyself" as the unregenerate man can safely compel his fellow man to go.

The purpose of this article is to show that true morality cannot be promoted through the human law. This article will first present a biblical understanding of the role of human authority in Part II, beginning with the Genesis accounts of the Creation and the fall of man and ending with the teachings of Jesus and His apostles. Next, in Part III, the article will critique the conclusion improperly drawn from God's ultimate control of all human authority—that human governors are God's vicegerents. Then, in Part IV, the article will describe the distinctively Christian teaching on the response to human authority as an instrument of God's providence. The article will conclude in Part V with advice to the Christian ruler regarding some practical problems with attempting to import God's moral law into positive human law.

II. A BIBLICAL VIEW OF HUMAN GOVERNMENT

A. The Creation, the Fall, and Human Authority

The above-described fundamental divide among believers begins "[i]n the beginning."[8] Some have seen human government as a good thing—an outworking of "the divine directive to subdue the earth."[9] This view is based on the understanding that, when God told the first people to "have dominion over the fish of the sea, and over the fowl of the air,

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[8] *Genesis* 1:1.

[9] Scott Pryor, Supplemental Materials for Contracts: 2002-2003 (unpublished manuscript, on file with author).

and over every living thing that moveth upon the earth,"[10] this "dominion mandate" included the command that man exercise authority over other men. I will here take a different view—that all human authority over other humans, as we understand such authority today, including civil government, is an evil made necessary by the fall of man from sinless perfection.

While the creation account gives man authority to rule the earth, it does not suggest the desirability of man's authority over other men. At creation, God made man vicegerent over all *the rest* of creation. This dominion mandate did not include authority over other men because other men did not yet exist, and it was not clear until the fall that the coercive power of human government would be needed.

Perhaps one mere hint at human authority over other humans can be discerned in the account of the creation of woman. God said, "It is not good that the man should be alone; I will make him an help meet for him."[11] The Apostle Paul alluded to this account in his first epistle to the Church at Corinth in a passage discussing whether men and women ought to pray with their heads covered. One reason given by Paul for why the head covering, symbolic of submission, is to be worn by women but not by men is that "[n]either was the man created for the woman; but the woman for the man."[12] Particularly when read together, Genesis 2-3 and 1 Corinthians 11 can be read to suggest a certain natural ordering within the ideal family.[13] But this is a far cry from an establishment of civil human authority.

And even if the first family experienced some sort of familial "authority," Scripture clearly states that an authority structure different from this ideal came into being with sin. As part of Eve's curse for her role in the fall, God decreed that her "desire" would be to "[her] husband, and he shall rule over [her]."[14] This, then, is the first biblical mention of human ruling over other humans, not part of the mandate to rule the rest of creation—"the fish of the sea, . . . the fowl of the air, . . . cattle, . . . and over every creeping thing that creepeth upon the earth"—but part of the curse, after the fall.[15]

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[10] *Genesis* 1:28.

[11] *Genesis* 2:18.

[12] 1 *Corinthians* 11:9.

[13] *See also Ephesians* 5:21-6:9.

[14] *Genesis* 3:16.

[15] This view also rejects the idea that civil government is a manifestation of man's God-given social nature. Man's social nature perhaps implies contract as part of the law of nature, but not necessarily the coercion inherent in human government. The law of contract is the law of voluntary association. But a general civil government is for the restraint of evil and forced order through human authority made necessary by the fall. I acknowledge that the view that I express here may be distinctively Protestant. As Professor Angela Carmella recently explained, "[u]nlike much Protestant thought, which

Before the fall, there was no need for authority and no need for government. "Neither bar of justice nor police, nor army, nor navy, is conceivable in a world without sin . . . ."[16] In his sinless state, Adam lived in simple obedience to God. This is the ideal state of man—answerable to God alone, and God's only "rule" for man was that man must not eat of the tree of the knowledge of good and evil. Man had and needed no detailed knowledge of good and evil—thou shalt not kill, steal, or covet—no need to discern between "mine" and "thine."[17] To know good and evil would mean death.[18] Thus, man's only law was that he must not choose to live under law by receiving the knowledge of good and evil. But Adam (and we with him) rejected man's perfect created state of simple obedience, choosing instead to know good and evil and therefore to be subject to law and authority. Adam ate of the tree,[19] and true to God's promise, in the moment that Adam chose law, he died—his eyes were opened, and Adam knew that he was naked.[20] Because the knowledge of good and evil came through disobedience, that knowledge could only condemn Adam and mankind.

What implications does the view of human government as a necessary evil instead of a positive good have for the role of government? If man's authority over man is inherently good, part of man's pre-Fall nature, then an expansive role for that authority may be warranted. If, on the other hand, coercive human authority is instead a necessary evil, then the proper goals of that authority are likely to be much more limited. This more limited role for the coercive power of the state is "better," from a Christian perspective, because it is more consistent with the Christian doctrine of human depravity. The same fallen nature that makes human authority necessary makes human authority suspect. "Man is a sinner and is, therefore, not to be trusted with unlimited authority and power."[21] Therefore, while sin may necessitate "that a compulsory force, from without, assert itself to make human society a possibility,"[22] "[t]his right is possessed by God, and by Him alone."[23] "No

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attributes the necessity of government to our sinfulness and views its main role to be the coercive restraint of evil, Catholic doctrine attributes its necessity to our sociality and views its role to be the affirmative promotion and coordination of the common good." *See* Angela C. Carmella, *A Catholic View of Law and Justice*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 1, at 255, 266.

16 ABRAHAM KUYPER, LECTURES ON CALVINISM 80 (2d prtg. 1994).

17 *See generally* Peter Judson Richards, *"The Law Written in Their Hearts"?: Rutherford and Locke on Nature, Government and Resistance*, 18 J.L. & RELIGION 151, 159 (2002).

18 *Genesis* 2:17.

19 *Genesis* 3:6.

20 *Genesis* 3:7.

21 HERBERT W. TITUS, GOD, MAN, AND LAW: THE BIBLICAL PRINCIPLES 27 (1994).

22 KUYPER, *supra* note 16, at 82.

man has the right to rule over another man . . . ."[24] All merely human government necessarily will be flawed. Jesus is the only governor who will succeed perfectly and completely. Therefore, "we must ever watch against the danger which lurks, for our personal liberty, in the power of the State."[25]

B. The Old Testament Example of Israel

Mere human authority over other men is never portrayed in Scripture as a positive good, but at best as a necessary evil. The only biblical examples of using political power to influence culture come from the theocracy of Israel, but Israel was *sui generis* and cannot serve as a model for us. Moreover, even when Israel demanded a civil authority, God warned against it expressly because the authority would tend toward evil and oppression, but once established, must be obeyed.[26] Nevertheless the Israelites insisted, and God gave them a king, but Israel's kings generally, and specifically the first king, Saul, turned out to be a disaster even though they were permitted and even anointed by God. King David himself failed in the end. All of these examples of human authority are negative types of the true human authority—the King Jesus. Only Jesus can rule and reign in righteousness. Only Jesus can be trusted completely.

Therefore, given a choice, believers should follow the example of Israel's King David and shun the human sword as the instrument of God's wrath. When David confessed to the Lord David's sin in numbering the people, God offered him a choice of three punishments: (1) three years of famine; (2) three months at the sword of Israel's enemies; or (3) three days at the sword of the Lord.[27] God had repeatedly used similar circumstances in the past as His "servant" to accomplish His vengeance. David chose the sword of the Lord: "let us fall now into the hand of the LORD; for his mercies are great: and let me not fall into the hand of man."[28] David's wise choice was rewarded when God mercifully cut short His pestilence.[29] God does not always give us a choice—sometimes God chooses to use the sword of man to accomplish His vengeance without giving us an opportunity to participate in that choice. But when given a choice, believers should, like David, avoid the power of man whenever possible.

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[23] *Id.*

[24] *Id.*

[25] *Id.* at 81.

[26] 1 *Samuel* 8:11-17.

[27] 1 *Chronicles* 21:12; 2 *Samuel* 24:13.

[28] 2 *Samuel* 24:14; 1 *Chronicles* 21:13.

[29] 1 *Chronicles* 21:15; 2 *Samuel* 24:16.

C. New Testament Teaching Concerning Human Government

The teaching of Jesus and the apostles concerning the relationship of the believer to culture was counter-intuitive: the Christian "wins" through submission, not through force. John MacArthur, the well-known contemporary pastor, suggests that the Christian Church should follow the example of its Savior and Head:

> Many of [Jesus'] followers, including the Twelve, to varying degrees expected Him to free them from Rome's oppressive rule. But our Lord did not come as a political deliverer or social reformer. He never issued a call for such changes, even by peaceful means. Unlike many late twentieth-century evangelicals, Jesus did not rally supporters to some grandiose attempt to "capture the culture" for biblical morality or greater political and religious freedoms.[30]

Thus, Jesus revolutionized society, but shunned political power.

1. Jesus' Teaching Concerning His Kingdom

The earthly ministry of Jesus was suffused with the "kingdom" motif. When the angel Gabriel announced to Mary that she would have a son, Gabriel proclaimed that Mary's son would "reign over the house of Jacob for ever; and of his kingdom there shall be no end."[31] Jesus' forerunner, John the Baptist, prepared the way for Jesus' ministry by preaching, "Repent ye: for the kingdom of heaven is at hand."[32] Before Jesus began His earthly ministry, one of the temptations by the devil that Jesus resisted was the temptation to rule over the kingdoms of the world.[33] Thereafter, Jesus started His public ministry by picking up the theme of John the Baptist, "Repent: for the kingdom of heaven is at hand."[34]

Jesus repeatedly taught that this kingdom that He was proclaiming was a different kind of kingdom. This kingdom belongs to the poor,[35] to the persecuted,[36] and to the childlike.[37] Jesus repeatedly described this kingdom with parables.[38] He explained that His earthly mission would be accomplished in this non-conventional way—through submission, suffering and death.[39] But this plan did not line up with Peter's expectations, so Peter rebelled, and the Lord severely rebuked Peter:

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30 JOHN MACARTHUR, WHY GOVERNMENT CAN'T SAVE YOU 10-11 (2000).

31 *Luke* 1:33.

32 *Matthew* 3:2.

33 *Matthew* 4:8-10; *Luke* 4:5-6.

34 *Matthew* 4:17; *Mark* 1:15.

35 *Matthew* 5:3; *Luke* 6:20.

36 *Matthew* 5:10.

37 *Matthew* 19:14; *Mark* 10:14-15; *Luke* 18:16-17.

38 *See Matthew* 13 (various kingdom parables).

39 *Matthew* 16:21.

"Get thee behind me, Satan: thou art an offence unto me: for thou savourest not the things that be of God, but those that be of men."[40] Peter needed to shed man's way of thinking and accept by faith God's way, which Jesus spelled out upon His rebuke of Peter. Jesus explained that those who would come after Him must take up their crosses and follow Him, not clinging to earthly lives, for the one who loses life will save it.[41]

But His disciples still did not seem to understand—they always were looking for a traditional earthly kingdom. Therefore, James and John, through their mother, made the audacious request to sit on Jesus' right and left in His kingdom.[42] When the other disciples became indignant over the request of James and John,[43] Jesus patiently corrected them all again:

> Ye know that the princes of the Gentiles exercise dominion over them, and they that are great exercise authority upon them. But it shall not be so among you: but whosoever will be great among you, let him be your servant: Even as the Son of man came not to be ministered unto, but to minister, and to give his life a ransom for many.[44]

And as Jesus drew near Jerusalem for the last time, He gave yet another parable because He perceived that His disciples "thought that the kingdom of God should immediately appear."[45] Yet repetition was necessary to aid Peter's learning of the nature of Jesus' "kingdom." In the face of Jesus' prophecy that all His disciples would fall away,[46] Peter boasted that he would never fall away—he would rather die.[47] And Peter apparently meant it. Yet Jesus pointed out that Peter would deny Him three times before the cock crowed twice.[48] Not long after his proud boast, Peter provided the Savior an opportunity to drive home the message that service through aggression was not what Jesus needed or wanted. When Judas betrayed Jesus with a kiss, Peter swung into action, not through obedience and submission, but by taking matters into his own hands—by using force to hasten Peter's vision of Jesus' mission. Peter cut off the ear of the high priest's slave[49] thus earning another rebuke from Jesus—"all those who take up the sword shall

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40 *Matthew* 16:23.
41 *Matthew* 16:24-25.
42 *Matthew* 20:20-21.
43 *Matthew* 20:24.
44 *Matthew* 20:25-28.
45 *Luke* 19:11.
46 *Mark* 14:27.
47 *Mark* 14:29-31.
48 *Mark* 14:30.
49 *Mark* 14:47.

perish by the sword."[50] Do not try to use force, Peter. Like Me, you will always be at the receiving end of force.

Peter's mistake was a common one—trying to accomplish the Lord's purposes Peter's way. Peter did not understand, yet, that the Lord did not need this, that He could call legions of angels if force were required.[51] But Jesus had chosen not to use His angels just then, even though He knew in advance that Judas would betray Him.[52] Jesus chose instead to permit betrayal by Judas (God's unwitting servant) to deliver Jesus as a sacrifice. Judas' betrayal was not right, was not fair, was horribly wrong, but was the unpredictable way God had chosen in His providence. Peter could not possibly have foreseen how God would accomplish His purpose, and this was the point. Peter's proud effort to use force only got in the way.

While the other disciples fled, Peter followed at a distance.[53] Although following the Savior at this point would appear dangerous, to be sure, Peter already had proven that he was willing to die. He still wanted to be near the Master, perhaps still looking for an opportunity to serve the Lord. Soon Peter was identified as a follower of Jesus.[54] We know that Peter then denied the Lord, but why? Was it because he was afraid? That seems unlikely in the light of his earlier willingness to fight to the death. There must be another explanation, and perhaps it is this: if Peter were identified as a follower of Jesus and arrested, the movement would fail. The other disciples all had fled. Peter must remain free himself to help the Savior at the first opportunity. So he twice chose to save himself in the face of accusation, trying to deflect attention with a quick denial. Finally, it was necessary to curse and swear, the cock crowed, Peter remembered, and finally learned to trust and obey the Lord instead of his own efforts. The Savior had warned Peter to "watch and pray so that [he would] enter not into temptation,"[55] but Peter never imagined that the temptation to betrayal would come, not through cowardly abandonment, but rather through proud disobedience. And we believers can be so like Peter. We are willing to do anything for the Lord, as long as it fits our notions of service.

But the prevailing conception of "leadership" is not God's model. Up to the very moment of the ascension, Christ's disciples continued to look for the immediate and traditional establishment of an earthly kingdom.[56] The Lord, in response, again patiently corrected their impulse to stick

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50 *Matthew* 26:52.

51 *Matthew* 26:53.

52 *See Matthew* 26:20-25.

53 *Matthew* 26:56-58.

54 *Matthew* 26:69.

55 *Matthew* 26:41.

56 *Acts* 1:6.

their noses into God's business: "It is not for you to know times or seasons which the Father hath put in His own power."[57] Their job was to be "witnesses,"[58] not to be worrying about setting up an earthly kingdom. Jesus had never given them a strategy, no plan of attack for conquering the world for Him—just instructions to share throughout the world what they had seen and heard. He never told His disciples, "I send you forth as leaders to change the world." Rather, He said, "I send you forth as sheep in the midst of wolves."[59] The world would not embrace believers as leaders. Rather, the believers would be "hated by all."[60] Sheep do not lead wolves.

Jesus was not sending His disciples to conquer—He sent them to the slaughter. He warned His disciples that their fellow men would send them to courts, and would scourge them.[61] Such suffering is God's model for winning the world. The believers were not to expect to become governors and kings. Rather, they would be hauled before governors and kings, and their conduct there would be a "testimony"[62] to their Savior. The world must reject the Christian as it rejected the Christian's Master.[63]

But the believer need not fear human rulers. They have power over only the body, and the providence of the believer's good God is sure—a sparrow will not fall to the ground without the permission of the heavenly Father.[64] He knows the number of the hairs on our heads.[65] Therefore, the believer need not fear,[66] not because He will protect our lives, but because if we lose our lives for His sake, we will find them.[67] Of course, the disciples did, in fact, upset the world for Christ,[68] not through force, not through politics, but rather through simple obedience to the Great Commission to spread the gospel. God used their obedience to build His "spiritual house" of "lively stones."[69] Thus, even if believers were charged by God to build a government for God on earth, the coercive power of the state would not be the proper tool. The true

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57 *Acts* 1:7.
58 *Acts* 1:8.
59 *Matthew* 10:16.
60 *Matthew* 10:22.
61 *Matthew* 10:17.
62 *Matthew* 10:18.
63 *Matthew* 10:25.
64 *Matthew* 10:29.
65 *Matthew* 10:30.
66 *Matthew* 10:31.
67 *Matthew* 10:39.
68 *Acts* 17:6.
69 1 *Peter* 2:5.

Kingdom of God can be "ushered in" only through obedience, only through the gospel.

2. The Apostles on the Believer's Relationship to Human Governors

We know that Peter eventually learned the lesson taught him by the Savior because in Peter's first epistle,[70] he warned believers that they would not be at home in this world but would rather be "strangers and pilgrims" here.[71] Therefore, believers must be careful to have their "conversation honest" among unbelievers so that even if anyone were to "speak against" the believers "as evildoers," the world would see the believers' "good works," and therefore believe and "glorify God."[72] It is for this reason that the follower of Christ and His apostles accepts "every ordinance of man," not because governmental authority is inherently right, but for the Lord's sake.[73] The believer's gentle submission will assure that any unfounded accusations against the believer will appear foolish.[74]

In the second chapter of his first epistle to Timothy, the Apostle Paul[75] likewise directed his protégé, Timothy, to pray for "kings, and for all that are in authority; that we may lead a quiet and peaceable life in all godliness and honesty."[76] Paul taught the same things to wives and to slaves: submit, and thereby, perhaps, you will win even the evil husband or master to Christ. Paul likewise directed Christian women to make themselves attractive through good works[77] and to "learn in silence with all subjection."[78] Peter also taught wives to "be in subjection" to their husbands because God can use the quiet submission of the Christian wife to win the unbelieving husband.[79] Thus, the apostles taught that Christians should, in every cultural role in which they find themselves, live exemplary lives of quiet submission, thereby providing an attractive testimony that God can use to point the way to Christ, the ultimate example of submission.[80]

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[70] While acknowledging that some dispute Peter's authorship of the book of 1 Peter, I accept the orthodox Christian position that the book's own claim to have been authored by Peter is genuine.

[71] 1 *Peter* 2:11.

[72] 1 *Peter* 2:12.

[73] 1 *Peter* 2:13.

[74] 1 *Peter* 2:15.

[75] I again acknowledge that some modern Christians dispute the long-accepted position that 1 Timothy's claim to Pauline authorship is genuine.

[76] 1 *Timothy* 2:1-2.

[77] 1 *Timothy* 2:10.

[78] 1 *Timothy* 2:11.

[79] 1 *Peter* 3:1.

[80] This proper response is independent of the merits of the particular human authority that happens to be in power at the moment. The response of the anointed King

III. THE ERRONEOUS VIEW OF TEMPORAL RULERS AS GOD'S VICEGERENTS

Only so long as Christians were a persecuted minority was the teaching of Jesus and the apostles concerning Christian submission remembered. The earliest church fathers echoed the teachings of Jesus and the apostles. For example, Justin Martyr reveled in the Christian's identity as a mere sojourner and foreigner in human kingdoms.[81] He argued that God established Christianity, not as men might suppose—not "by sending some minister to men, or an angel or ruler, or one of those who direct earthly things . . . "[82]—but by sending the Creator Himself, but again not in "sovereignty (*tyrannis*) and fear and terror."[83] When God sent His Son to the world, He sent Him to win the world, not

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David to the kingship of Saul provides a ready example. Saul had been the duly anointed King of Israel "selected" by God and acclaimed by the people. 1 *Samuel* 10. But Saul had not reigned long before God rejected Saul as king because Saul twice disobeyed God—once with an improper sacrifice, *see* 1 *Samuel* 13:11-14, and again in the conduct of the war against the Amalekites. 1 *Samuel* 15:16-35. Interestingly, in both instances of disobedience, Saul arguably acted in "service" to God. Saul's kingship stands as a testament to the folly of trying to do God's business in man's way. *See* Craig A. Stern, *Things Not Nice: An Essay on Civil Government*, 8 REGENT U. L. REV. 1 (1997). Therefore, God had Samuel anoint David as king instead of Saul. 1 *Samuel* 16:1-13. Saul remained in power for some time after David was anointed, and grew to resent David and even tried to kill him. 1 *Samuel* 18:6-16. As Saul's persecution of David intensified, David was forced to live on the run. 1 *Samuel* 19:1-20; 20:1; 21:10; 23:13-14.

Thus, King Saul was rejected as king by God (and by the very human authority that anointed him king in the first place) and was going about doing evil including seeking to kill his duly anointed successor. Against this backdrop, we find David hiding in a cave as Saul enters the cave to relieve himself. 1 *Samuel* 24:3. David had Saul at his mercy.

Under these circumstances, David did not lift his sword against Saul, David's persecutor. David did "cut off a corner of Saul's robe," and "David's heart troubled him because he had cut Saul's robe." 1 *Samuel* 24:4-5. David's words at this juncture are instructive: "The Lord forbid that I should do this thing unto my master, the Lord's anointed, to stretch forth mine hand against him, seeing he is the anointed of the Lord." 1 *Samuel* 24:6. Noteworthy also is Saul's response when he learned of David's show of loyalty: "And Saul lifted up his voice, and wept. And he said to David, Thou art more righteous than I: for thou hast rewarded me good, whereas I have rewarded thee evil . . . . And now, behold, I know well that thou shalt surely be king . . . . And Saul went home . . . ." 1 *Samuel* 24:16-22.

This anecdote holds a lesson concerning the believer's relationship to human authority. Just as Saul was the anointed of the Lord worthy of loyalty, so all human authorities, good and bad, whether doing evil or good, are in the Lord's hand and are God's anointed ministers. The believer must not lift his hand against God's civil "ministers" but rather, through loyalty, obedience and submission, exhibit a life that will allow the believer to live peaceably in this world, trusting God to use the testimony of the believer's life of faith and quiet submission to draw the world to God, just as David's submission to Saul caused Saul to repent, at least temporarily.

[81] *See* Justin Martyr, *Letter to Diognetus* (Kirsopp Lake trans., 1913), *reprinted in* FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT 12, 13 (Oliver O'Donovan & Joan Lockwood O'Donovan eds., 1999).

[82] *Id.*

[83] *Id.* at 14.

to conquer it: "in gentleness and meekness, as a king sending a son he sent him as a king, he sent him as God, he sent him as man to men; he was saving and persuading when he sent him, not compelling, for compulsion is not an attribute of God."[84] God does not get what he wants through fear. Justin Martyr acknowledged the limits of human laws, proclaiming that they could never restrain as Jesus, the *Logos*, can; he thus denied the charge that Christians seek a human kingdom.[85]

But with the accession of Constantine, the attitude of the church fathers changed, and that of Jesus and the apostles was soon forgotten. The human ruler now could be seen, not as God's mere pawn, as taught by the Apostle Paul,[86] but rather as "our divinely favoured emperor, receiving as it were a transcript of the divine sovereignty, directs in imitation of God himself the administration of this world's affairs."[87] After Constantine, the emperor ruled for God, not merely by God's leave; the absolute power of the monarch was a thing to be praised as "far transcend[ing] every other constitution and form of government . . . ."[88] The cross, to the apostles a sign of submission and death to this world,[89] became under Constantine a symbol of human conquest.[90] After Constantine, believers no longer needed to break bread from house to house as under the apostles,[91] for Constantine "command[ed] all to unite in constructing the sacred houses of prayer."[92] Thus, the Christianity of Constantine was fundamentally different from the Christianity that Jesus launched and that the apostles fostered.

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[84] *Id.*

[85] *See* Justin Martyr, *First Apology*, *in* ANCIENT CHRISTIAN WRITERS (L.W. Bernard trans., 1997), *reprinted in* FROM IRANAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT, *supra* note 81, at 9, 11.

[86] *Romans* 13:4.

[87] Eusebius of Caesarea, *From a Speech for the Thirtieth Anniversary of Constantine's Accession*, *in* FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT, *supra* note 81, at 60.

[88] *Id.*

[89] *See Galatians* 6:14.

[90] *See* Eusebius, *supra* note 87 at 63-64.

> [O]ur emperor, secure in the armour of godliness, opposed to the numbers of the enemy the salutary and life-giving sign [i.e., the cross] as at the same time a terror to the foe and a protection against every harm, and returned victorious at once over the enemy and the demons whom they served. And then with thanksgiving and praise, the tokens of a grateful spirit, to the author of his victory, he proclaimed this triumphant sign by monuments as well as words to all mankind, erecting it as a mighty trophy against every enemy in the midst of the imperial city and expressly enjoining on all to acknowledge this imperishable symbol of salvation as the safeguard of the power of Rome and of the empire of the world.

Id.

[91] *See Acts* 2:46.

[92] Eusebius, *supra* note 87, at 64.

But the first generation of church fathers to be born under a "Christian" government immediately felt the pinch of that government. In the face of the government's invitation to leave with his followers over a difference with the ruling authorities in doctrine, Ambrose of Milan declined, expressing a readiness "to bear the usual fate of a bishop, if [the emperor] follows the usual practice of kings."[93] Ambrose was forced by a "Christian" emperor, as the apostles had been by pagans, "to defer, but not to yield, to emperors, to expose [himself] freely to their punishments . . . ."[94]

Christians never seem to learn from receiving religious persecution to avoid giving it. While Augustine taught that the dominion of one rational being over another is not the ideal,[95] he nevertheless was perhaps the leading church father to manifest an acceptance of the idea of Christian coercion when he reluctantly defended state persecution and perhaps the extension of worship by a Christian ruler. But as Charles Colson has lamented:

> the excesses of the politicized church created horrors Augustine could not have imagined. The church turned to military conquest through a series of "holy wars" that became more racial than religious. Jews, Muslims, and dark-skinned Christians were massacred alike. . . .
>
> In the twelfth and thirteenth centuries a system was organized for adjudicating heresy. Like many well-intentioned reforms, however, the Inquisition simply produced a new set of horrors. Unrepentant heretics were cast out by a church tribunal, which regularly used torture, and were executed by the state.[96]

The Christian impulse toward coercion survived the Protestant Reformation, for Calvin also advocated a very intrusive role for human magistrates, including, among other things, a role in protecting God's honor—"it is fitting that they should labor to protect and assert the honor of him whose representatives they are, and by whose grace they govern."[97] The Westminster Confession similarly described the civil magistrate's duty:

> to see that the truth of God be kept pure and entire, that all blasphemies and heresies be suppressed, all corruptions and abuses in worship and discipline prevented or reformed, and all the ordinances of God duly settled, administered, and observed. For the better effecting whereof he hath power to call synods, to be present at them,

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[93] *See* Ambrose of Milan, *Sermon against Auxentius*, *in* FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT, *supra* note 81, at 70.

[94] *Id.*

[95] AUGUSTINE, THE CITY OF GOD, bk. XV, ch. 15 (Gerald G. Walsh & Daniel J. Honan trans.) *reprinted in* 24 THE FATHERS OF THE CHURCH 223 (Hermigild Dressler et al. eds., 1954).

[96] CHARLES COLSON, KINGDOMS IN CONFLICT 112 (1987).

[97] JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION, bk. IV, ch. XX, § 9 (John T. McNeill ed., Ford Lewis Battles trans., The Westminster Press, Vol. 2 1960) (1536).

> and to provide that whatsoever is transacted in them be according to the mind of God.[98]

Perhaps only the Anabaptists and their spiritual descendants preserved the original teaching of Jesus and the apostles that God's kingdom is spiritual, not physical, and is built through submission, not through aggression. Because the Anabaptists taught that believers come to Jesus one-by-one, rather than as part of a covenant community, they rejected infant baptism.[99] The broader significance of this rejection did not escape the notice of followers of other more dominant Christian traditions: "To attack, as Baptists did, the idea of covenant that made the practice of infant baptism meaningful was to attack its social manifestations as well, and such Protestants as the Massachusetts Bay Puritans saw only alarm and confusion in this fundamental challenge to their experiment in holy commonwealth."[100] Moreover, "[t]he privatization of faith implicit in the Baptist concept of 'soul liberty' inevitably challenged the millennia-old assumption that faith required the support and protection of the civil magistrate. Baptists thus became opponents of religious establishments and fierce advocates of religious liberty . . . ."[101] "The external world was for them a place of pilgrimage rather than a permanent or semipermanent residence fit for godly renovation."[102]

Thus, from the time of Constantine to the time of Luther and beyond, leading Christian thinkers have espoused the idea that God has authorized civil government to "extirpate every form of false religion and idolatry . . . ."[103] Professor David Smolin has accurately observed that "Christian teaching throughout the ages has been virtually unanimous in declaring that the magistrate has been empowered by God with the authority to use force to enforce at least some part of God's law."[104] The Scriptural "anchor" of this long history of Christian scholarship favoring enforcement of God's law by the civil magistrate is the thirteenth chapter of Paul's epistle to the Romans.[105] But Romans 13 would be better understood as one example of the biblical doctrine that the believer should submit to God's providence.

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98 WESTMINSTER CONFESSION, ch. XXIII (1646).

99 *See* Timothy L. Hall, *"Incendiaries of Commonwealths": Baptists and Law, in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 1, at 341.

100 *Id.* at 342.

101 *Id.* at 343.

102 *Id.* at 346.

103 KUYPER, *supra* note 16, at 100.

104 David M. Smolin, *The Enforcement of Natural Law by the State: A Response to Professor Calhoun*, 16 U. DAYTON L. REV. 393, 393 (1991).

105 *Id.*

A. The Biblical Doctrine of Submission to God's Providence

The Apostle Paul taught that "all things work together for good to them that love God, to them who are the called according to His purpose."[106] God plans, controls, and uses all things to make His people more like His Son.[107] Scripture makes clear that when Paul said God uses "all" things for good, "all" has no exceptions. Thus, the "servants" of God's providence have included floods,[108] frogs,[109] lice,[110] flies,[111] disease,[112] hail,[113] locusts,[114] quail,[115] serpents,[116] a donkey,[117] thunder and rain,[118] a lion,[119] ravens,[120] a great fish,[121] and human rulers, both good and bad.[122]

The believer therefore can go through this life confidently no matter the circumstances, for "if God be for us, who can be against us?"[123] If the believer faces "tribulation, or distress, or persecution, or famine, or nakedness, or peril, or sword,"[124] no matter, nothing can separate the believer from the love of Him who superintends all things for our good. In spite of seeming "defeats," the believer is nevertheless a victor through the sovereign Christ, who loves His own.[125] Thus, neither "death, nor life, nor angels, nor principalities, nor powers, nor things present, nor things to come, nor height, nor depth, nor any other creature, shall be able to separate us from the love of God, which is in Christ Jesus our Lord."[126] God's providence is "pervasively presupposed as well as explicitly taught throughout the Scriptures."[127]

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106 *Romans* 8:28.

107 *Romans* 8:29.

108 *Genesis* 6:7-7:24.

109 *Exodus* 8:6.

110 *Exodus* 8:17.

111 *Exodus* 8:24.

112 *Exodus* 9:2-10.

113 *Exodus* 9:24.

114 *Exodus* 10:13.

115 *Numbers* 11:31.

116 *Numbers* 21:6.

117 *Numbers* 22:28-30.

118 1 *Samuel* 12:18.

119 1 *Kings* 13:21-24.

120 1 *Kings* 17:4.

121 *Jonah* 1:17.

122 *Jeremiah* 27:6; *Daniel* 2:37-38; *Romans* 13:4; 1 *Peter* 2:14.

123 *Romans* 8:31.

124 *Romans* 8:35.

125 *Romans* 8:37.

126 *Romans* 8:38-39.

127 GORDAN J. SPYKMAN, REFORMATIONAL THEOLOGY: A NEW PARADIGM FOR DOING DOGMATICS 270 (1992).

Therefore, the commands of human governors, as long as they touch only merely temporal, material things, usually should be unimportant to the believer in God's providence. The believer will, in obedience to God, yield such things to the temporal human government. Thus, when Jesus was asked whether it was proper to pay taxes to Caesar,[128] He asked whose image and inscription was on the money.[129] Once it was established that Caesar's inscription was there, it was easy to identify as mere things of this world both the human government that Caesar embodied and the coin that his government minted. Therefore, if the earthly Caesar demands money, the believer should pay,[130] but the believer must reserve for God his heart and soul, the heavenly things that belong to God alone. Similarly, Jesus admonished His disciples in the Sermon on the Mount not to resist mere physical imposition—coats, blows and the like.[131]

Of course, God's providence extends to all human relationships. As Jesus said at His trial before a "kangaroo court," man can have no power over man unless God allows it.[132] He "removeth kings, and setteth up kings."[133] And once a ruler comes to power, he can exercise only the power that God permits. "The king's heart is in the hand of the LORD, . . . he turneth it whithersoever he will."[134] Thus, the Bible teaches that human rulers are, almost literally, God's pawns.

Because all power resides ultimately with and flows from God,[135] if a relationship of human authority exists, then, in an important sense, God is the author of that relationship, and what God has established, man must not seek to avoid.[136] Therefore, to the believer, human government is not a social contract but rather a divine appointment, for God obligates the believer to government, with or without the believer's consent. Contemporary pastor John MacArthur states the point very clearly:

> [T]he entire universe, including Satan and his demons, is subject to the omnipotent, omniscient will of the Creator. Without exception, the power any leader, political party, or agency wields is delegated and circumscribed by God. Therefore, it only makes sense biblically that

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[128] *Matthew* 22:17.

[129] *Matthew* 22:19-20.

[130] *Matthew* 22:21.

[131] *Matthew* 5:38-42.

[132] *John* 19:11.

[133] *Daniel* 2:21.

[134] *Proverbs* 21:1.

[135] *Romans* 13:1.

[136] For example, in His teaching concerning the propriety of divorce, Jesus says "What therefore God hath joined together, let not man put asunder." *Matthew* 19:4-6.

> we ought to obey the government because its one and only source is God.[137]

Thus, the believer's obligation to obey government is no recognition of human authority, but rather is submission to God's providence. "[T]he ultimate duty of obedience is imposed upon us not by man, but by God Himself."[138] God's sovereignty over human relationships is a source of great comfort to the believer because it means that nothing—no human power—can touch the believer without first passing through the filter of God's sovereign, loving hand.

These principles are taught throughout the Bible, including in the written accounts of Jesus' teachings. For example, Matthew 19 and Mark 10 both record Christ's response to a question from the Pharisees about divorce:[139] "What therefore God hath joined together, let not man put asunder."[140] Jesus stated directly the reason He opposed divorce: divorce is man's attempt to take apart what God has allowed to come together. This teaching was more pointed in Christ's day than in ours. Those who oppose divorce today frequently think of divorce as breaking a promise to remain faithful "until death do us part." But in Christ's time, divorce was understood as breaking more than a mere human promise. Frequently, fathers chose brides for their sons, working out the details directly with the father of the bride-to-be. It was easier in such a culture to see the coming together of a bride and groom as God's work rather than the spouses' choice.

Marriage is but one example of the clear teaching throughout Scripture that the believer must submit to, instead of rebelling against, the circumstances in which God has placed him. The relationship of master and slave is another example.[141] And most importantly for present purposes, this principle of submission applies also to the relationship between citizen and ruler. The believer should bear witness to his faith in God's sovereignty by submitting to *all* earthly authority.

The apostles reiterated the principle that the believer should submit to God by submitting to earthly authority—all authority is something that God has allowed and wishes to use in the believer's life. For example, while Romans 13 has been the Scriptural "anchor" of the Christian view that human rulers are authorized to enforce some part of God's law,[142] the context of Romans 13 and the preceding chapter is Paul's teaching that the Christian should, as much as possible, live

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[137] MACARTHUR, *supra* note 30, at 28.

[138] KUYPER, *supra* note 16, at 83.

[139] *See Matthew* 19:1-12; *Mark* 10:1-12.

[140] *Matthew* 19:6; *Mark* 10:9.

[141] 1 *Peter* 2:18-20.

[142] *E.g.*, Smolin, *supra* note 104, at 393.

peaceably with everyone.[143] If the Christian is wronged, he should let God avenge that wrong.[144] Immediately after establishing that vengeance is God's domain, not ours, Paul points out that one tool God uses to exercise vengeance is human government: "there is no power, but of God, the powers that be are ordained of God."[145] Paul expounds this concept three verses later: "For [the human ruler] is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil."[146] The significance of Romans 13:3-4 is not that rulers will always praise good and punish evil. We know from bitter historical experience that this is not the case. Rather, Romans 13 is a statement of God's sovereignty. He uses all things, including all earthly authorities, good and bad, to accomplish His purposes. Therefore, believers should submit to those authorities in confidence and hope.

Likewise, Christian slaves were to "be subject" to their masters, not because slavery is good, nor because the master is good, and not because the master is self-consciously serving God. In fact, slaves were to obey not only the "good and gentle" master, but also the "froward."[147] Slaves were to obey their masters because God has sovereignly allowed the master to hold that position. This does not mean that the master will be good or that slavery is good—far from it. The believing slave must submit in any event.

The believer who submits need not worry.[148] The believer might suffer under an evil authority, but the believer need not fear that authority, for God has allowed it. Suffering is not to be avoided at all costs. The believer should be ready to suffer[149] and should even rejoice in suffering.[150] Believers are not better than their perfect Master, who also suffered. This suffering of believers is part of God's plan: "Christ also suffered for us, leaving us an example," that we should "follow his steps."[151] Just as He placed Himself in the hands of God, who controls all things and always "judgeth righteously,"[152] so should believers who "suffer according to the will of God commit the keeping of their souls to

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143 *Romans* 12:18.
144 *Romans* 12:19.
145 *Romans* 13:1.
146 *Romans* 13:4.
147 1 *Peter* 2:18.
148 1 *Peter* 3:14.
149 1 *Peter* 4:12.
150 1 *Peter* 4:13.
151 1 *Peter* 2:21.
152 1 *Peter* 2:23.

him in well doing, as unto a faithful Creator."[153] If the believer is to suffer, she must make sure that it is for doing good, not for doing wrong,[154] because God is pleased when His people "endure grief, suffering wrongfully."[155]

Thus, even when the believer suffers wrongfully at the hands of a wicked ruler, just as Jesus Christ and His apostles suffered wrongfully at the hands of wicked rulers, that ruler is God's "minister." He is God's errand-boy. God intends to use the ruler's evil to accomplish good—like turning off the light so that the lives of longsuffering believers shine ever more brightly in this dark world.

B. Twisting the Doctrine of Submission into a Mandate of Discretionary Authority

Because God uses all things to accomplish His purposes, the believer must submit to his circumstances, including human rulers, as instruments of God's providence. How should an understanding of God's providence affect the believer's view of the civil magistrate's role in enforcing God's law? Calvin wrote that human magistrates "have a mandate from God, have been invested with divine authority, and are wholly God's representatives, in a manner, acting as his vicegerents."[156] Calvin's statement warrants scrutiny. The idea that the human ruler is a "minister of God" certainly implies that God uses the magistrate. But Calvin's teaching goes well beyond this uncontroversial proposition. Calvin teaches that God uses the human ruler in a particular way—to exercise discretion on God's behalf. But whether the human ruler does God's work self-consciously is a separate question from whether God will use the ruler to accomplish His work. Thus, Calvin's teaching includes at least four propositions: 1) God uses human rulers; 2) human rulers exercise God's authority; 3) human rulers self-consciously serve God; and 4) part of that service is the enforcement of at least part of God's law. The first of these four propositions flows logically from the doctrine of God's providence; the other three will be examined in turn.

1. Does the Believer's Obligation to Submit Imply the Temporal Ruler's Discretionary Authority?

Romans 13 teaches that believers should submit to human rulers for the Lord's sake. What does this command imply about the ruler's authority? Note that Romans 13 is addressed, not to rulers, but rather to Christian citizens. This is in interesting contrast to the other

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[153] 1 *Peter* 4:19.

[154] 1 *Peter* 3:17, 4:15.

[155] 1 *Peter* 2:19.

[156] CALVIN, *supra* note 97, at bk. IV, ch. XX, § 4.

hierarchies addressed by Paul—husbands and wives, parents and children, masters and slaves. In each of these relationships, Paul addresses both parties, instructing each to submit to the other. Yet Paul does not instruct the ruler. Therefore, if Romans 13 teaches anything about the ruler's proper view of his own authority, we must infer it either from the fact that Paul told believing citizens to submit or from Paul's description of how God uses human rulers.

At first blush, the command for believing citizens to submit implicitly grants authority to the ruler, and perhaps it does, but only in a limited sense. Let me illustrate. As the father of young children, I have sometimes hired teenaged babysitters. Before the babysitter arrives, I often take my children aside and instruct them that they are to obey the babysitter. Does the babysitter then exercise my authority?

To answer that question, it is important to rehearse another speech that I sometimes give on babysitting occasions. Because I recognize that the babysitter herself is barely more than a child, I might tell her (perhaps outside the hearing of my own children) something like this: "I think that it would be unfair and unwise of me to expect you to discipline my children. That is my job. For the next few hours, I would like you to make sure that my children do not kill each other and that they do not burn the house down. That is all. A situation may arise that cries out for discipline. For such an occasion, here is my cell phone number. I can be back here in thirty minutes."

Now, does the babysitter exercise authority? Yes, but in a limited sense. What should my child do if the babysitter tells him to sit in the corner? Well I told my child to obey—he should sit in the corner. But was the babysitter "authorized" to issue that command? No.

The point here is that requiring submission implies nothing about the scope of the authority of the ruler. This is especially so because, unlike my control over the babysitter, God has plenary control over every human ruler at every moment. Because my children will understand that I cannot control the babysitter absolutely, they might infer that my command to obey carries with it an understanding that the babysitter will exercise at least some discretionary authority. But when God tells the believer to obey human rulers, it is in the context of God's sovereign control over all things, including the ruler. Obeying the ruler is tantamount to obeying God in a way that obeying the babysitter is not tantamount to obeying me. Thus, there is no justification for turning the obligation of submission around to justify authoritarianism.

This disconnect between the obligation to submit and the authority of the ruler appears also in the other hierarchies that Paul addresses. While the apostle told wives to "submit" to their husbands, he never told husbands to be masters of their wives—far from it. And though Paul told slaves to obey their masters, he never justified slavery. Likewise, when

God tells us to obey the government, that command is not a mandate of authority to those who would use the coercive power of government. To the contrary, government, like every human authority, is a necessary evil to be minimized, not a good to be seized and exploited.[157]

2. Temporal Rulers: Willful Agents of God or Unwitting Agents of God's Will?

Chapter thirteen of Paul's Epistle to the Romans says nothing about how the human ruler should see his own role, but the text does do more than merely command believers to submit. Paul also describes how God uses human rulers: human rulers are God's "ministers."[158] Thus, describing the role of rulers raises the question whether the role of "minister" necessarily implies that governors must or should think of themselves as God's vicegerents. Many have read this passage as establishing a biblical norm for all human government—that biblically correct human government must self-consciously use the sword to execute God's vengeance—but such teaching is a dangerous extrapolation from the precise teaching of the passage. Paul writes in Romans 13 that government *is*—indicative mood—a terror and revenger upon evil, not that it *is to be*—imperative mood—a terror and revenger. This is a subtle but important distinction. The passage teaches that the believer can safely submit to the state because God is in ultimate control and will use human government to accomplish His purposes, not that human government must take that role upon itself by self-consciously pursuing God's purposes, and certainly not by using the sword.

Thus, the fact that Paul describes the ruler as God's "minister" does not necessarily mean that the ruler self-consciously serves God. In fact, Rome—the very government described by Paul as "God's minister" when Romans 13 was penned—was no self-conscious friend of God. Rome frequently used the "sword" to be sure, but not always to execute the vengeance of God, but rather to execute, or at least to punish, believers in Jesus (not to mention Jesus Himself). Nevertheless, the Apostle characterized Rome as "God's minister." While the historical fact of Rome's wickedness may not prove that government should not self-consciously serve God, it does show that when Paul refers to Roman rulers as God's "ministers," Paul is not saying that those rulers must self-consciously serve God.

Even though Romans 13 does not tell rulers to be God's ministers, and even though the rulers in place at the time did not necessarily think of themselves that way, it is at least conceivable that when Paul said that rulers are a terror to evil works, he was not merely describing—that

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[157] *See supra* notes 9-29 and accompanying text.

[158] *Romans* 13:4.

he meant to imply a normative, self-conscious role for human rulers. But even though this "vicegerent" interpretation of Romans 13 is conceivable, it clearly is not the only possibility, nor even the best one. Scripture demonstrates that when God requires a minister, such as a civil magistrate, to accomplish His will, He does not necessarily go looking for volunteers. God can and does use human instruments (among others) to accomplish His purposes on this earth, and He does so without necessary regard to the willingness or motives of the human actors. Sometimes those human actors are consciously pursuing God's purposes, sometimes they are not. God uses them in any event. God can and does use civil government, good and evil, to accomplish His purposes. *All* things, including all authorities, are God's tools.

The Scriptures are replete with examples of God's unwitting servants. The Old Testament account of Joseph provides an excellent example of both a believer in God submitting to the unjust circumstances that God, in His providence, had permitted and God's using unwitting agents to accomplish His purposes. Joseph twice dreamed that he would be exalted and that even his own family would bow down to him, and Joseph and his family appeared to interpret these dreams as a potential sign from God.[159] In response, Joseph's brothers sold him as a slave, an unmistakable injustice.[160] Under the circumstances, one might understand if Joseph had sought to escape from his condition of slavery, but he apparently did not. Rather, he served his human master as a good slave, and God blessed him.[161] When his master's wife sought to tempt Joseph, Joseph resisted, was falsely accused by her, and was thrown in jail.[162] But again Joseph was a model prisoner, and God blessed him there too.[163]

Joseph's own words show that he knew that he had been wronged, that by rights he should be living in his father's house instead of in prison in Egypt: "I was stolen away out of the land of the Hebrews: and here also have I done nothing that they should put me into the dungeon."[164] If anyone would ever justly use force to accomplish God's purposes, it was Joseph. God had shown Joseph that he was destined to rule, but twice betrayed, Joseph's career appeared to be hopelessly sidetracked. Yet it appears that Joseph never tried to escape or to force his own view of God's vision, but rather faithfully served in whatever position he found himself, no matter how menial.

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159 *Genesis* 37:5-11.

160 *Genesis* 37:27-28.

161 *Genesis* 39:1-6.

162 *Genesis* 39:7-20.

163 *Genesis* 39:21-23.

164 *Genesis* 40:15.

Joseph did try to remedy the injustice done to him—he tried to get word to Pharaoh to remedy his false imprisonment—but Joseph was again the victim of injustice when the king's cupbearer forgot to mention Joseph to Pharaoh.[165] It was not until two years later, but not a moment too late by God's timetable, that God gave Pharaoh the dream that would lead to Joseph's release.[166] Finally, through a series of circumstances that could not have been predicted by man, Joseph was elevated to a place of authority in Egypt.[167] From a human perspective, if Joseph had been treated justly, God's purpose would not have been fulfilled, at least not in the way that God apparently intended. If Joseph had obtained the just release that he sought two years earlier, God's miraculous plan would not have come to fruition. Joseph did not seek to be sold as a slave. God could have stopped Joseph's brothers from their evil design, kept Potiphar's wife from falsely accusing Joseph, or reminded the cup bearer to mention Joseph, but God permitted all of those wrongs because that was His plan all along. When Joseph's brothers finally bowed before Joseph their ruler, they feared for their lives because of the evil they knew that they had done to him. But Joseph demonstrated that he understood well the doctrine of God's providence, that he had learned the difference between submitting to God and proudly seeking to do God's job: "Fear not [he told his brothers]: for am I in the place of God? But as for you, ye thought evil against me; but God meant it unto good . . . ."[168] Does that mean that Joseph's brothers did a good thing? Obviously not. But they nevertheless were doing God's bidding, for God meant their evil for good.

The pages of Scripture contain many similar accounts of God's unwitting servants. God specifically allowed Pharaoh and the Egyptians to survive for the express purpose of showing His power.[169] Thus, Pharaoh became an unwitting "servant" of God.[170] God likewise raised up enemies to judge His people and then judges to deliver His people from the enemies He had raised up.[171] Thus, both the enemies of Israel and Israel's judges were God's servants.

Perhaps the most noteworthy example of a human governor chosen by God to accomplish His divine purposes was Nebuchadnezzar, the pagan king of Babylon. Nebuchadnezzar was no friend of God or Israel. Nevertheless, God gave Nebuchadnezzar "a kingdom, power, and

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165 *Genesis* 40:20-23.

166 *Genesis* 41:1.

167 *Genesis* 41:33-44.

168 *Genesis* 50:18-20.

169 *Exodus* 9:16.

170 *Romans* 9:17.

171 *Judges* 2:11-16.

strength and glory,"[172] and Scripture calls Nebuchadnezzar God's "servant."[173] God used the sword of Babylonian authority to judge His people. Babylon was not self-consciously doing good at the time—Babylon was evil. But just as God used the evil actions and intentions of Joseph's brothers for good, God used the sword of the evil Babylonian empire to accomplish His sovereign purposes. Babylon was by no means the only nation used by God to accomplish His purposes; He similarly used Assyria,[174] Egypt,[175] and Syria.[176] Thus, a ruler can be "a terror" to evil,[177] can praise good,[178] can be God's minister,[179] a revenger[180] and executioner of wrath,[181] all without ever giving it a thought.

IV. THE FEAR OF MAN BRINGS A SNARE, BUT THE FEAR OF THE LORD IS THE BEGINNING OF WISDOM

Thus, Scripture never commands that the civil magistrate should self-consciously enforce God's law. Moreover, Scriptural principles dictate the contrary. Grounding human government in God's law runs afoul of biblical principles in several ways. First, fallen man cannot abide by the fullness of God's law. Second, the impracticality of importing all of God's law into human law leads to picking and choosing, which tends to undermine the divine purpose of God's law. Third, true morality cannot be compelled. Fourth, basing human law on part of God's law focuses man's attention on man instead of on God. Fifth, because this world is ruled by unregenerate men, any attempt to base positive human law on moral principle will lead to perverse human law.

A. The Vain Attempt to Apply God's Perfect Moral Law in a Fallen World

It simply is not possible to require heavenly perfection in this fallen world; this would be to require the impossible for man. The world has yet to see, and never shall see, the Christian who completely lives up to his own moral standard. Much less can the Christian impose that standard on a non-believing and unwilling man who does not accept "the things of the Spirit of God, for they are foolishness unto him, neither can he know them, for they are spiritually discerned."[182]

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172 *Daniel* 2:37-38.
173 *Jeremiah* 27:6.
174 2 *Kings* 18:11-12.
175 2 *Chronicles* 12:2-4.
176 2 *Chronicles* 28:1-5.
177 *Romans* 13:3.
178 *Id.*
179 *Romans* 13:4.
180 *Id.*
181 *Id.*
182 1 *Corinthians* 2:14.

Christian scholars long have recognized that God's moral law cannot be applied in its fullness to fallen man. Aquinas counseled against requiring the impossible through human law: "laws imposed on men should also be in keeping with their condition, for, as Isidore says . . . law should be *possible both according to nature, and according to the customs of the country*."[183] Likewise, while advocating a "constructive"[184] role for the natural law, Professor Charles Rice hastens to echo Aquinas' acknowledgment that ultimate virtue is beyond the reach of human law and that the "human law should not try to enforce every virtue or prohibit every vice."[185] Thus, following Aquinas, those who read Romans 13 as a mandate of authority frequently seem to be troubled by the implications of their own reading. "Few would hold that the Bible permits a state to punish whatever sin its citizens agree it ought to punish."[186] Therefore, the advocates of enforcement of God's law by human rulers choose only some part of that law to be enforced. For example, Professor David Smolin contends that "merely evil thoughts are not punishable by the state" because, among other reasons, everyone has them, and we "cannot punish everyone."[187] Professor Smolin is, of course, correct: God's moral law condemns everyone.

Because it is nearly universally recognized that the fullness of God's moral law cannot serve as a humanly enforceable standard for fallen human conduct, advocates of enforcement of God's law by the state are forced to water it down. They must face the intractable question of how to divide that part of God's moral law that ought to be enforced by the human ruler from that part that ought to be left to enforcement by God. May the ruler outlaw blasphemy? Sodomy? Poor parenting? Cruelty? Gluttony? Is there a clear stopping place? We all want to outlaw theft, but if morality is the basis for outlawing theft, why not outlaw covetousness? Some may want to outlaw adultery, but why not outlaw "look[ing] on a woman to lust after her"?[188] The argument that we cannot read people's minds misses the mark. Many crimes include a *mens rea* element that requires our criminal justice system to prove what is in men's minds. This, then, is a fundamental difficulty faced by

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183 THOMAS AQUINAS, TREATISE ON LAW 91 (Regnery Publishing 1998) (1267-73).

184 Professor Rice advocates "two functions" for natural law with respect to human law—the "constructive" and the "critical." Charles Rice, *Some Reasons for a Restoration of Natural Law Jurisprudence*, 24 WAKE FOREST L. REV. 539 (1989), *reprinted in* IS HIGHER LAW COMMON LAW? 46 (Jeffrey A. Brauch ed., 1999). In Rice's account of the "constructive" role for natural law, "natural law serves as a guide for the enactment of laws to promote the common good." *Id.*

185 *Id.*

186 Stern, *supra* note 80 at 5.

187 Smolin, *supra* note 104, at 399.

188 *Matthew* 5:28.

those who would enlist human government to enforce God's law–nobody[189] really seems to have the stomach for doing it completely.

The failure to solve this problem has not been for want of trying. Christian lawyers have tried to explain when God's moral law should be enforceable by man and when not, but no explanation suffices. Scripture itself does not tell us how to water down God's law so that it can be enforced by man. None of the proffered divisions between the enforceable part of God's law and the unenforceable part is spelled out in Romans 13 or anywhere else in Scripture.[190] As explained by contemporary pastor John MacArthur, Romans 13 sets out no exception to the obligation of submission: "Notice that the apostle, under the inspiration of the Holy Spirit, gives this command without qualification or condition."[191] Scripture does not speak of the magistrate's authority, only of the believer's obligation to obey, which is general. Thus, if Romans 13 is a grant of authority, it appears to be general. And with all due respect to the great Christian minds[192] that have concluded to the contrary, it appears that once the idea that government should self-consciously enforce natural law is accepted, there is no logical stopping point between what should be enforced and what should not.[193]

Aquinas concluded that human law must forbid "only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and suchlike."[194] But Aquinas' dividing line between the "more grievous vices" and those that do not hurt others is fatally flawed. First, the distinction between "more and less grievous" sin is false – sin is an absolute, not a relative matter. "For whosoever shall keep the

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[189] Perhaps I should qualify this sentence with the word "almost" because of the Christian Reconstructionists who are, at least, consistent. It is those who seek to preserve a role for God's law in human government but except some portion of God's law from enforcement who have deep consistency issues. My chief quarrel with the Reconstructionist view is with the idea that God will bring about His earthly kingdom through human law.

[190] Some have suggested that God's statement to Noah and his sons memorialized in *Genesis* 9:6 that "whoso sheddeth man's blood, by man shall his blood be shed" is a clear statement of at least one part of God's law that can be enforced by man. Perhaps it is, but this does not get us very far since we all agree that murder must be punishable by man. What we need is a principle that will allow us to determine when government should punish and when it should not. To say that government should punish murder does not necessarily provide a principle that can be applied to other potential crimes.

[191] MACARTHUR, *supra* note 30, at 21.

[192] *See infra* notes 193-202 and accompanying text.

[193] *See generally* Elizabeth Mensch, *Christianity and the Roots of Liberalism*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 1, at 54, 66 (discussing Augustine's and Luther's view that the polity is "only a necessary . . . dike against chaos" and that there is "no conceptual basis for legal limits to a ruler's power.").

[194] AQUINAS, *supra* note 183, at 942.

whole law and yet offend in one point, he is guilty of all."[195] Either we are transgressors of God's law, or we are not. The apostle Paul clearly taught that we all are transgressors.[196] Second, the idea that only some sin hurts others also is false.[197]

Professor David Smolin attempted to develop Aquinas' basic idea of distinguishing the more grievous vices from the less by setting out more thorough principles for drawing a line between that part of God's law that the civil magistrate is authorized by God to enforce and that part that the civil magistrate is not authorized to enforce.[198] Smolin, like earlier Christian writers,[199] advocates an aggressive role for human government: "[I]t is logical to include within the state's power the ability to punish *conduct* that is gravely immoral."[200] Also, like those who had gone before him, Smolin recognizes the impracticability and undesirability of taking state punishment of vice to its logical extreme and so formulates several limiting principles for human enforcement of natural law. For example, "[d]ecisions regarding state enforcement must take account of the practical good versus practical evil that would result from either state enforcement or state nonenforcement."[201] But there is nothing distinctively "Christian" about Smolin's elaborate attempt to divide that part of natural law that the state should enforce from that part that it should not. His arguments (like those of Aquinas before him) are pragmatic.[202] Such pragmatic arguments abandon the consistent principle of government enforcement of morality by advocating such enforcement only when enforcement is relatively easy. For the church to settle for that outward reformation that may be possible would be to abandon our mission to expose the world's need by holding it to God's perfect standard.

And even if it did make sense to separate those sins that cause more harm from those that cause less, is that really the cut that we would make? What causes more "harm" to society, consensual sodomy or the unkind word? James, the half brother of Jesus, taught that the spoken

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[195] *James* 2:10.

[196] *Romans* 3:23.

[197] Professor Craig Stern has debunked the idea of pursuing the common good through civil punishment of only "harmful" evil—all sin hurts others. *See* Stern, *supra* note 80, at 10.

[198] Smolin, *supra* note 104, at 397-402.

[199] *See* discussion *infra* notes 97-98 and accompanying text.

[200] Smolin, *supra* note 104, at 399.

[201] *Id.* at 401.

[202] Aquinas and Smolin are not the only Christian thinkers seeking to divide enforceable biblical proscriptions from unenforceable. Notably, Professor Craig Stern has provided the beginnings of such a division but acknowledged that "[m]uch work remains." Stern, *supra* note 80, at 11. Professor Stern, my beloved and esteemed colleague, is about to publish an expanded attempt at that work.

word can do tremendous damage.[203] He described the tongue as "a fire, a world of iniquity . . . that . . . defileth the whole body, and setteth on fire the course of nature: and it is set on fire of hell."[204] It is an "unruly evil, full of deadly poison."[205] Yet despite this clear Scriptural teaching that evil speaking is vastly destructive of human well-being, I do not know anyone who advocates criminalizing the unkind word as sodomy has been criminalized.[206]

Scripture suggests that singling out for criminal sanctions only "unrespectable" sins is wrong.[207] The God of the Christian Bible does not favor the respectable. To the contrary, He "[chose] the poor of this world [to be] rich in faith."[208] Failure to love our unlovely neighbor is sin, and the unloving person is a transgressor of God's law, just like the murderer.[209]

B. The Error of the Pharisees: Trying to Attain an Unattainable Standard

Most contemporary attempts to ground human law in God's natural law seem to flow from Aquinas' teaching that the immediate aim of natural law is "the common good."[210] A "big" government with an extensive moral role flows from Aquinas' view; if the immediate goal of law is progress through obedience toward "the good," then perhaps human law ought to reflect God's perfect moral law as closely as possible so that, in obeying human law and thereby some part of God's moral law, people more closely approximate "the good." Professor Angela Carmella put it this way: "Because the state's purpose is tied to the promotion, protection, and coordination of the common good, its role is essentially a

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[203] *James* 3:5.

[204] *James* 3:6.

[205] *James* 3:8; *see also* David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 24 IND. L.J. 1161, 1188-90 (1998) (describing the evil of *loshon hora* or "evil speaking" based on Psalm 34).

[206] The results of the historical attempts to divide the enforceable from the unenforceable look, well, suspicious. For example, many on the "religious right" conclude that God has given human rulers at least discretionary authority to choose to punish sodomy. But what about the rest (perhaps the most important part) of God's moral law? Those who try to make such a division frequently end up exempting from state regulation "pet sins," such as gossip and gluttony, while singling out for special censure those sins to which many of us happen not to be tempted. But why is consensual sodomy more deserving of punishment than the sin of hurtful words?

[207] *See generally James* 2:1-10.

[208] *James* 2:5. Ironically, it is the respectable of this world who historically have oppressed and are likely to continue to oppress believers in Jesus, *see James* 2:5-6, yet we believers, when we attain some political power, are tempted to oppress, not our oppressors, but the world's "unrespectable," with whom one would think believers in Jesus might actually feel some kinship.

[209] *James* 2:8-13.

[210] *See* AQUINAS, *supra* note 183, at 94.

moral one . . . . Catholic thought supports active government involvement in the economy, education, health care, housing, opposition to discrimination, and the environment—virtually every field modern political systems address."[211]

But what if Aquinas misperceived the role of natural law? What if natural law is an intermediate tool leading to "the good," not directly through obedience, but rather through apparent disobedience? What if the "first precept" of natural law is not "good" but "unattainable perfection"?

The Apostle Paul explained the relationship between obedience to God and human salvation in his epistle to the Galatian churches. Those who depend on the works of the law are under a "curse" because the law curses all who do not live up to its standard of perfection.[212] Thus, the law condemns all.[213] But in condemning our disobedience, thus pointing out our need and helplessness, the law does us good as a "schoolmaster to bring us unto Christ, that we might be justified by faith."[214]

Martin Luther used the Tenth Commandment to illustrate this convicting power of God's precepts:

> "Thou shalt not covet," is a precept by which we are all convicted of sin, since no man can help coveting, whatever efforts to the contrary he may make. In order therefore that he may fulfil the precept, and not covet, he is constrained to despair of himself and to seek elsewhere and through another the help which he cannot find in himself . . . . Now what is done by this one precept is done by all; for all are equally impossible of fulfillment by us.[215]

This nature and purpose of God's law as a schoolmaster is illustrated by the Scriptural accounts of those who approached Jesus asking what they needed to do to be saved. His response shows two things about the law of God. First, we all know something of God's law intuitively, and second, we cannot live up to the standard that we all have written on our own hearts. Consider St. Matthew's account of the rich young ruler who came to the Lord asking what he could do to earn eternal life. The Lord responded first by pointing out that nobody is good, except God. Nevertheless, Jesus answered the man's question—"keep the commandments."[216] Apparently not appreciating just how desperate was his own situation, this man set about trying to nail down his own obedience to God's moral law, asserting that he had obeyed the

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[211] Carmella, *supra* note 15, at 269.

[212] *Galatians* 3:10.

[213] *Galatians* 3:22.

[214] *Galatians* 3:24.

[215] Martin Luther, *Concerning Christian Liberty*, *in* 36 HARVARD CLASSICS 353, 367 (Charles W. Eliot ed., R.S. Grignon trans., The Collier Press 1910).

[216] *Matthew* 19:17.

commandments from his youth.[217] But as Jesus had elegantly taught in the Sermon on the Mount, man can, at most, attain an outward conformity to some rules.[218] God's perfect moral law is not merely, or even primarily, "thou shalt not kill," "thou shalt not steal," and "thou shalt not commit adultery." God's law is more demanding than that: "[A]ll of the Law and the Prophets" hang on the single inward issue of love.[219] Therefore, Jesus included in His list of the commandments to be obeyed by the rich young ruler the commandments' underlying unifying principle: "love thy neighbor as thyself."[220] The man apparently did not understand that the commandments were particular manifestations of the fundamental overarching requirement of God's perfect moral law—love. So Jesus told him to "sell that thou hast, and give to the poor."[221] Then the man understood that he could not live up to God's standard of perfect love. That should have come as no surprise—Jesus had told him at the outset that no mere man is good.

The rich young ruler's mistake was the mistake of Adam and the mistake of the Pharisee—he thought God's law was a list of rules that he could follow. The Pharisees achieved a certain outward appearance of righteousness.[222] But Jesus taught that righteousness cannot be achieved by living up to the law. God's law is the unattainable ideal—it must be unattainable to accomplish its essential human purpose of revealing man's imperfection and need of salvation. Anything short of perfect love is a sinful falling short of God's perfect standard, and we all fall short.[223] We humans cannot live up to a perfect moral standard—that is, in fact, the point of the standard. In a very real sense, God's

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[217] *Matthew* 19:20.

[218] Jesus taught that entering the kingdom of heaven through obedience to the law would require an obedience that "exceed[s] the righteousness of the scribes and Pharisees." *See Matthew* 5:20. Jesus then went on to list several illustrations of the limitations of outward conformity to rules. *See, e.g., Matthew* 5:21-22 ("Ye have heard that it was said by them of old time, Thou shalt not kill . . . But I say to you, That whosoever is angry with his brother without a cause shall be in danger of the judgment . . . .").

[219] *Matthew* 22:40.

[220] *Matthew* 19:19.

[221] *Matthew* 19:21.

[222] *See Matthew* 23:25-28.

> Woe unto you, scribes and Pharisees, hypocrites! for ye make clean the outside of the cup and of the platter, but within they are full of extortion and excess. Thou blind Pharisee, cleanse first that which is within the cup and platter, that the outside of them may be clean also. Woe unto you, scribes and Pharisees, hypocrites! for ye are like unto whited sepulchres, which indeed appear beautiful outward, but are within full of dead men's bones, and of all uncleanness. Even so ye also outwardly appear righteous unto men, but within ye are full of hypocrisy and iniquity.

Id.

[223] *Romans* 3:23.

moral law is not meant to be obeyed. Let me be clear—God's moral law cries out for obedience and should be obeyed, but God knows that we cannot obey it. God nevertheless has written His law on our hearts to teach us our own inadequacy. Therefore, man does not need mere human law to tell right from wrong. The human conscience tells us what is right,[224] and we know that we do not measure up.

This message was not lost on the disciples who witnessed Christ's conversation with the rich young ruler. "Who then can be saved?" they asked.[225] God's law had its intended effect on their hearts—they knew that they did not live up to the standard. And Jesus immediately identified the solution. Salvation comes, not through trying to do the impossible, not through trying to live up to God's perfect moral standard—"[w]ith men this is impossible."[226] Salvation comes through submitting to God's plan of salvation—"with God all things are possible."[227]

Thus, man is led to the only possible "good" for fallen man—salvation by God's grace—not immediately, through partial obedience to natural law. That is man's way, Adam's way, the Pharisees' way. Rather, man is led to "the good" by seeing his own inadequacy in the light of perfect natural law and finding adequacy in Jesus Christ's perfect life and finished work. When we, like the Pharisees, choose to multiply rules, even in a human attempt to track the knowledge of good and evil provided by the forbidden fruit, we continue to choose law—a watered down version, perhaps, but a law that can only condemn. Only God can accomplish the good for man, not through man's obedience to natural law, but rather through man's faith in God's miraculous provision of salvation in spite of man's inability to live up to the natural law standard. For human law to accomplish the "schoolmaster" role of God's law, the human law would have to be unattainable, and nobody suggests that should be the case.

Indeed, for Christians, ourselves sinners, to argue for an unattainable human standard would be inappropriate. God uses His law to accomplish His purposes in the lives of His creatures. But only a perfect God can demand a perfect standard of conduct. Christians would misuse God's law if we tried to force our vision of God's law on our fellow men. It would be unseemly to take God's moral law, a perfect, unattainable standard that God uses to show us our need, and to hold up excerpts of that perfect standard as a benchmark for human conduct upon pain of punishment.

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[224] *Romans* 7:16.

[225] *Matthew* 19:25.

[226] *Matthew* 19:26.

[227] *Id.*

For example, Professor Charles Rice explained that natural law serves as a guide for the enactment of human laws to promote virtue in the sense of "the common good," and cited as a contemporary possible opportunity to apply natural law "the harmful effects of permissive divorce."[228] Professor Rice therefore suggests that "[l]egislators should . . . consider restrictions on divorce so as to strengthen the family as a divinely ordained natural society entitled to the protection of the State."[229]

Such talk has the lilt of beautiful music to the ears of the "religious right"—we are so sold on the premise that children would be better off in a divorce-free world that we tend to swallow uncritically the idea that the state should get involved in bringing that world about. And it is pretty clear where this line of thinking leads. The idea of "family as a divinely ordained natural society" leads not only to laws minimizing divorce, which is fairly universally seen today as something to be minimized, but also to laws minimizing cohabitation outside of marriage, both same-sex and opposite sex. Of course targeting cohabitation, particularly heterosexual cohabitation, for restriction would be much more controversial in the broader community, but if the idea is to promote a Judeo-Christian vision of "family as a divinely ordained society," why not punish heterosexual cohabitation? The Scriptural argument that cohabitation is an "evil" is pretty easy to make, at least as easy as the arguments against homosexuality and divorce, but our enthusiasm to punish does not extend equally to all "evils."

C. Spiritual Virtue Cannot be Compelled

The scope of positive human law must be limited to temporal things both because temporal law cannot reach the eternal and because God reserves to Himself the government of the eternal. Martin Luther, unlike John Calvin, taught that "[h]eresy is a spiritual matter which you cannot hack to pieces with iron, consume with fire, or drown in water."[230] The weapons against heresy are not merely physical; such spiritual warfare requires much more powerful weapons. As the Apostle Paul wrote:

> For though we walk in the flesh, we do not war after the flesh: (For the weapons of our warfare are not carnal, but mighty through God to the pulling down of strong holds;) casting down imaginations, and every high thing that exalteth itself against the knowledge of God, and bringing into captivity every thought to the obedience of Christ . . . .[231]

Therefore, Luther explained:

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[228] *See* Rice, *supra* note 184, at 46.

[229] *Id.*

[230] Martin Luther, *Temporal Authority: To What Extent it Should be Obeyed, in* LUTHER: SELECTED POLITICAL WRITINGS 63 (J.M. Porter ed., 1974).

[231] 1 *Corinthians* 10:3-5.

> The temporal government has laws which extend no further than to life and property and external affairs on earth, for God cannot and will not permit anyone but himself to rule over the soul. Therefore, where the temporal authority presumes to prescribe laws for the soul, it encroaches upon God's government and only misleads souls and destroys them. We want to make this so clear that everyone will grasp it, and that our fine gentlemen, the princes and bishops, will see what fools they are when they seek to coerce the people with their laws and commandments into believing this or that.[232]

Even if human government could compel outwardly moral conduct, such mere outward "morality" would be no morality at all. As then Professor and now Judge Michael McConnell recently explained, this Christian belief in the primacy of conscience is a foundation of liberalism: "Under this view, it is literally impossible as a theological matter for government power to improve a citizen's spiritual state."[233] If the sovereign God who created us did not make us moral automatons, but rather permitted us to choose to obey Him, how dare the state presume to compel obedience to any moral code?[234] Using force to prevent sinful acts may be temporally beneficial both to the constrained sinner and to those around him, but at what cost? Is this temporal benefit worth giving up the eternal benefit of liberty of conscience? As Luther taught, "it is not right to prevent evil by something even worse."[235]

D. Merely Human Moral Standard as Idolatry

If positive human law is not to adopt the impossible perfection of divine love as the benchmark of acceptable human conduct, what is the biblical standard for human law? The proper foundation for human law is just the opposite of man-mandated virtue. Biblical human law should free man from the temptation to look to his fellow man as a source of condemnation or approval. "The fear of man bringeth a snare."[236] In this fallen world, man should neither fear his fellow man nor trust his fellow man. When the believer looks only to God for well–being and not to his fellow men, only then will he be safe.

God's law focuses man's attention and hope on God. Positive human law should do the same. But the more thorough, detailed and articulated positive human law becomes, the more it tends to substitute fear of, trust in, and dependence upon man for fear of, trust in, and dependence

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[232] LUTHER, *supra* note 230, at 61.

[233] *See* Michael W. McConnell, *Old Liberalism, New Liberalism, and People of Faith*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 1, at 13.

[234] *See id.* at 14.

[235] LUTHER, *supra* note 230, at 62.

[236] *Proverbs* 29:25.

upon God. Why fear God when human rulers govern your every step? Why trust the Lord when human government provides your every need?

From this biblical perspective, ideal human law would go only so far as necessary to alleviate the need for man to fear force from his fellow man. The Christian Church appears to have generally agreed that a "primary purpose of state enforcement is to make human society possible."[237] Without at least minimal human law, man must always look over his shoulder in fear of his fellow man. But excessive human law falls into the opposite trap—causing people to look to their fellow man for good. It is a mistake to cause men to seek the favor of human rulers. "It is better to trust in the LORD than to put confidence in princes."[238] True justice comes from the Lord alone.[239] Human authority merely gets in the way.

Humans appear to have a natural, sinful tendency to look to each other for authoritative leadership to speak in the place of God and to tell us what is right and wrong. Thus, exalting the authority of mere man is idolatry; it places the state in the place of God. The believer has the Scriptures and has the Holy Spirit. These are enough to guide the believer into all Truth. We do not need the fallible state to supplement what God has given us directly.

Just as sinful people tend to replace God with their fellow men, many of those fellow men are more than willing to take God's place, often in God's name. But the Christian ruler must avoid this temptation. Marie Failinger and Patrick Keifert have described the danger of what they call the "theocratic move":

> [D]emanding that law recognize and swear allegiance to a theocentric understanding of social life through coercion, not only risks the God-given conscience of the religiously other. It also pretends to an idolatry backed by force: for humans to be God by demanding allegiance of mind and heart to a particular interpretation of God's will . . . is almost worse than to allow the forces of the Devil to have free rein over part of the given world.[240]

E. Telling Human Rulers That They May Choose What Parts of God's Law to Enforce is a Bad Idea

The Christian doctrine of human depravity would suggest that government should not enforce its merely human view of morality. Government is made up of men, and men are depraved—their minds and

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[237] Smolin, *supra* note 104, at 397.

[238] *Psalm* 118:9.

[239] *Proverbs* 29:26.

[240] Marie A. Failinger & Patrick R. Keifert, *Making Our Home in the Works of God: Lutherans on the Civil Use of the Law*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 1, at 386, 394.

hearts are darkened by sin. Those whose minds have been enlightened by the gospel and the Holy Spirit are only strangers and pilgrims here in this world until the Christ comes to rule and to reign in true righteousness. As Augustine put it, "God is not the ruler of the city of the impious."[241] The Christian recognition of fallen man's depravity counsels against enforcement of anything as subject to temporal uncertainty and disagreement as "natural law." Surely no believer would want to leave public morality to the rule of a world system in which the believer is an alien any more than the world would want believers to impose their morality on the world.

It is perhaps telling that leading advocates of a so-called "constructive"[242] role for natural law also advocate a "critical" role to shield us from the "perversion" of natural law.[243] According to Professor Charles Rice, natural law "provides a reason to draw a line and criticize an action of the state as unjust and even void."[244] But once the natural law genie is out of the bottle, it is not at all clear that it can be so easily put back in.

While the world might rightly fear the Christian's claim to a "constructive" role for natural law, the "religious right" sometimes appears blind to the danger of advocating natural law's civil enforcement. If society were ever to charge judges with enforcing some "higher law," those judges would have no choice but to enforce "higher law" as they see it. If a judge sincerely believed one of the perversions of higher law, she would have no choice but to enforce that perversion, which she sincerely believed to be higher law. Thus, the believer who would demand that governors enforce "higher" law may be demanding the enforcement of higher law's perversion.[245] John Hart Ely was right—"natural law approaches are surely one form of noninterpretivism."[246] *Roe v. Wade,* which the "religious right" sees as a perversion of law, is certainly no positivist outcome and is precisely what Christians invite when they advocate a role for natural law in either constructing or voiding human law.[247]

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[241] H. Jefferson Powell, *The Earthly Peace of the Liberal Republic, in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT, *supra* note 1, at 73, 90 (suggesting that Augustine's social theology would lead to the exclusion of religion from government).

[242] *See* discussion *supra* note 184.

[243] *See* Rice, *supra* note 184, at 47.

[244] *Id.*

[245] From the perspective of many Christians, this scenario has, in fact, been close to reality for decades now. After all, the "right" to abortion is based on a woman's natural law right to control her own body.

[246] JOHN HART ELY, DEMOCRACY AND DISTRUST 1 (1980).

[247] And for *Roe* fans, consider that this "fundamental right" is perhaps only a conservative appointment or two away from obliteration by judges who do not share the values of the Warren Court. For a discussion of the discomfort felt by erstwhile fans of

Not coincidentally, *all* of the biblical examples of proper civil disobedience involve disobedience to human rulers' misguided attempts to compel the rulers' own views of proper religious devotion. For example, King Nebuchadnezzar ordered the three Hebrew "children," Shadrach, Meshach and Abednego, to bow down to the king's image of gold[248] in violation of the First and Second Commandments.[249] The Hebrews refused, not to save their own skin, or in a misguided attempt to accomplish God's purposes, but because the king had commanded direct disobedience to God. This proper civil disobedience was rooted, not in the fear of man, but rather in faith in the power of God. When the Hebrew children refused to worship Nebuchadnezzar's idol, the king threatened them with the fiery furnace and asked "who is that God that shall deliver you out of my hands"?[250] Their answer shows the proper basis for Christian civil disobedience: "our God whom we serve is able to deliver us from the burning fiery furnace."[251] They had faith in God's sovereignty. This was no blind faith in a supernatural salvation from the flames, for they acknowledged that they might die.[252] But regardless of whether God chose to deliver them from the flame, they expressed their confidence that God would "deliver us out of thine hand, O king."[253] They knew that Nebuchadnezzar was merely a tool in God's hand and that God would use Nebuchadnezzar for God's glory, either by delivering them from the physical effects of the fire, or by delivering them through martyrs' deaths. Either way, they would do right and leave the result to God. The fire was nothing. The power of the king was nothing. Only obedience to God mattered.

Similarly, the account of Daniel and the den of lions illustrates both the danger of a human ruler seeking to pursue heavenly ends through earthly authority and the proper response of the believer to such a misguided attempt. King Darius, seeking to promote his view of proper religious devotion through government power, was persuaded to decree, much as Nebuchadnezzar had before him, that for thirty days no one was to petition God or man, save Darius.[254] This dictate would have prohibited Daniel from praying to God, but Daniel faithfully continued to

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courts enforcing their own values, when those courts experience periods of political transition, *see* Louis W. Hensler III, *The Recurring Constitutional Convention: Therapy for a Democratic Constitutional Republic Paralyzed by Hypocrisy*, 7 TEX. REV. L. & POL. 263, 286-87 (2003).

248 *Daniel* 3.

249 *Exodus* 20:3-4.

250 *Daniel* 3:15.

251 *Daniel* 3:17.

252 *Daniel* 3:18.

253 *Daniel* 3:17.

254 *Daniel* 6:7-9.

pray in obedience to God, and was cast into the den of lions as a consequence. There God miraculously shut the lions' mouths.[255] God used Darius' misguided exercise of power to show God's sovereignty over the lions and over Darius. Apparently, Darius did not learn his lesson. Upon seeing the deliverance of Daniel, Darius decreed that everyone must worship the true God, still believing that true religious devotion could be compelled.[256] Scripture does not say, but history does not indicate that the Medo-Persian Empire was converted by Darius' decree that all believe in the true God. Yet Daniel's obedience to and faith in God has stood as a testimony to millions of people for thousands of years.

And it was the Jewish religious authorities of the day who commanded the apostles Peter and John, in violation of the Great Commission given to them by Jesus,[257] "not to speak at all nor teach in the name of Jesus."[258] The apostles correctly responded that it would not be "right in the sight of God to hearken unto you more than unto God."[259] The would-be promoters of their own view of proper religious devotion placed before the apostles a stark choice between obedience to man and obedience to Christ. The apostles correctly chose to disobey man, not out of fear of man or human compulsion, but based on their faith in God. Thus, the lesson to be drawn from biblical examples of civil disobedience is not that human law must model God's law—just the opposite. The lesson is that man's authority over man always is dangerous and always tempts to focus the eyes of the citizen on the human ruler and his dictates instead of on God and His commands.

The Christian Reconstructionists make the very powerful point that human subjectivity in moral lawmaking is dangerous.[260] But as Professor Tremper Longman has demonstrated, such dangerous subjectivity cannot be avoided by simply applying Old Testament law today as the Reconstructionists would, because subjectivity and the potential for oppression remains.[261] However, reconstructionism's flaw is not that it would attempt to enforce a moral law that no longer applies. Rather, reconstructionism's flaw is that it advocates mere human enforcement of God's moral law. If the correct answer to the Reconstructionists were to update Old Testament law to New Testament standards, then instead of

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[255] *Daniel* 6:10-24.

[256] *Daniel* 6:25-27.

[257] *Matthew* 28:18-20; *Acts* 1:8.

[258] *Acts* 4:18; 5:17-31.

[259] *Acts* 4:19.

[260] *See* Tremper Longman, *Theonomy: A Reformed Critique* 41-54 (1990), *reprinted in* IS HIGHER LAW COMMON LAW?, *supra* note 184, at 381, 387.

[261] *See id.*

the death penalty for adultery, we would have criminal punishment for "look[ing] on a woman to lust after her."[262]

V. ADVICE TO THE CHRISTIAN RULER

A. Learn Again to Serve God Through Vocation

The foregoing is generally consistent with the Anabaptist tradition, and were it not for one disagreement with the Anabaptists—over whether the Christian should serve as a civil magistrate at all—I could have ended this article with the last section.[263] Professor Robert Cochran has aptly summarized the Anabaptist position:

> Anabaptists are nonresistant—that is, they believe that Christians may not use force. Their separation from political and legal culture flows from their belief in nonresistance. A necessary element of government is the use of coercion and Christians are prohibited from using the sword. God may use people in governmental positions to restrain and punish evil, but these are not positions that Christians can occupy. Thus Anabaptists will not serve as soldiers or police.[264]

But I believe that God calls His people to serve Him in all walks of life, including, sometimes, in positions of temporal authority.

On this topic, Augustine cited John the Baptist's teaching,[265] which is reminiscent of Jesus' Sermon on the Mount: "He that hath two coats, let him impart to him that hath none; and he that hath meat, let him do likewise."[266] Certain "government employees" then asked John how this teaching applied to them. John responded first to tax collectors,[267] not by teaching that the tax collectors should stop forcing people to give up their money, but by replying, "Exact no more than that which is appointed you."[268] In other words: be a good tax collector, follow the positive law, and do not cheat people. "Likewise the soldiers asked him, saying, '[a]nd what shall we do?'"[269] John did not respond, "Lay down your arms" or, "Refuse to fight." Rather, he replied, "Do violence [intimidation] to no man, neither accuse any falsely; and be content with your wages."[270] In other words: be good, quiet soldiers. Augustine's teaching was consistent with John's—Christian doctrine does not keep

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[262] *See Matthew* 5:28.

[263] *See* Smolin, *supra* note 1.

[264] Cochran, *supra* note 2, at 246.

[265] AUGUSTINE, LETTER 138, *reprinted in* AUGUSTINE: POLITICAL WRITINGS 209 (Michael W. Tkacz & Douglas Kries trans., 1994) (412).

[266] *Luke* 3:11.

[267] *Luke* 3:12.

[268] *Luke* 3:13.

[269] *Luke* 3:14.

[270] *Id.*

the Christian out of public service. Rather, Christian doctrine makes the Christian a better, more effective and harmless public servant.[271]

After I expressed the forgoing view to a colleague not long ago, he asked me whether being a Christian lawyer is like being a Christian plumber. After all, Luther compared service to mankind as a ruler with service as a farmer or other tradesman.[272] Perhaps the Christian lawyer is like the Christian plumber. The Christian plumber should be a good plumber. The good plumber effectively fulfills his role: facilitating the transmission of water through buildings. Does the Christian plumber enforce the natural laws of physics? No. Does he take the laws of physics into account? Of course he does, if he is a good plumber.

Likewise, "good" law takes God's truth into account, including the truth concerning the nature of man. Perhaps the proper goal of the ruler is not good in general, but a more limited mark—a civil order that permits other servants of God to accomplish their goals—plumbers to plumb, musicians to make music, and churches to edify believers and to reach out to unbelievers with the gospel. In this way, a just legal system is a legal system that keeps out of the way, allowing God's enforcement of natural law to take its course.

Acceptance of the idea that human government must not seek to impose the perfection of God's law does not mean that God's perfect law will have no impact on human society in general or on human government in particular. Rather, that impact will be indirect, accomplished through individual lives as Christians live out God's moral law. And, of course, the ruler should try to be a good ruler, just like the tax collector should try to be a good tax collector, the soldier should be a good soldier, the plumber should be a good plumber, and the lawyer should be a good lawyer.

Thus, the citizen of heaven has a role to play in the earthly city—not to seek domination or the ushering in of the heavenly city—but a positive influence. Scriptural metaphors for the Christian life are passive—salt, light, living stones, slaves, sheep—not agents, not vicegerents. Augustine was right—Christian soldiers should be among the very best soldiers. Christian citizens should be model citizens. And Christian rulers should be better rulers than they would have been without their Christianity. Senator Jon Kyl made this point at the confirmation hearing of John Ashcroft for Attorney General of the United States:

> There have been two interesting assertions made with respect to Senator Ashcroft by opponents. The first is that he has very strong

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[271] This apparently is Niebuhr's "dualist" category of Christians, a position championed most famously by Martin Luther. *See generally* Cochran, *supra* note 2, at 247 (describing the dualist category).

[272] *See* Failinger & Keifert, *supra* note 240, at 393.

> convictions, faith and belief in God. Indeed, he does. The second is that he may not enforce the law and the Constitution. Well, the second assertion is at odds with the first. You can be assured that when John Ashcroft places his hand on the Bible and swears to uphold the laws and the Constitution, that he will do that on behalf of the people of the United States of America.[273]

B. Learn Again to Live in this World as a Sojourner

Professor Timothy Hall has observed that modern-day Baptists, perhaps the spiritual cousins of the early Anabaptists, have largely adopted a more aggressive view of the relationship between Christians and culture: "For example, even before the 1980's found many Baptists joining ranks with conservative political action groups like the Moral Majority, the chief creedal statement of the Southern Baptists had envisioned a fair amount of commerce between the City of God and the cities of the world."[274] The Christian's impulse to "Christianize" his nation is understandable: the Christian longs for home. But we are not there, not yet. I fear that we believers are tempted to build and satisfy ourselves with a temporal "kingdom" that is a pale substitute for the home that we long for. C. S. Lewis warned against neglecting the best while working for the good:

> Now, if we are made for heaven, the desire for our proper place will be already in us, but not yet attached to the true object, and will even appear as the rival of that object. And this, I think, is just what we find. . . . If a transtemporal, transfinite good is our real destiny, then any other good on which our desire fixes must be in some degree fallacious, must bear at best only a symbolical relation to what will truly satisfy.
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> . . . [Y]ou and I have need of the strongest spell that can be found to wake us from the evil enchantment of worldliness which has been laid upon us for nearly a hundred years. Almost our whole education has been directed to silencing this shy, persistent, inner voice; almost all our modern philosophies have been devised to convince us that the good of man is to be found on this earth. And yet it is a remarkable thing that such philosophies of Progress or Creative Evolution themselves bear reluctant witness to the truth that our real goal is elsewhere. When they want to convince you that earth is your home, notice how they set about it. They begin by trying to persuade you that earth can be made into heaven, thus giving a sop to your sense of exile in earth as it is. Next, they tell you that this fortunate event is still a

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[273] *U.S. S. Judiciary Comm. Holds a Confirmation Hearing for Attorney Gen.-Designate John Ashcroft: Before The S. Judiciary Comm.*, 107th Cong. 21 (2001) (statement of Sen. Jon Kyl).

[274] Hall, *supra* note 99, at 347.

> good way off in the future, thus giving a sop to your knowledge that the fatherland is not here and now.[275]

The earliest type of the believing pilgrim was the patriarch, Abraham. God had promised Abraham, while he was still called Abram, that God would make Abram a great nation but that Abram would need to leave his home for a land that God would show him.[276] Abram obeyed God and went out in faith, not knowing where he was going.[277] Abram was not commanded to build the nation that God promised, just to step out in faithful obedience. And so he did, "[b]y faith . . . sojourn[ing] in the land of promise, as in a strange country, dwelling in tabernacles . . . ."[278] He did not presume himself to build the city of promise, but instead "looked for a city which hath foundations, whose builder and maker is God."[279]

This is not to say that Abram's trust always was perfect. He, like Peter after him, was tempted to take matters into his own hands. And this temptation appears to have been particularly acute, as it was for Peter, when God's promise seemed impossible from a human perspective. For example, when famine threatened Abram's view of God's promise, he left the promised land and moved to Egypt.[280] While there, Abram succumbed to the fear of man and hatched a scheme to preserve his own life by lying about Sarai's identity as his wife. God had to save Abram from his own folly and ultimately drove Abram from Egypt.[281]

The turning point in Abraham's life of faith appears to have come with the long-awaited birth of Isaac, the son of promise. God had promised this son in Sarah's old age,[282] and that promise was miraculously fulfilled.[283] But God again tested Abraham's faith, and this time Abraham passed the test. God told Abraham to offer Isaac as a

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[275] C.S. Lewis, *The Weight of Glory*, *in* THE WEIGHT OF GLORY AND OTHER ADDRESSES 25, 29-32 (Walter Hooper ed., 2001).

[276] *Genesis* 12:1-2.

[277] *Hebrews* 11:8.

[278] *Hebrews* 11:9; *Genesis* 12:8.

[279] *Hebrews* 11:10.

[280] *Genesis* 12:10.

[281] *Genesis* 12:17-20. As time passed and advanced age set in, Abram likewise found it difficult to trust God's promise of an heir and many descendants. Again, humanly speaking, God's promises appeared to have become impossible, and so Abram stepped in and fathered a son by Sarai's servant. Moreoever, Abraham later repeated his earlier error in Egypt by lying to King Abimelech to save his own life. But Abraham's lie led King Abimelech to take Sarah, Abraham's wife, as the king's wife. In that account, God again supernaturally intervened on behalf of Abraham and Sarah, showing that Abraham did not need to lie to the authorities to protect himself because God, in His sovereignty, was able to protect Abraham. *See Genesis* 20.

[282] *Genesis* 18:10.

[283] *Genesis* 21:1-2.

burnt offering.[284] Once again, obedience to God's command would make fulfillment of God's promise impossible from a human perspective, but this time Abraham's faith did not waiver. Abraham told his servants that he and Isaac would "go yonder and worship, and come again to you."[285] If God were true to His word, Isaac must somehow survive the burnt offering experience. Therefore, just like the three Hebrew children who did not fear Nebuchadnezzar's fire, Abraham had a confidence, not in his own schemes, but in the promise of His God. So when Isaac asked "where is the lamb," Abraham could confidently proclaim that "God will provide himself a lamb."[286] When Abraham obeyed, God did the impossible and provided God's lamb to die in Isaac's place.[287]

Believers should identify, not with the Caesars, but with the pilgrim Abraham, or with Christ, who was never at home here on earth.[288] The Christ was no conquering leader. His very incarnation was only the beginning of His utter humiliation as a man. He did not cling to His divine form, but "made himself of no reputation, and took upon him the form of a servant, and was made in the likeness of men."[289] His birth in a stable is famous for its humility. And while He sojourned here on earth, He was "despised and rejected of men; a man of sorrows, and acquainted with grief."[290] He was humiliated, bound, an executed prisoner, a failure, a stumbling stone, an offense.[291] The Lion of the tribe of Judah became as a "lamb to the slaughter."[292] For now, the only roaring lion walking about[293] here on this earth is Satan, not Christ. The Christian may look for the blessed hope[294] of that glorious day when every knee shall bow to Christ,[295] but not today—not yet. Until then Christians will be "strangers and pilgrims"[296] here. Jesus taught that the world would hate His followers, and what is important is the basis for the animosity. It must not be a natural animosity against Christian aggression. Rather, when the world hates Christians, it should be

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284 *Genesis* 22:2.
285 *Genesis* 22:5.
286 *Genesis* 22:7-8.
287 *Genesis* 22:13-14.
288 *John* 8:23.
289 *Philippians* 2:7.
290 *Isaiah* 53:3.
291 *Isaiah* 8:14.
292 *Isaiah* 53:7.
293 1 *Peter* 5:8.
294 *Titus* 2:13.
295 *Romans* 14:11.
296 1 *Peter* 2:11.

because Christians are not of this world, as Jesus was not of this world.[297]

Judge Michael McConnell aptly described the folly of Christians engaging in a temporal "war," seeking to further moral or religious goals through the state:

> Today, secular liberals frequently disdain religious ways of thinking and use the powers of the state, especially in the field of education, to advance their ideology. Christians and other religious citizens often return the favor, disdaining liberalism as a hostile ideology. I believe this is a mistake for both groups.[298]

Everyone loses the battle for control of state power to advance ideology. The Christian informed by what Scripture has to say about man's depravity will not respond in kind to the secularists' political power plays by "taking back the public schools" through official prayer in schools and the like. The Christian answer is instead to get the state out of the business of directly providing education at all. Likewise, the Christian would not outlaw sodomy, but would instead seek to get the state out of the sex and marriage business altogether. The earthly city's role is purely to preserve peace and order so that the Heavenly City can be built. Therefore, to protect man from sinful encroachments by his fellow man, the Christian should work to make sure that theft, murder, and the like all are illegal. But sodomy, fornication, and other "victimless" offenses need not be so.

Contemporary theologian Walter Wangerin has poignantly captured the proper attitude of the Christian in this world:

> What then of our big churches, Christian? What of our bigger parking lots, our rich coffers, our present power to change laws in the land, our political clout, our glory for Christ, our triumphant and thundering glory for Christ? It is excluded! All of it. It befits no Christian, for it was rejected by Jesus. If ever we persuade the world (or ourselves) that we have a hero in our Christ, then we have lied. Or else we are deceived, having accepted the standards of this world. He came to die *beneath* the world's iniquity. The world, therefore, can only look *down* on him whom it defeated—down in hatred until it repents; but then it is the world no more. Likewise, the world will look down on us—down in contempt until it elevates the Christ it sees in us; but then it won't be our enemy any more, will it?[299]

Not satisfied to carry Christ's cross of submission and suffering, Christians frequently take up instead the role of political operator, or moral inquisitor. But the believer who rejects his role as the despised of this world frequently ends up either squeezing into the world's mold or alienating the very world that the believer is called to win through

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[297] *John* 15:19.

[298] McConnell, *supra* note 233, at 23-24.

[299] WALTER WANGERIN, JR., RELIVING THE PASSION 83 (1992).

submission. The Christian who, contrary to biblical admonition,[300] seeks to win the world through friendship with the world can end up instead being won by the world. Professor Robert Cochran describes this potential pitfall of trying to convert culture:

> The attractiveness of political power creates a strong incentive to compromise. Those within the National Council of Churches and those within the Christian Coalition would both identify themselves as Christ-transforming-culture Christians. But when the press releases of the National Council of Churches are indistinguishable from those of the Democratic Party and the press releases of the Christian Coalition are indistinguishable from those of the Republican Party, one wonders who is transforming whom.[301]

The Christian judge of the world's morality errs equally. The Christian church judges only itself, not those outside the church. Therefore, sexual immorality, covetousness, idolatry, etc. are tolerated outside the church because only God judges there. God can and will enforce His moral law on the world at large. He does not need his church to do that, and He never has asked believers to do that. He will use man and nature to accomplish His purposes. The Christian's goal for the unbelieving world ought not to be the mere change of outward reformation, but true conversion through inward regeneration. And in pursuing the wrong goal, Christians can undermine their opportunity to accomplish the right goal:

> When the church takes a stance that emphasizes political activism and social moralizing, it . . . diverts energy and resources away from evangelization. Such an antagonistic position toward the established secular culture . . . leads believers to feel hostile not only to unsaved government leaders with whom they disagree, but also antagonistic toward the unsaved residents of that culture—neighbors and fellow citizens they ought to love, pray for, and share the gospel with. To me it is unthinkable that we become enemies of the very people we seek to win to Christ, our potential brothers and sisters in the Lord.[302]

In rejecting our role as rejected, we can drive away the very world that we are called to draw through our submission:

> While the religious right has made its presence felt, this presence has spawned more criticism than praise. They have been denounced as hapless defenders of a mythical Christian America, feckless pawns of Republican Party strategists, intolerant champions of Christian triumphalism, and knee-jerk defenders of the "American Way of Life."[303]

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[300] *See James* 4:4.

[301] Cochran, *supra* note 2, at 248-49.

[302] *See* MACARTHUR, *supra,* note 30, at 14.

[303] David L. Weeks, *The Uneasy Politics of Modern Evangelicalism*, XXX CHRISTIAN SCHOLAR'S REVIEW 403, 406 (2001).

After all these centuries of Christians trying to force the world into the Christian mold, it is time for Christians to recapture the teaching of Jesus and the apostles. The true follower of Jesus does not try to seize the power of the earthly king to accomplish God's purposes—that would be to usurp God's role. It is supremely arrogant even to think that we can imagine how God desires to accomplish His will. Could Joseph have seen God's hand in Joseph's serial oppression? Could the disciples have discerned the hand of God in Judas' betrayal? God rarely spells out for us precisely what His will is in any given circumstance. He gives us the love principle to live by and some specific commands to illustrate that principle. He then expects us to use our God-given reason, obediently submitting to His law of love, to make wise choices in life. He, then, in His sovereignty, uses our choices, good and bad, wise and foolish, to accomplish His purposes. But to jump straight to an attempt to accomplish God's ends without employing God's chosen means for us—wise and obedient decisions based on the love principle—is overly simplistic and abandons our personal responsibility as Christians. As my beloved colleague Craig Stern so elegantly put it:

> We would affirm God's sovereignty and His ability to work His will according to His own decrees without uninvited assistance from us. Perhaps others would take our position more seriously, at least recognizing our dedication to a truly biblical view of civil law instead of to a self-sanctified program of pragmatic power politics.[304]

VI. CONCLUSION

True morality cannot be promoted through the fear of man. Only the fear of God can lead men to Him. The world should have nothing to fear from the Christian, who would never seek to impose his view of God's moral law on society at large. To the contrary, the Christian's obligation to submit to all human authority should make the Christian the least threatening of all citizens.

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[304] Stern, *supra* note 80, at 11.

BEGGING THE HIGH COURT FOR CLARIFICATION: HYBRID RIGHTS UNDER *EMPLOYMENT DIVISION V. SMITH*

*Ryan M. Akers**

> The court begins its opinion by stating that this is a case in search of a controversy. One wonders, rather, whether this is a court afraid of a case. No court would eagerly enter the jurisprudential thicket surrounding the intersection of First Amendment free exercise concerns and [another companion right].[1]

I. INTRODUCTION

It is a mathematical axiom that zero plus zero always equals zero[2] and that any number greater than zero plus any number greater than zero always equals the sum of those two numbers. The latter principle can otherwise be stated as two values that are added together create a single greater value. In American jurisprudence, this principle is apparent when separate rights, statutes, or court decisions are considered in tandem to create a greater penalty, protection, or right.[3]

It is not the purpose of this article to offer a complete solution to what has become murky waters surrounding the Supreme Court's interpretation of the Free Exercise Clause.[4] While it would be logical to

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1 Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1147 (9th Cir. 2000) (O'Scannlain, J., concurring).

2 Henderson v. Kennedy, 253 F.3d 12, 19 (D.C. Cir. 2001).

3 *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 69 (3rd ed. 1996) (discussing Chief Justice Marshall's reliance on "structures and relationships" among various constitutional provisions).

> I am inclined to think well of the method of reasoning from structure and relation. I think well of it, above all, because to succeed it has to make sense – current, practical sense. The textual-explication method, operating on general language, [contains] within itself no guarantee that it will make sense, for a court may always present itself or even see itself as being bound by the stated intent, however nonsensical, of somebody else. [With structural approaches] we can and must begin to argue at once about the practicalities and proprieties of the thing, without getting out dictionaries whose entries will not really respond to the question we are putting. [We] will have to deal with policy and not with grammar.

Id. (quoting C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 22-23 (1969)).

4 *See, e.g.*, Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 1 (1989).

suppose that Constitutional Construction 101 requires that the highest possible level of scrutiny be given to the alleged violation of any provision expressly written into the text of the Constitution, a given provision must be considered in the context in which it is currently being interpreted to be effectual. There is no doubt that the right to the free exercise of religion is a fundamental right enjoyed by citizens of the United States guaranteed by the First Amendment of the Constitution.[5] That right was extended to the states in 1940.[6] Prior to *Employment Division v. Smith*,[7] the Supreme Court agreed that the right to free exercise of religion is fundamental. In *Sherbert v. Verner*,[8] the Court required the state to show a compelling interest in promulgating and enforcing any law that results in the violation of an individual's right to the free exercise of religion.[9]

Even under this seemingly straightforward test, courts were regularly adhering to the principle that "an individual's religious beliefs [cannot] excuse him from compliance with an otherwise valid law prohibiting conduct that the state is free to regulate."[10] Consequently, the compelling interest standard for review of free exercise claims was quickly becoming a misnomer.[11]

This article will expose the above stated incongruity, describe the resulting confusion surrounding the treatment of hybrid rights, and reveal the possible value in the Court's unpopular formulation of the Hybrid Right's Doctrine enunciated in *Smith*.[12] Part II will introduce the Hybrid Rights Doctrine and the problem associated with treating violations of multiple constitutional provisions the same as violations of

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> Since the critical terms in the [religion] clauses are neither self-evident nor defined, and religion is a profoundly emotional subject, it is not surprising that the religion clauses have given rise to enormous controversy, both popular and academic, and to a body of case law riven by contradictions and bogged down in slogans and metaphors ("wall of separation," "entanglement," "primary effect"). There is need for a fresh approach.

Id.

[5] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) (holding that, when state laws impinge on personal rights protected by the Constitution, strict scrutiny is applied).

[6] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[7] Employment Div. v. Smith, 494 U.S. 872 (1990).

[8] Sherbert v. Verner, 374 U.S. 398 (1963).

[9] *Id.* at 403, 406-09.

[10] *Smith*, 494 U.S. at 878-79. For a general consideration of pre-*Smith* free exercise jurisprudence, see Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

[11] *Smith*, 494 U.S. at 885.

[12] *Id.* at 881-82.

single constitutional provisions. First, this Part will explore the origins and implications of the Hybrid Rights Doctrine in the context of the Supreme Court's formulation of the issue in *Smith*. Then, it will use the recent opinion of the Second Circuit in *Leebaert v. Harrington*[13] to illustrate a current analytical approach and the challenges facing a court attempting to apply *Smith*.

Part III will provide an objective analysis of the confusion that has embraced the district and appellate courts in interpreting *Smith*.[14] This Part will consider the three interpretive approaches used by the various courts. First, it will address the position of the Second and Sixth Circuits which hold that the Hybrid Rights Doctrine is not a constitutional doctrine. Second, this Part will address the theory that only a colorable constitutional claim is needed to join a free exercise claim to invoke the *Smith* exception. The third approach this Part will discuss is that an independently viable claim must be joined with a valid free exercise claim in order to invoke the *Smith* hybrid rights exception.

Part IV will offer an objective application and analysis of the various interpretations and conclude that the Supreme Court should articulate a clear affirmation that the Hybrid Rights Doctrine is a constitutional doctrine. This Part will argue that the Court should make clear that an independently viable constitutional claim is required in conjunction with a free exercise claim.

The purpose of this article is to extrapolate upon the dictate of *Smith*, which purports to do away with the once requisite compelling interest standard[15] for free exercise challenges and replace it with something novel (or maybe not so novel). Regardless, the vastly different approaches to the language in *Smith* taken by courts across the country will almost certainly force the high court to revisit and clarify exactly what it meant.[16]

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[13] Leebaert v. Harrington, 332 F.3d 134 (2d Cir. 2003).

[14] *See also* Peter M. Stein, Smith v. Fair Employment and Housing Commission: *Does the Right to Exclude, Combined with Religious Freedom, Present a "Hybrid Situation" under* Employment Division v. Smith? 4 GEO. MASON L. REV. 141, 143 n.4 (1995) (citing numerous cases in which state courts and federal courts have arrived at different conclusions derived from varying interpretations concerning the application of *Smith's* hybrid rights language).

[15] City of Boerne v. Flores, 521 U.S. 507, 534 (1997) ("Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to Constitutional law.").

[16] *Ecclesiastes* 5:8 ("If you see the poor oppressed in a district, and justice and rights denied, do not be surprised at such things; for one official is eyed by a higher one, and over them both are others higher still.").

II. THE HYBRID RIGHTS DOCTRINE

A. *The Hybrid Rights Doctrine Under* Employment Division v. Smith

In April 1990, Justice Scalia delivered the opinion of the Supreme Court in *Smith* and vastly changed the jurisprudential landscape regarding the Free Exercise Clause. The crux of *Smith* is best summed up by the following excerpt from Justice Scalia's opinion:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, *but the Free Exercise Clause in conjunction with other constitutional protections*, such as freedom of speech and of the press or the *right of parents to direct the education of their children*.[17]

After *Smith*, the general rule was that a facially neutral and generally applicable state regulation is constitutional, regardless of how the regulation affects the exercise of religion.[18] The exception to this general rule is a hybrid situation.[19] A hybrid rights situation is one in which a free exercise claim is made in conjunction with another constitutional claim.[20] Where a valid hybrid rights claim is made, a higher level of scrutiny is required to justify the violation of those rights.[21] In support of this new approach to free exercise claims, the opinion stated:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct . . . "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling" . . . contradicts both constitutional tradition and common sense.[22]

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[17] Employment Div. v. Smith, 494 U.S. 872, 881 (1990) (citations omitted) (emphasis added). The latter part of this quotation ("the right of parents . . . to direct the education of their children") was derived from the holdings of Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) and Wisconsin v. Yoder, 406 U.S. 205 (1972).

[18] *Smith*, 494 U.S. at 890 (holding it is consistent with the Free Exercise Clause to deny unemployment benefits for violation of a general and neutrally applicable law prohibiting ingestion of peyote, even if ingestion was a religious act).

[19] *Id.* at 881.

[20] *Id.*

[21] With respect to the right of parents to direct the education of their children, Justice Scalia went on to say that the Court's holding in *Pierce* as interpreted in *Yoder* provides that "when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment." *Id.* at 881 n.1 (quoting *Yoder*, 406 U.S. at 233).

[22] *Id.* at 885 (citations omitted).

Writing for the majority, Justice Scalia reasoned that the compelling interest standard for justifying a violation of an individual's right to the free exercise of religion is qualitatively different from applying that standard to other constitutional provisions, such as equal protection or free speech.[23] He stated that "[w]hat it produces in those other fields – equality of treatment and an unrestricted flow of contending speech – are constitutional norms; what it would produce here – a private right to ignore generally applicable laws – is a constitutional anomaly."[24] Hence, a free exercise claim in isolation is insufficient to warrant the violation of a generally applicable law, but if it is joined with another right that the Court deems to be within the scope of a "constitutional norm," the combined protection may be sufficient.

The Supreme Court, in a decision subsequent to *Smith*, reiterated that, when a law is not both neutral and generally applicable, it must, under the Free Exercise Clause, be justified by a compelling state interest and be narrowly tailored to advance that interest.[25] Consequently, the test for free exercise claims utilized prior to *Smith* (requiring strict scrutiny) remains for laws that either facially, or in practice, discriminate on the basis of religion.[26]

The result that has raised so much controversy is that the Free Exercise Clause has been effectively abrogated to mere surplusage in the face of a neutral and generally applicable law; it requires help from some other source in the Constitution to validate the Free Exercise claim.[27] Furthermore, in regard to a law that is neither neutral nor of general applicability, the Free Exercise Clause is not being interpreted as the grant of an affirmative constitutional right.[28] In the latter case, this interpretation leaves no substance to an independent Free Exercise Clause. The Court treats it as a virtual non-suspect class by which the Fourteenth Amendment's right to equal protection requires only a rational state interest to justify a law that discriminates based upon

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[23] *Id.* at 885-86.

[24] *Id.* at 886.

[25] Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32 (1993).

[26] *Id.* at 534.

[27] *Id.* at 566-67 (Souter, J., concurring in part) (claiming that a hybrid right is illogical because, if another constitutional right is required to make it, then there is no need to mention the Free Exercise Clause at all).

[28] *See* City of Boerne v. Flores, 521 U.S. 507, 550 (1997) (O'Connor, J., dissenting) (remarking that the Framers of the Constitution did not intend that the Free Exercise Clause be interpreted merely to prevent the "government from adopting laws that discriminated against religion, . . . [but] that the Constitution affirmatively protects religious free exercise and that it limits the government's ability to intrude on religious practice").

religion.[29] The Free Exercise Clause is not even given the same weight as would be given any other fundamental right under an Equal Protection analysis. In sum, *Smith* has been a difficult decision for courts, both to apply its hybrid rule and to give a sound rationale for its choice of application.[30]

B. Leebaert v. Harrington: *An Example of the Confusion that is the Hybrid Rights Doctrine*

On June 13, 2003, the United States Court of Appeals for the Second Circuit held that the language in *Smith* "relating to hybrid claims is dicta and not binding upon this court."[31] The situation at issue in *Leebaert v. Harrington*[32] is not atypical of those confronted by other courts asked to rule on the applicability of *Smith* and its hybrid rights language. As a Christian, Turk Leebaert objected to his seventh-grade son, Corky, being forced to attend his public school's health education curriculum.[33] Leebaert contended that, because the public school required his son to attend these classes, the school was infringing upon both his Fourteenth Amendment right,[34] under the Due Process Clause, to direct the upbringing of his children,[35] and his First Amendment right, under the Free Exercise Clause, to the free exercise of his

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[29] *See generally* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976). For equal protection purposes, "a suspect class is one saddled with such disabilities, or subjected to such history of purposeful unequal treatment, or regulated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* (internal quotations omitted).

[30] *See* Robin Cheryl Miller, Annotation, *What Constitutes 'Hybrid Rights' Claim Under* Employment Div., Dept. of Human Resources of Oregon v. Smith, *494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876*, 163 A.L.R. FED. 493 (2003).

> [A] number of courts have considered whether the language in *Smith* concerning hybrid rights claims was intended to establish constitutional doctrine, and most such courts, embracing the hybrid rights doctrine, have stated or recognized that, under *Smith*, where a hybrid rights claim is shown to exist, the free exercise claim is not subject to the general rule announced in *Smith*, that a 'valid and neutral law of general applicability' does not violate the Free Exercise Clause, and instead the free exercise claim is subject to a higher level of scrutiny, although a few courts, apparently rejecting the hybrid rights doctrine, have declared that the conjoining of an independent constitutional claim with a free exercise claim does not except the free exercise claim from the general rule announced in *Smith*.

Id. at 504.

[31] Leebaert v. Harrington, 332 F.3d 134, 143 (2d Cir. 2003) (quoting Knight v. Conn. Dep't. of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001)).

[32] *Id.*

[33] *Id.* at 136-37.

[34] No state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

[35] *Leebaert*, 332 F.3d at 137.

religion.[36] His free exercise claim was based upon his religious belief that abstention from sex before marriage is appropriate, the school's teaching that a family does not necessarily have to be comprised of a man and woman as the basic unit is contrary to his beliefs, and teaching regarding usage of drugs and tobacco are best left in the home.[37] Furthermore, he stated that he as the father should be the one to teach his children about health, sex, and character development, rather than the government.[38]

Leebaert asserted that the violation of his rights under the Fourteenth Amendment and the First Amendment, either separately or in conjunction, required the court to apply strict scrutiny; the school's curriculum and attendance requirements "must be narrowly tailored to meet a compelling state interest."[39] The court refused to do so and applied middle-tier scrutiny, which required only that the public school show a rational state interest to justify its curriculum and attendance requirements,[40] a test that is easily overcome. To understand Leebaert's claims, a brief summary of the Second Circuit's rationale intertwined with standing tests and determinations by the Supreme Court regarding similar claims is necessary.

1. Leebaert's Claim that Parents Have a Fundamental Right to Direct the Upbringing of Their Children

In its *Leebaert* opinion, the Second Circuit began its reasoning concerning Leebaert's parental rights claim by stating that "[w]here the right infringed is fundamental, strict scrutiny is applied to the challenged governmental regulation."[41] In a number of cases, the Supreme Court has stated that "the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests" recognized by the Court.[42] In *Troxel v. Granville*,[43] the Supreme Court quoted the cases of *Meyer v. Nebraska*[44] and *Pierce v. Society of Sisters*[45] to support its longstanding position that

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[36] *Id.* at 137-38.

[37] *Id.*

[38] *Id.* at 136-37.

[39] *Id.* at 139.

[40] *Id.* at 142-43.

[41] *Id.* at 140.

[42] Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality).

[43] *Id.*

[44] Meyer v. Nebraska, 262 U.S. 390, 401 (1923). "In *Meyer*, the Supreme Court held that 'the right of parents to engage him so to instruct their children . . . [is] within the liberty of the [Due Process Clause of the Fourteenth] Amendment.'" *Leebaert*, 332 F.3d at 140 (quoting *Meyer*, 262 U.S. at 400)).

[45] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925). In *Pierce*, the Supreme Court reasoned:

parents have the right to both "control the education of their own" and "direct the upbringing and education of children under their control."[46] The *Troxel* opinion continued by stating that "the Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a better decision could be made."[47] With this language, it would logically follow that *any* regulation infringing on a parent's right to raise his children would be subject to strict scrutiny.

Even after being confronted with the Supreme Court's holdings in *Meyer*, *Pierce*, and *Troxel*, the Second Circuit concluded that the public school's infringement of Leebaert's parental rights should not be subject to strict scrutiny.[48] To reach this result, the court dealt with the scope of the admitted right to direct the upbringing of one's children by asserting that the issue in *Leebaert* was really one of "whether Leebaert's asserted right – the right to excuse his son from mandatory public school classes – is fundamental."[49]

In so doing, the court effectively transformed the essence of Leebaert's claim from the general right to direct the upbringing of his children, under *Meyer*, *Pierce*, and *Troxel*, to the specific right of a parent to change the public school curriculum. Once the argument was so framed, precedent was examined to determine the validity of the newly defined right that Leebaert was supposedly asserting. The Second Circuit relied on another Supreme Court case, *Runyon v. McCrary*,[50] to limit the precedential effect of *Meyers*, *Pierce*, and *Troxel*.[51] *Runyon* did not even deal with parental rights, but with a Caucasian private school's denial of admission to African-American students. In *Runyon*, the Supreme Court stated that the situation in which a private school refused to admit African American students infringed "no parental right recognized in *Meyer*, *Pierce*, [or] *Yoder*."[52] The *Runyon* court, while recognizing as valid a parent's right to direct the upbringing of his

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> rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty . . . excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.

Id. at 535.

[46] *Troxel*, 530 U.S. at 65 (quoting *Meyer*, 262 U.S. at 401, and *Pierce*, 268 U.S. at 534-35).

[47] *Id.* at 72-73 (internal quotations omitted).

[48] *Leebaert*, 332 F.3d at 142-43.

[49] *Id.* at 140.

[50] Runyon v. McCrary, 427 U.S. 160 (1976).

[51] *Leebaert*, 332 F.3d at 140.

[52] *Runyon*, 427 U.S. at 177.

child,[53] held that it was unconstitutional, on other grounds, to deny students admission on the basis of their race.[54]

The *Leebaert* court, using language from *Runyon*, described the holdings in *Meyer* and *Pierce* as protecting the right of parents regarding "the subject matter . . . taught at . . . private school[s] and[,] . . . the latter established a parental right to send . . . children to a particular private school rather than a public school."[55] This language allowed the *Leebaert* court to piggyback on a decision made by the First Circuit[56] to thereby conclude that "*Meyer*, *Pierce*, and their progeny do not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught."[57] Consequently, the *Leebaert* court held that requiring a child to attend "health education" classes does not unconstitutionally infringe upon a parent's right to direct the upbringing of his children, when the public school can demonstrate a rational reason for requiring it in its curriculum.[58]

2. Leebaert's Hybrid Rights Claim

The *Leebaert* court balked at Leebaert's assertion that his claim warranted strict scrutiny because it implicated both his right to free exercise and his right to direct the upbringing of his child, thus creating a hybrid rights claim under *Employment Division v. Smith*.[59] Instead,

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[53] The Court quoted *Pierce* for the proposition that it is the "liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925)). Consequently, it remains that, when a fundamental right has been infringed by governmental regulation, including the right of parents to direct the education of their children, as recognized in *Meyer*, *Pierce*, *Runyon*, and *Troxel*, strict scrutiny is applied. *See Leebaert*, 332 F.3d at 140. The issue becomes: What is the scope of the right to direct one's minor children?

[54] *Runyon*, 427 U.S. at 186. It is interesting to note that the Court in *Runyon* made a point of mentioning that "[n]othing in this record suggests that [either of the schools at issue in the case] excludes applicants on religious grounds, and the Free Exercise Clause of the First Amendment is thus in no way involved." *Id.* at 167 n.6.

[55] *Leebaert*, 332 F.3d at 140 (quoting *Runyon*, 427 U.S. at 177) (internal quotation omitted).

[56] Brown v. Hot, Sexy, and Safer Prods., Inc., 68 F.3d 525 (1st Cir. 1995). *Brown* was decided prior to the Supreme Court's decision in *Troxel*. In its decision, the First Circuit stated that "the Supreme Court has yet to decide whether the right to direct the upbringing and education of one's children is among those fundamental rights whose infringement merits heightened scrutiny." *Id.* at 533. The First Circuit declined to answer that question and stated that the parental claim would fail even strict scrutiny. *Id.* The Court stated that the parental rights delineated in *Meyer* and *Pierce* did not include "a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children." *Id.*

[57] *Leebaert*, 332 F.3d at 141.

[58] *Id.* at 143.

[59] *Id.* at 143-44.

the court claimed that the hybrid rights approach was not binding upon it.[60] In making this assertion, the court relied on a Sixth Circuit case, *Kissinger v. Board of Trustees of the Ohio State University*,[61] which "explicitly rejected a more stringent legal standard for hybrid claims."[62] The court agreed with the *Kissinger* court that it could "think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated."[63] Because the court flatly rejected the viability of a hybrid rights claim, it did not discuss the validity of Leebaert's claims under a hybrid rights analysis.

Nevertheless, Leebaert argued that, even though the court refused to recognize the applicability of *Smith*, it surely could not ignore the Supreme Court's holding in *Wisconsin v. Yoder*.[64] The *Leebaert* court did in fact recognize the holding in *Yoder* to be the "Supreme Court['s] invalidat[ion of] Wisconsin's compulsory high school attendance law under the Free Exercise Clause in response to Amish parents' objections."[65] The *Leebaert* court further recognized that the Supreme Court held that "when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment."[66]

The *Leebaert* court continued by stating that Leebaert's claim stood in contrast with the situation in *Yoder* by citing the "pains" the Supreme Court took to limit its holding to a free exercise claim of the nature revealed in the *Yoder* court's record.[67] Because Leebaert failed to allege that "his [religious] community's entire way of life is threatened by Corky's participation in the mandatory health curriculum," the court held that his "free exercise claim is . . . qualitatively distinguishable from that alleged in *Yoder*."[68] In the end, the Second Circuit would not be swayed. The question of the viability of hybrid rights under *Smith* delved deeper into murky waters, with the answer left unknown.

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60 *See id.* at 143.

61 Kissinger v. Bd. of Trs. of the Ohio State Univ., 5 F.3d 177 (6th Cir. 1993).

62 *Leebaert*, 332 F.3d at 144.

63 *Id.*

64 Wisconsin v. Yoder, 406 U.S. 205 (1972).

65 *Leebaert*, 332 F.3d at 144.

66 *Id.* (quoting *Yoder*, 406 U.S. at 233).

67 *Id.*

68 *Id.* at 144-45 (quoting Brown v. Hot, Sexy, and Safer Prods., Inc., 68 F.3d 525, 539 (1st Cir. 1995)).

III. THREE CLEAR VIEWPOINTS EMERGE REGARDING HYBRID RIGHTS UNDER *EMPLOYMENT DIVISION V. SMITH*

The courts have come up with three very different interpretations of the hybrid rights language in *Smith*. These three different interpretations have resulted in a split among six circuit courts of appeals. Courts adhering to the first interpretation refuse to accept the language in *Smith* as binding constitutional doctrine. The Second and Sixth Circuits have refused to accept *Smith*'s hybrid rights language, calling it mere dicta.[69] The second position requires only a "colorable claim" that a constitutional right has been violated in addition to a free exercise claim to warrant heightened scrutiny under a hybrid rights theory; courts within the Ninth and Tenth Circuits have adopted this approach.[70] The third position holds that the hybrid rights exception can be invoked only when an independently viable claim is joined with a free exercise claim; courts within the First Circuit and the D.C. Circuit have espoused this view.[71] To demonstrate the foregoing divergence of opinion, the following analysis summarizes various court decisions which have taken one of the three views in attempting to decipher the hybrid rights language in *Smith*.

A. Denial of the Hybrid Rights Doctrine

The Second and Sixth Circuit Courts have stated that the language in *Smith* was merely dicta and that it does not constitute binding constitutional doctrine.[72] The first time hybrid rights were addressed by the Sixth Circuit was in *Vandiver v. Hardin Board of Education*.[73] In *Vandiver*, a home-schooler was forced to take equivalency tests in order to be designated a senior upon matriculating at a public school.[74] He objected to this testing and alleged that the required testing violated his and his parents' constitutional rights.[75] The court held that there was no violation of free exercise rights in this situation, but in so doing it considered the possible implication of hybrid claims.[76]

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69 *Leebaert*, 332 F.3d at 143; Kissinger v. Bd. of Trs. of the Ohio State Univ., 5 F.3d 177 (6th Cir. 1993).

70 *See* Miller v. Reed, 176 F.3d 1202 (9th Cir. 1999); Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694 (10th Cir. 1998).

71 *See* Henderson v. Kennedy, 253 F.3d 12 (D.C. Cir. 2001); Gary S. v. Manchester Sch. Dist., 241 F. Supp. 2d 111 (D.N.H. 2003). "The First Circuit has addressed the issue, holding that the [*Smith* hybrid] exception can be invoked only if the plaintiff has joined a free exercise challenge with another independently viable constitutional claim." *Id.* at 121.

72 *See supra Leebaert*, 332 F.3d at 143; *Kissinger*, 5 F.3d at 180.

73 Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927 (6th Cir. 1991).

74 *Id.* at 929-30.

75 *Id.*

76 *Id.* at 931-34.

The *Vandiver* court recognized that "[t]he *Smith* decision implies without stating that those hybrid claims which raise a free exercise challenge coupled with other constitutional concerns remain subject to strict scrutiny."[77] The court essentially expanded the holding of *Smith* concerning hybrid rights from criminal prohibitions to civil issues, and particularly, educational requirements.[78] Prior to the *Vandiver* decision, the scope of the applicability of hybrid rights claims was unclear. The decision was important in that it opened the door for hybrid rights' applicability to virtually every conceivable claim, thus providing a basis by which other courts (particularly in other circuits) could employ *Smith*'s hybrid rights formulation to both criminal and non-criminal statutory regulations.

Vandiver was implicitly overruled in *Kissinger v. Board of Trustees*. *Kissinger* is now recognized as the leading case for the proposition that *Smith's* hybrid rights language is mere dicta.[79] In *Kissinger*, the plaintiff was a woman enrolled in Ohio State University's Veterinary School who objected to the school's requirement of a class (Operative Practices and Techniques) that entailed performing surgery on a living and healthy animal.[80] Following the surgery, the animal was killed.[81] She objected to taking the class and requested an alternative means of fulfilling the requirement.[82] The school refused and she brought a lawsuit alleging that the school violated her constitutional rights to freedom of speech, freedom of association, freedom of religion, due process, and equal protection.[83] Faced with a lawsuit, the school settled with the plaintiff by offering an alternative class, but the case continued to resolve a dispute arising out of the assessment of attorneys' fees with the plaintiff alleging only a violation of her right to the free exercise of her religion.[84] The plaintiff was unsuccessful because the Sixth Circuit held that Ohio State's curriculum was generally applicable to all of its veterinary students, and it was not aimed at any particular religion or religious practice.[85]

Before arriving at the above stated conclusion, the Sixth Circuit addressed *Smith*. The court stated that the opinion in *Smith* did not "explain how the standards under the Free Exercise Clause would

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[77] *Id.* at 933.

[78] *Id.* at 932.

[79] Kissinger v. Bd. of Trs. of the Ohio State Univ., 5 F.3d 177 (6th Cir. 1993). *See also infra* note 92 and accompanying text (relying on *Kissinger*'s interpretation of *Smith*).

[80] *Id.* at 178.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 178-79.

[84] *Id.* at 179.

[85] *Id.*

change depending on whether other constitutional rights are implicated," and that until the Supreme Court clarifies what it meant, the Sixth Circuit would not apply hybrid rights.[86] In reference to *Vandiver*, where the court seemingly accepted the applicability of hybrid rights, the court stated that that opinion "did not hold that the legal standard under the Free Exercise Clause depends on whether a free-exercise claim is coupled with other constitutional rights."[87] The court also distinguished the case from *Yoder* by stating that, in *Yoder*, school attendance was mandatory, but the plaintiff in *Kissinger* had chosen to attend school there.[88]

In 2001, in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*,[89] the Sixth Circuit again had occasion to revisit the hybrid rights issue. In that case, a city had an ordinance requiring door-to-door solicitors to register with the city before they could solicit private residences.[90] Under the ordinance, owners of private residences had the option of filling out a form with the city that permitted them to check off certain groups that they did not want to solicit their homes.[91] A group of Jehovah's Witnesses challenged the ordinance claiming it violated their rights to free speech and free exercise of religion. But the court, relying in part on *Kissinger*, said the ordinance was content neutral and of general applicability; consequently, intermediate scrutiny applied to the claim.[92]

Kissinger was also relied on in *Prater v. City of Burnside*,[93] a case involving a church alleging at the trial court, among other claims, that the city violated its free exercise rights when it elected to develop a road between two adjacent lots owned by the church.[94] The Sixth Circuit reminded the trial court that it should not have even analyzed this situation for a valid hybrid rights claim because the circuit had foreclosed the validity of such a claim in *Watchtower*.[95]

The Second Circuit was asked to interpret the language in *Smith* relating to hybrid rights in *Knight v. Connecticut Department of Public*

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86 *Id.* at 180.

87 *Id.*

88 *Id.*

89 Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 240 F.3d 553 (6th Cir. 2001).

90 *Id.* at 558-59.

91 *Id.*

92 *Id.* at 561-62 (relying on its decision interpreting *Employment Division v. Smith* in *Kissinger v. Board of Trustees* for the conclusion that the standard of scrutiny does not change simply because a hybrid rights claim is made).

93 Prater v. City of Burnside, 289 F.3d 417 (6th Cir. 2002).

94 *Id.* at 422-23.

95 *Id.* at 430.

Health.[96] In that case, two state employees were told not to discuss their religious beliefs during their official duties.[97] The court ruled that it did not need to address the general applicability of hybrid rights as stated in *Smith* because the facts in the case indicated that the situation was squarely within the "public employee context" and thus must be analyzed under a different test.[98] Before it gave its ruling, however, the court stated that it read *Smith*'s hybrid rights language as dicta.[99]

Finally, in 2003, *Leebaert*[100] came before the Second Circuit. In making its decision to declare that *Smith*'s discussion of hybrid rights was dicta and not binding on it, the court relied on its decisions in both *Kissinger* and *Knight*.[101]

B. Colorable Claim in Conjunction with a Free Exercise Claim Invokes the Hybrid Rights Doctrine

The Ninth and Tenth Circuits have enriched the debate with, at times, colorful analysis of hybrid rights in coming to the conclusion that a free exercise claim coupled with another colorable constitutional claim is sufficient to invoke a higher level of scrutiny.

The Ninth Circuit began its interpretation of *Smith* in *American Friends Service Committee Corp. v. Thornburgh*.[102] In *Thornburgh*, a group of Quakers sued the United States for violating their constitutional rights to free exercise and an employer's right to employ individuals for his business.[103] The court held that the right to employ is not a cognizable right and thus fails as a right that could support a free exercise claim and invoke the hybrid rights analysis as stated in *Smith*.[104]

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[96] Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156 (2d Cir. 2001).

[97] *Id.* at 160.

[98] *Id.* at 167.

[99] *Id.*

[100] *See supra* Part II.B.

[101] *See supra* note 69 and accompanying text.

[102] Am. Friends Serv. Comm. Corp. v. Thornburgh, 941 F.2d 808 (9th Cir. 1991) (opinion revised in 961 F.2d 1405 (9th Cir. 1991)).

[103] *Id.* at 809.

[104] *Id.* The Court went on to state:

> [the] "right to employ" has been accorded insufficient constitutional protection to place it alongside the cases *Smith* cites as examples of "hybrid claims." Those cases are restricted to express constitutional protections such as freedom of speech, and firmly recognized substantive due process rights such as the privacy right in rearing children. There would be little left of the *Smith* decision if an additional interest of such slight constitutional weight as "the right to hire" were sufficient to qualify for this exception.

Id.

Miller v. Reed[105] is one of the major cases that came before the Ninth Circuit regarding hybrid rights. The case involved a man who sued California's Department of Motor Vehicles because it required him to give his social security number in order to renew his driver's license.[106] He claimed that this requirement violated his constitutional rights to interstate travel and his free exercise of religion.[107] In its opinion, the court stated that hybrid rights claims are applicable to even non-criminally prohibited conduct.[108] The court expressed its acceptance of hybrid rights and articulated that, to make a hybrid rights claim, the "free exercise plaintiff must make out a 'colorable claim' that a companion right has been violated – that is, a 'fair probability' or a 'likelihood,' but not a certitude, of success on the merits."[109] In the case at hand, the court stated that there is not a constitutionally granted fundamental right to drive. Consequently, because the plaintiff in this case did not supplement his Free Exercise claim with a constitutional claim of colorable merit, he did not have a hybrid rights claim.[110]

In another case before the Ninth Circuit, *Thomas v. Anchorage Equal Rights Commission*, the court determined whether plaintiffs had standing to contest the constitutionality of an Alaska statute that prohibited landlords from discriminating among potential tenants based upon marital status.[111] The court held that, because no landlord had yet been injured by the law, the issue was not ripe, and therefore the landlords could not challenge the law.[112]

However, the concurrence and the dissent in *Thomas* discussed hybrid rights, alleging that it is likely that the majority came to its conclusion because it wanted to avoid deciding the possible hybrid rights claims.[113] The opinions claimed that *Smith*'s hybrid rights language is

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[105] Miller v. Reed, 176 F.3d 1202 (9th Cir. 1999).

[106] *Id.* at 1204.

[107] *Id.*

[108] *Id.* at 1207.

[109] *Id.*; *accord* Am. Family Ass'n v. City & County of San Francisco, 277 F.3d 1114 (9th Cir. 2002); Ventura County Christian High Sch. v. City of San Buenaventura, 233 F. Supp. 2d 1241 (C.D. Cal. 2002).

[110] *Miller*, 176 F.3d at 1208.

[111] Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1137 (9th Cir. 2000).

[112] *Id.* at 1142.

[113] *Id.* at 1147 (O'Scannlain, J., concurring). The concurrence candidly states that:

> The court begins its opinion by stating that this is a case in search of a controversy. One wonders, rather, whether this is a court afraid of a case. No court would eagerly enter the jurisprudential thicket surrounding the intersection of First Amendment free exercise concerns and civil rights created by fair housing laws. Thus we postpone, perhaps serendipitously, but ineluctably, definitive application of *Employment Division v. Smith*.

Id.

fraught with complexity both in doctrine and in practice.[114] The concurring opinion even listed several of the leading cases in other circuits that came to differing conclusions regarding the application of hybrid rights.[115] The concurring opinion completed its treatment of the hybrid rights issue by stating that, "[p]erhaps the Supreme Court will have an opportunity before the issue arises again in this circuit to refine its approach in this area in light of the experience of five circuits."[116]

The dissenting opinion posed a hypothetical wherein a city bans consumption of all alcohol in the interest of combating rampant alcoholism in the community and Catholics seek an exemption for communion purposes. The dissent expressed concern over the possibility that *Smith* would definitively preclude such an exemption because the Catholics may not be able to formulate a proper hybrid claim.[117] The dissent continued by stating:

> The Free Exercise Clause is not mere surplusage. It establishes a constitutional right and has the force of law. Proper construction requires that the clause be construed to establish a right other than and in addition to the rights established by the Free Speech Clause, The Establishment Clause, and the Equal Protection Clause.[118]

The Tenth Circuit has given virtually the same treatment to hybrid rights as the Ninth Circuit. In *Swanson v. Guthrie*, parents sued a public school district, alleging a violation of their free exercise rights and their right to direct the upbringing of their child, for its refusal to allow their home-schooled child to attend the school part-time.[119] The court held that the right to direct the upbringing of a child does not include the right to send a child to a public school on a part-time basis, and, consequently, a valid hybrid rights claim had not been alleged.[120] Specifically, the court intimated that "[w]hatever the *Smith* hybrid-rights theory may ultimately mean, we believe that it at least requires a colorable showing of infringement of recognized and specific constitutional rights, rather than the mere invocation of a general right such as the right to control the education of one's child."[121]

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[114] *Id.* at 1147-48.

[115] *Id.* (showing that for a valid hybrid rights claim, a plaintiff must show a violation of his free exercise right and: according to the Ninth and Tenth Circuits, a colorable infringement of a companion right; according to the D.C. and First Circuits, an independently viable claim of infringement of a companion right; and according to the Sixth Circuit, the hybrid rights exception doesn't even apply).

[116] *Id.* at 1148.

[117] *Id.* at 1150 (Kleinfield, J., dissenting).

[118] *Id.*

[119] Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 696 (10th Cir. 1998).

[120] *Id.* at 703.

[121] *Id.* at 700.

In *Thiry v. Carlson*, parents who were one thirty-second Indian fought to save their house and land, upon which was buried their still-born baby, and through which the government wanted to build a highway.[122] The family objected to the government's proposal, alleging that it violated their right of free exercise and right to family unity and integrity.[123] The Court ultimately held that there was no substantial burden on the family's religious rights because the gravesite could be moved and the family could be buried alongside her. Thus, in the face of a neutral and generally applicable law, there is nothing to base a hybrid rights claim upon.[124]

In the case of *Axson-Flynn v. Johnson*, heard before the United States District Court for the District of Utah, a female student at a state university was required as part of its curriculum to perform in plays.[125] She told professors she would not use profanity or remove clothing at an audition for an upcoming play.[126] In a performance, she omitted profane words and feared she would be expelled from the program based upon meetings she had had with her professors and the director of the program.[127] She sued the school, alleging violation of her rights to free exercise and free speech forming a hybrid right.[128] The court held that the professors were entitled to immunity from such a suit and that the curriculum requirements bore more than a reasonable relationship between the curriculum and the purpose of ensuring that graduates were competent in the field.[129]

Although it did not make a difference for the plaintiff in *Johnson*, the court's opinion is quite helpful in fleshing out exactly what is meant by a colorable claim. There, the plaintiff had alleged a free speech right that the court held failed as a matter of law. But was it sufficient to make a colorable claim? The court referred to Black's Law Dictionary, which defines a colorable claim as one "appearing to be true, valid, or right."[130] In considering this definition, the court declared that:

> If this definition is taken as the standard, it cannot be said that Plaintiff has a colorable Free Speech claim which would invoke a higher level of scrutiny; she has not made a "showing of infringement of recognized and specific constitutional rights" that appears true,

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122 Thiry v. Carlson, 78 F.3d 1491, 1493 (10th Cir. 1995).

123 *Id.*

124 *Id.* at 1496.

125 Axson-Flynn v. Johnson, 151 F. Supp. 2d 1326, 1328 (D. Utah 2001).

126 *Id.*

127 *Id.* at 1329.

128 *Id.* at 1328.

129 *Id.* at 1341.

130 *Id.* at 1338 (quoting BLACK'S LAW DICTIONARY 259 (7th ed. 1999)).

> valid, or right because her Free Speech claim fails as a matter of law.[131]

Even with such a definition of a colorable claim, the problem becomes what exactly constitutes "appearing?" The court then went on to recognize that the Tenth Circuit:

> has more generously defined what constitutes a colorable claim, holding that: to determine whether a claim is colorable, it is necessary to examine its merits. A determination that a claim lacks merit, however, does not necessarily mean it is so lacking as to fail the colorable test. A . . . claim . . . is not colorable if it is immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial or frivolous.[132]

The *Johnson* court concluded that, under the Tenth Circuit's definition of a colorable claim, the plaintiff had "raised a genuine question regarding whether required participation in the [curriculum] constituted government compelled speech offending constitutional Free Speech protections."[133] Consequently, she made a colorable free speech claim and a hybrid rights claim. The court concluded that heightened scrutiny was required.[134] It decided, however, that strict scrutiny should not be applied, relying instead on *Yoder* to make the proper level of scrutiny "more than merely a reasonable relationship between its law and a purpose within the competency of the state."[135] Nevertheless, even under this heightened scrutiny, the court held that the plaintiff's claim failed.[136]

C. An Independently Viable Constitutional Claim Joined with a Free Exercise Claim Invokes the Hybrid Rights Doctrine

The First Circuit and the D.C. Circuit have required that a valid hybrid rights claim must include both a valid free exercise claim and an independently viable companion claim. The First Circuit case, *Brown v. Hot, Sexy and Safer Productions, Inc.*, is the leading case for this position.[137] In *Brown*, a public school required attendance at a sex education course; the parents of a student in that school brought due process, equal protection, and free exercise claims against the school for requiring attendance in these classes.[138] The court held that the parent's

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[131] *Id.*

[132] *Id.* (citing Harline v. DEA, 148 F.3d 1199, 1203 (10th Cir. 1998) (internal quotation marks omitted)); *see also* United States v. McAleer, 138 F.3d 852, 857 (10th Cir. 1998) (noting that "colorable" claims have "some possible validity").

[133] *Johnson*, 151 F. Supp. 2d at 1338.

[134] *Id.* at 1339.

[135] *Id.*

[136] *Id.* at 1341.

[137] Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525 (1st Cir. 1995).

[138] *Id.* at 529.

claims were without merit because, under equal protection, the discrimination was based upon viewpoint, not gender;[139] the free exercise claim failed because there would likely be no future violation of those rights;[140] the due process claim failed because the plaintiffs acknowledged that no post-deprivation procedure would correct the damage done.[141]

The court reasoned that the case did not present a hybrid rights claim because, since there was not a valid "privacy or substantive Due Process claim," the parents' "Free Exercise challenge is thus not conjoined with an independently protected constitutional protection."[142] Also, the free exercise claim was qualitatively distinguishable from that alleged in *Yoder*.[143] Thus, the court established that a valid hybrid rights claim in its jurisdiction required an independently viable constitutional claim.[144]

Similarly, the D.C. Circuit has stated that a valid hybrid rights claim requires an independently viable constitutional claim in addition to a valid free exercise claim.[145] In *Henderson v. Kennedy*, two Christians sought to sell t-shirts on the National Mall, but were prohibited from doing so by a National Park Service statute.[146] In upholding the constitutionality of the statute, the court rejected a possible hybrid rights claim analysis, stating that heightened scrutiny was not applicable in the case because both the free exercise and the free speech claims were untenable.[147] The court reasoned that it is illogical to hold that the "the combination of two untenable claims equals a tenable one," and added that, "in law as in mathematics zero plus zero equals zero."[148] The court held that a hybrid claim depends for its success on the success of the companion constitutional claim.[149]

IV. ANALYSIS OF THE THREE APPROACHES TO HYBRID RIGHTS

Generally, when the government can show a rational state interest for promulgating a neutral and generally applicable law, no violation of the First Amendment's Free Exercise Clause occurs. In his opinion in

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[139] *Id.* at 541.

[140] *Id.* at 539.

[141] *Id.* at 537.

[142] *Id.* at 539. *But see supra* Part II.B.

[143] *Id.*

[144] *See* Gary S. v. Manchester Sch. Dist., 241 F. Supp. 2d 111 (D.N.H. 2003); Pelletier v. Me. Principals' Ass'n, 261 F. Supp. 2d 10 (D. Me. 2003).

[145] *See* EEOC v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996).

[146] Henderson v. Kennedy, 253 F.3d 12 (D.C. Cir. 2001).

[147] *Id.* at 19.

[148] *Id.*

[149] *Id.*

Employment Division v. Smith, Justice Scalia claimed that it would produce a constitutional anomaly for an alleged violation of an individual's Free Exercise right to be overcome only by a compelling state interest.[150] However, if a right to free exercise is joined with another right the Court deems to be within the scope of a "constitutional norm," the combined hybrid right may raise the level of scrutiny.[151]

Nevertheless, when a neutral and generally applicable law infringes upon more than just one's free exercise right (a hybrid right), critics of hybrid rights would afford the same justification as that required for a violation of a single right. Should there not be some recognition of the fact that the law violates multiple constitutional rights?

For example, in the criminal law context, if an individual accidentally kills another person by knocking something over or by dropping something while leaving a bank, the resulting criminal charge for the offense, if any, may be merely manslaughter. However, under the felony murder doctrine, if that same event occurs while the accused is committing or fleeing the scene of a robbery, the resulting criminal charge for the combined offenses may be capital murder.[152] In isolation, the crimes of either manslaughter or robbery would fail to support a possible death sentence, but together, our jurisprudence elects to heighten the punishment. The law views each of the crimes of manslaughter and robbery as having a value higher than one and thus, when added together to result in a far more egregious offense to society, than either of the acts in isolation. Another example in the criminal context involves racially motivated conduct; when a criminal selects his victim because of his race, his sentence may be increased.[153]

Is it logical to apply this aggregation of law in the reverse, to afford greater weight to affirmative rights if asserted together? This question should be answered in the affirmative for any violation of a right that is valued at anything greater than nothing according to the above mathematical analogy. By this I mean that, in the United States all citizens have a range of personal inalienable rights, protected by the Constitution, that would logically garner a value of greater than zero (because, after all, they are the foundation of our legal system). Consequently, the combination of multiple constitutional rights should lead the Court to require higher standards of scrutiny to justify the violation of the rights.

Such aggregation, in fact, does take place among various provisions of the Constitution. For example, the Supreme Court's substantive due

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150 Employment Div. v. Smith, 494 U.S. 872, 886 (1990).

151 *Id.* at 885-86.

152 *See* Tison v. Arizona, 481 U.S. 137 (1987).

153 Wisconsin v. Mitchell, 508 U.S. 476 (1993).

process jurisprudence utilizes numerous constitutional provisions to arrive at various non-textual fundamental rights. To see substantive due process in action, note that at no place within the text of the Constitution do the terms "parenting," "contracting," "abortion," or "sexual intimacy" appear. Proponents of such "fundamental" rights rely on the text of the 14th Amendment, which provides that "no State can deprive any person of life, liberty or property without due process of law."[154] A deprivation of liberty occurs when state action invades certain rights provided to individuals by the Constitution.[155] The challenge before courts confronted with assertions of the above rights is to ascertain the scope of the meaning of the term "liberty" within the Due Process Clause.[156]

The Supreme Court has recognized that the term "liberty" grants a fundamental right to an individual's privacy.[157] This zone of privacy is derived from *several* fundamental constitutional guarantees that are enumerated within the Bill of Rights.[158] The right to privacy has provided the basis upon which the Court has found a constitutional right to parenting,[159] contracting,[160] abortion,[161] contraception,[162] and sexual intimacy,[163] among others. Is this not the adding together of various rights under the Constitution to produce new rights by which the Constitution affords the highest possible protection, requiring a compelling state interest to justify violation of any of them?

Another example of a constitutional right that fluctuates in the level of governmental justification required to violate it is the First Amendment right to the freedom of speech.[164] Violation of an individual's

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154 Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

155 Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997).

156 *Id.*

157 Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

158 *Id.* at 484. These Constitutional guarantees include the right of association contained in the First Amendment, the Third Amendment's prohibition against the quartering of soldiers, the Fourth Amendment's right of freedom from unreasonable searches and seizures, the Fifth Amendment's right against compelled self-incrimination, and the Ninth Amendment's language concerning the non-exclusivity of specific rights enumerated in the Constitution.

159 Troxel v. Granville, 530 U.S. 57 (2000); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925); Meyer v. Nebraska, 262 U.S. 390, 401 (1905).

160 Lochner v. New York, 198 U.S. 45 (1923).

161 Planned Parenthood v. Casey, 505 U.S. 833 (1992); Roe v. Wade, 410 U.S. 113 (1973).

162 Eisenstadt v. Baird, 405 U.S. 438 (1972).

163 Lawrence v. Texas, 539 U.S. 558 (2003).

164 *See* Bertrand Fry, Note, *Breeding Constitutional Doctrine: The Province and Progeny of the "Hybrid Situation" in Current Free Exercise Jurisprudence*, 71 TEX. L. REV. 833 (1993). Applying hybrid rights

right to free speech requires the government to show a compelling state interest when the regulation is aimed at the content of speech, and a lesser level of justification when regulation is aimed at conduct associated with speech.[165] While this difference in scrutiny results from the competing interests between the government and the individual, in various contexts the Court has recognized that the scrutiny afforded to alleged violations of free speech hinge upon the existence of another constitutional right. For example, the government must show a compelling interest when it promulgates a law that may chill free speech because it is overly broad or vague.[166] This is so because a statute that potentially limits a person's speech because he does not know if it applies to him violates both the individual's rights under the 14th Amendment's Due Process Clause and the First Amendment's right to free speech.

In the context of the hybrid rights asserted in *Smith*, the issue becomes: which interpretation is best in keeping with governmental regulatory concerns and its citizens' constitutional rights? Three basic approaches have emerged to answer the question of whether violation of a hybrid right (free exercise joined with another affirmative right) justifies heightened scrutiny to exempt an individual from a religiously neutral and generally applicable law.[167]

The first approach, the refusal to recognize hybrid rights, fails completely to provide for the possibility that multiple violations of a right should be justified by something more than a rational state interest on the part of the state. Not only in this regard does this viewpoint fail, but also because it essentially disregards the clear holding in *Yoder* that heightened scrutiny is required for violation of a free exercise right joined with a due process claim.[168] In so doing, this viewpoint retains the general holding in *Smith* prohibiting religious exemptions from neutral and generally applicable regulations, but leaves out the exception to that rule explicitly recognized in that opinion—except when another constitutional right is added to a free exercise claim.

> gives minority-religion adherents a way to signal that the lawmaker has exceeded its legitimate authority . . . . Justice Scalia clearly believes that the framework he lays out in *Smith* has general application. In *Barnes v. Glen Theatre, Inc.*, Justice Scalia advocated the same framework for use in free speech cases . . . he does take notice of the strong powers that are . . . granted to society in its effort to regulate itself.

Id. at 861.

[165] *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991).

[166] Gentile v. State Bar of Nev., 501 U.S. 1030 (1991); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

[167] *See supra* notes 69-71 and accompanying text.

[168] *See supra* note 21; *see also* Jonathan B. Hensley, Comment, *Approaches to the Hybrid-Rights Doctrine in Free Exercise Cases*, 68 TENN. L. REV. 119, 138 (2000).

The second approach, requiring a colorable claim in addition to the free exercise claim, is positive in that it retains independent force of law for the Free Exercise Clause, recognizing it for what it is: a constitutionally granted affirmative right. However, the loose requirement of adding to that claim only a colorable claim of another right fails to provide a bright-line test by which other courts can apply a hybrid analysis. The question of exactly what constitutes a colorable claim presents another difficulty for this position. It is a test that has for one of its primary elements a deliberately vague standard. If only a partial or colorable right must be proven, then the individual asserting the right could prevail on free exercise alone without proving infringement on an additional right. Such a result would be contrary to the stated exception to the general rule in *Smith*, which clearly required another right, not merely a colorable one, to be joined with free exercise to create a hybrid right that warrants higher scrutiny.

The third position, which requires an independently viable claim in addition to a free exercise claim, is the most accurate reading of the exception articulated in *Smith*. Here, the individual asserting a hybrid rights claim must show separate infringement of two affirmative rights. Nevertheless, the criticism is that this position effectively reads the Free Exercise Clause out of the Constitution. This is only true, however, when an individual asserts, or a court determines, that the right combined with the free exercise claim governs the standard of scrutiny that should be applied. Additionally, this view permits utilization of the combining together of affirmative rights that is already accepted practice in constitutional jurisprudence. Adoption of this view will result in compliance with the mandate of *Smith* and *Yoder* while providing courts with a clear analysis by which to confront assertions of a hybrid right. Lastly, this view places a high benchmark which claims must reach in order to warrant an exemption from a neutral and generally applicable law, thus largely retaining the power of the government to enforce its law.

V. CONCLUSION

In lieu of attributing to the Free Exercise Clause the weight of an affirmative fundamental right, regardless of whether the right is asserted to combat a neutral and generally applicable law or a law that discriminates on the basis of religion, the Supreme Court should bolster its opinion in *Smith* with a new bright-line analysis for hybrid rights claims.

Of the three methods of interpreting *Smith's* hybrid rights language, the Supreme Court should adopt the independently viable constitutional claim interpretation. In making this decision, the Court should clearly articulate two principles. First, infringement of a person's

free exercise of religion by a non-neutral and generally applicable law requires the highest available level of scrutiny before it can be justified, thus affirming *Sherbert v. Verner*. Second, there is an exception to the general rule that individuals cannot claim exemption from neutral and generally applicable laws on the basis of free exercise of religion. This exception pertains where an individual can assert an independently viable free exercise claim and an independently viable companion right. The resulting justification needed to uphold the law as constitutional would either be a more than merely reasonable relation to a legitimate state interest or the justification required to uphold the law against the scrutiny applied to the companion right, whichever is greater.

Such a holding would vindicate the place and value of the Free Exercise Clause as providing a fundamental right, keep with the Supreme Court's holdings in *Smith* and *Yoder*, resolve the conflict among six circuits, and not give individuals seeking an exemption from neutral and generally applicable laws a license to disobey otherwise valid regulations promulgated by the government.

EVERSON AND "THE WALL OF SEPARATION BETWEEN CHURCH AND STATE": THE SUPREME COURT'S FLAWED INTERPRETATION OF JEFFERSON'S LETTER TO THE DANBURY BAPTISTS

*Raymond W. Kaselonis, Jr.**

> *Congress shall make no law respecting an establishment of religion, or* prohibiting the free exercise thereof . . . .[1]
>
> – The First Amendment to the U.S. Constitution

I. INTRODUCTION

Following the signing of the Declaration of Independence and throughout the American Revolution, the original thirteen states were governed by the Articles of Confederation.[2] Under the Articles of Confederation, the states passed the Northwest Ordinance, which set forth the requirements to be met by any U.S. territory seeking admission to the Union.[3] Among the provisions of the Northwest Ordinance was Article III, which provided that, in order for a territory to become a state, its schools were required to teach religion and morality in addition to reading, writing, and arithmetic.[4] America's Founding Fathers viewed the Northwest Ordinance as so important that, upon the dissolution of the Articles of Confederation and the subsequent ratification of the U.S. Constitution, they enacted the Ordinance again to ensure that the schools of any state entering the Union were teaching the principles they adhered to in forming that Union.[5]

The circumstances surrounding the passage of the Northwest Ordinance under the Constitution are quite noteworthy, yet they are often absent from modern discussion of the First Amendment.[6] The Northwest Ordinance was passed by the First Congress on August 7,

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* J.D., Regent University School of Law, 2001; B.A., University of Texas at Austin, 1997. I give special thanks to my lovely wife and my wonderful mother and father, each of whom inspires me in a special way and to whom I owe so much.

1 U.S. CONST. amend. I, § 1.

2 *See* DAVID BARTON, EDUCATION AND THE FOUNDING FATHERS 6 (2d ed. 1993).

3 *See id.*

4 *See id.* at 7.

5 *See id.* at 6.

6 Noted Founding-Era scholar David Barton provides one noteable exception to this trend. His analysis of the Supreme Court's Establishment Clause jurisprudence is cited extensively throughout this article.

1789.[7] During the same time frame, members of Congress debated the adoption of the First Amendment from June 7, 1789 to September 25, 1789.[8] What should be strikingly clear is that these two provisions, both inextricably linked to religion, and one historically proven to require the teaching of Christianity in state schools, were drafted by the same men at the same time in our nation's history. Yet, the Supreme Court of the United States and countless lower courts have firmly ingrained within the American mindset that the First Amendment requires a strict "separation of church and State."

As a result, the provisions and history of the Northwest Ordinance are revolutionary in the minds of most modern Americans. To learn that teaching religion and morality in state schools was, at one time, not only supported by our government but required, contradicts what most Americans have come to know about the First Amendment. For in most American minds, the "separationist" jurisprudence of the twentieth-century Supreme Court is, and always has been, the philosophy underlying the ecclesiastical-governmental relationship within the United States. This understanding is simply incorrect.

The purpose of this article is to illustrate the doctrinal weaknesses of modern "separation of church and State" jurisprudence by focusing on its divergence from the original meaning of the First Amendment. Part II of this article will present a discussion of modern First Amendment Establishment Clause Supreme Court cases that advance the notion of "separation of church and State." Part III will provide a sharp contrast to modern Establishment Clause jurisprudence through a discussion of several early Supreme Court decisions concerning the importance of teaching Christian principles in the schoolroom. Finally, Part IV will discuss the point in Supreme Court history in which the original meaning of the Establishment Clause was discarded in favor of an entirely different notion: the "separation of church and State."

II. A SURVEY OF MODERN SUPREME COURT ESTABLISHMENT CLAUSE JURISPRUDENCE

The Supreme Court opened the door to an influx of "separationist" jurisprudence in its 1962 decision, *Engel v. Vitale*.[9] In *Engel*, the Board of Education of Union Free School District No. 9 of New Hyde Park, New York, permitted the recitation of a prayer in class at the start of each school day.[10] The school children were presented the opportunity, if they

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[7] *See* BARTON, *supra* note 2, at 7 (citing ACTS PASSED AT A CONGRESS OF THE UNITED STATES OF AMERICA 104 (Hartford, Conn., Hudson & Goodwin 1791)).

[8] *See id.* (citing I ANNALS OF CONGRESS OF THE UNITED STATES – FIRST CONGRESS 424-914 (Washington, D.C., Gales & Seaton 1834)).

[9] Engel v. Vitale, 370 U.S. 421 (1962).

[10] *Id.* at 422.

so chose, to recite the following: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[11] The parents of several students challenged the policy's validity under the Establishment Clause.[12]

In setting up its holding that the recitation of the prayer violated the Establishment Clause, the Court was careful to point out the governmental origin of the prayer. It commented that

> [t]his daily procedure was adopted on the recommendation of the State Board of Regents, a governmental agency created by the State Constitution to which the New York Legislature has granted broad supervisory, executive, and legislative powers over the State's public school system. These state officials composed the prayer which they recommended and published as a part of their "Statement on Moral and Spiritual Training in the Schools," saying: "We believe that this Statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program."[13]

The Court also noted the rationale behind the parents' argument: "The petitioners contend . . . that the state laws requiring or permitting use of the Regents' prayer must be struck down as a violation of the Establishment Clause because that prayer was composed by government officials as a part of a governmental program to further religious beliefs."[14] In defense of the prayer, the Board of Education argued that, though the prayer was admittedly religious in nature, it should be permitted because it was intended to focus students' attention on the nation's spiritual heritage.[15] The Court rejected the Board's argument and held that "the State's use of the Regents' prayer in its public school system breaches the constitutional wall of separation between Church and State."[16]

To explain its holding, the Court engaged in a lengthy discussion of the history and potential dangers of established churches in both sixteenth-century England and the early American colonies.[17] Justice Potter Stewart commented in his dissent on the Court's foray into history:

> The Court's historical review of the quarrels over the Book of Common Prayer in England throws no light for me on the issue before us in this case. England had then and has now an established church.

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[11] *Id.*

[12] *Id.* at 423.

[13] *Id.* at 422-23. The highest court of the State of New York, the New York Court of Appeals, upheld the recitation of the prayer as constitutional so long as no student was compelled to participate in the prayer over his or her parents' objections. *Id.* at 423.

[14] *Id.* at 425.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 425-35.

> Equally unenlightening, I think, is the history of the early establishment and later rejection of an official church in our own States. For we deal here not with the establishment of a state church, which would, of course, be constitutionally impermissible, but with whether school children who want to begin their day by joining in prayer must be prohibited from doing so. Moreover, I think that the Court's task, in this as in all areas of constitutional adjudication, is not responsibly aided by the uncritical invocation of metaphors like the "wall of separation," a phrase nowhere to be found in the Constitution. What is relevant to the issue here is not the history of an established church in sixteenth century England or in eighteenth century America, but the history of the religious traditions of our people, reflected in countless practices of the institutions and officials of our government.[18]

In light of the enactment of the Northwest Ordinance and similar policies by the First Congress, Justice Stewart's view appears to be more in keeping with the original understanding of the Establishment Clause. But Justice Stewart was outnumbered, and the majority's holding that voluntary, nondenominational prayer in the classroom is unconstitutional became the law of the land.[19]

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[18] *Id.* at 445-46 (Stewart, J., dissenting). Justice Stewart's dissent also noted that:

> The Court does not hold, nor could it, that New York has interfered with the free exercise of anybody's religion. For the state courts have made clear that those who object to reciting the prayer must be entirely free of any compulsion to do so, including any "embarrassments and pressures." Cf. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624. But the Court says that in permitting school children to say this simple prayer, the New York authorities have established "an official religion."
>
> With all respect, I think the Court has misapplied a great constitutional principle. I cannot see how an "official religion" is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation.

Id. at 445.

[19] In his book, *The Myth of Separation*, David Barton notes the following:

> Court decisions always cite previous cases as precedents; citing precedent is the means by which the past is used to give credibility to the present; precedent serves as the foundation upon which current decisions are built. A significant legal note to this case is that *not one single precedent was cited by the Court in its removal of school prayer!* That the Court was able to overturn 340 years of educational history in America without citing a single precedent was an accomplishment of which it was proud, as evidenced by a comment made the following year in the *Abington v. Schempp* case:
>
> > Finally, in *Engel v. Vitale*, only last year [1962], these principles were so universally recognized that the Court, *without the citation of a single case* . . . reaffirmed them.

Soon after *Engel* came *Abington School District v. Schempp*.[20] In *Abington*, two parents attacked a Pennsylvania statute that required ten verses of the Bible to be read at the opening of each school day.[21] The Bible reading was followed by a recitation of the Lord's prayer and was conducted over the school's public address system at the start of each school day; attendance at the readings was optional.[22]

The plaintiffs in the case, the Schempp family, had two children enrolled at Abington Senior High.[23] Due to their adherence to the teachings of the Unitarian Church, the Schempp's claimed that the morning Scripture reading violated their First Amendment rights in that "specific religious doctrines purveyed by a literal reading of the Bible . . . 'were contrary to the religious beliefs which they held and to their familial teaching.'"[24] Further, Mr. Schempp testified that simply removing his children from the Scripture reading was not an option because he believed that his children's relationship with their classmates and teachers would be adversely affected.[25]

The *Abington* Court prefaced its holding by citing testimony concerning the dangerous effects the Bible could have on children.[26] Referring to this aspect of *Abington*, David Barton has noted:

> Like the prayer used in [*Engel v. Vitale*], this too seemed to be a relatively innocuous practice: it was voluntary; the Bible was read without comment by one of the students from a version of his choice; there was no instruction other than what was contained within the verses. Nonetheless, the Court produced "expert" testimony to prove that voluntary Bible reading was dangerous to the children . . . .[27]

The trial court summarized Dr. Solomon Grayzel's "expert" testimony as follows:[28]

> there were marked differences between the Jewish Holy Scriptures and the Christian Holy Bible, the most obvious of which was the absence of the New Testament in the Jewish Holy Scriptures. Dr. Grayzel testified that portions of the New Testament were offensive to Jewish tradition and that, from the standpoint of Jewish faith, the concept of Jesus Christ as the Son of God was "practically blasphemous." He cited instances in the New Testament which,

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DAVID BARTON, THE MYTH OF SEPARATION 147 (3d ed. 1991) (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 220-21 (1963) (emphasis added)).

[20] Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

[21] *Id.* at 205.

[22] *Id.* at 206-07.

[23] *Id.* at 206.

[24] *Id.* at 208 (quoting Schempp v. Abington Sch. Dist., 177 F. Supp. 398, 400 (E.D. Pa. 1959)).

[25] *Id.*

[26] *Id.* at 209-12.

[27] BARTON, *supra* note 19, at 149.

[28] *Id.* at 149-50.

> assertedly, were not only sectarian in nature but tended to bring the Jews into ridicule or scorn. Dr. Grayzel gave as his expert opinion that such material from the New Testament could be explained to Jewish children in such a way as to do no harm to them. But if portions of the New Testament were read without explanation, they could be, and in his specific experience with children Dr. Grayzel observed, had been, psychologically harmful to the child and had caused a divisive force within the social media of the school.[29]

After recounting Dr. Grayzel's testimony, the Court wrestled with the unquestioned religious heritage of the nation.[30] The Court conceded, as had been previously articulated in *Zorach v. Clauson*,[31] that Americans "are a religious people whose institutions presuppose a Supreme Being."[32] The Court, however, countered that language by stating, "[t]his is not to say, however, that religion has been so identified with our history and government that religious freedom is not likewise as strongly imbedded in our public and private life."[33]

Next, the *Abington* Court stated its need to "discuss the reach of the [First] Amendment under the cases of [the Supreme] Court" before it examined the "'neutral' position in which the Establishment and Free Exercise Clauses of the First Amendment place our Government."[34] In so doing, the Court relied upon only *one* case, *Everson v. Board of Education*,[35] handed down a mere *sixteen* years earlier. Speaking in reference to that case, the *Abington* Court stated that "[a]lmost 20 years ago"[36] the Court had "rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another."[37] Without hesitation, the Court reaffirmed the notion that the *Everson* Court had initially laid down:

> The [First] Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.[38]

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29 *Abington*, 374 U.S. at 209.

30 *Id.* at 212-13.

31 Zorach v. Clausen, 343 U.S. 306 (1952).

32 *Abington*, 374 U.S. at 213 (quoting *Zorach*, 343 U.S. at 313).

33 *Id.* at 214.

34 *Id.* at 215.

35 Everson v. Bd. of Educ., 330 U.S. 1 (1947).

36 *Abington*, 374 U.S. at 216.

37 *Id.*

38 *Id.* at 217 (citation omitted) (quoting *Everson*, 330 U.S. at 31-32).

As will be seen later, the idea that the purpose behind the First Amendment was to forbid "every form of public aid or support for religion" is insupportable from both a historical perspective and within the Court's own jurisprudence.[39]

Thus, after calling upon the testimony of one man who believed the Bible could psychologically damage children and appealing solely to its ruling in *Everson*, the Court in *Abington* stated what purported to be "the common sense of the matter":[40]

> There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other.[41]

The Court added:

> [T]he First Amendment, in its final form, did not simply bar a congressional enactment *establishing a church*; it forbade all laws *respecting an establishment of religion*. Thus, this Court has given the Amendment a "broad interpretation . . . in the light of its history and the evils it was designed forever to suppress. . . ."[42]

Therefore, the Court held that the practice required by the Pennsylvania statute violated the Establishment Clause because it was religious in nature and was implemented in state-funded schools.[43] Like prayer, Bible reading was added to the list of unconstitutional public school practices.

Seventeen years after *Abington*, the Supreme Court continued its trend of removing religious influences from public school rooms in *Stone v. Graham*.[44] There, a Kentucky statute required the posting of privately-funded copies of the Ten Commandments on the wall of every public school classroom in the Commonwealth of Kentucky.[45] The

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[39] *See infra* Section III.

[40] *Abington*, 374 U.S. at 220 (quoting Zorach v. Clausen, 343 U.S. 306, 312 (1952)).

[41] *Id.* at 219-20 (citation omitted).

[42] *Id.* at 220 (quoting McGowan v. Maryland, 336 U.S. 420, 441-42 (1961)) (citation omitted).

[43] *Id.* at 223.

[44] Stone v. Graham, 449 U.S. 39 (1980).

[45] *Id.* at 39. The statute at issue read:

> (1) It shall be the duty of the Superintendent of Public Instruction, provided sufficient funds are available as provided in subsection (3) of this Section, to ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public elementary

plaintiffs sought to enjoin posting of the Ten Commandments as a violation of the Establishment and Free Exercise Clauses of the First Amendment.[46] The Kentucky trial court "upheld the statute, finding that its 'avowed purpose' was 'secular and not religious,' and that the statute would 'neither advance nor inhibit any religion or religious group' nor involve the State excessively in religious matters."[47] The Kentucky Supreme Court affirmed.[48]

The Supreme Court of the United States, "without [the] benefit of oral argument or briefs on the merits," overturned, in a "cavalier" fashion, the highest court of Kentucky's decision.[49] In its decision, the Court applied the three-part test it outlined in its 1971 case, *Lemon v. Kurtzman*.[50] Using the *Lemon* test, the Court held that "Kentucky's statute . . . had no secular legislative purpose" and therefore violated the Establishment Clause.[51]

The primary argument made in favor of the statute's validity was that the Ten Commandments' secular purpose is "clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."[52] The Court responded by stating:

> The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters . . . .
>
> . . . Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have

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> and secondary school classroom in the Commonwealth. The copy shall be sixteen (16) inches wide by twenty (20) inches high.
>
> (2) In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."
>
> (3) The copies required by this Act shall be purchased with funds made available through voluntary contributions made to the state treasurer for the purposes of this Act.

KY. REV. STAT. ANN. § 158.178 (Banks-Baldwin 1980).

46 *Stone*, 449 U.S. at 40.

47 *Id.*

48 *Id.*

49 *Id.* at 47 (Rehnquist, J., dissenting).

50 Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (holding that, for a state regulation to pass muster under the Establishment Clause of the First Amendment, it must have a secular legislative purpose, its primary effect must not advance or inhibit religion, and it must not create excessive government entanglement with religion).

51 *Stone*, 449 U.S. at 41.

52 KY. REV. STAT. ANN. § 158.178 (Banks-Baldwin 1980).

> any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause.[53]

As David Barton notes, "When the Court was confronted with the argument that the Ten Commandments had secular importance, it erupted in an emotional outburst of religious prejudice."[54]

In his dissenting opinion, Justice Rehnquist took the majority to task for reversing a state Supreme Court decision without accepting briefs on the merits or hearing oral arguments. He also was concerned with the Court's rejection of a secular purpose as established by the state legislature and upheld by the state courts.[55] His argument, however, did not persuade a majority of his colleagues. The posting of the Ten Commandments in the classrooms of America's public schools, for any purpose the Court deems to be religious in nature, became the next unconstitutional practice under the Court's separationist First Amendment jurisprudence.[56]

The Supreme Court restated its view of the legality of prayer in school with its 1985 decision, *Wallace v. Jaffree*.[57] In *Wallace*, the Court struck down an Alabama statute requiring one minute of silent meditation or silent voluntary prayer at the start of each public school day in Alabama.[58] In its opinion, the Court conceded that "voluntary

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[53] *Stone*, 449 U.S. at 41-42.

[54] BARTON, *supra* note 19, at 154.

[55] *Stone*, 449 U.S. at 43-47 (Rehnquist, J., dissenting). Justice Rehnquist stated:

> With no support beyond its own *ipse dixit*, the Court concludes that the Kentucky statute involved in this case "has *no* secular legislative purpose," and that "[t]he pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature." This even though, as the trial court found, "[t]he General Assembly thought the statute had a secular legislative purpose and specifically said so." The Court's summary rejection of a secular purpose articulated by the legislature and confirmed by the state court is without precedent in Establishment Clause jurisprudence. This Court regularly looks to legislative articulations of a statute's purpose in Establishment Clause cases and accords such pronouncements the deference they are due. . . . The fact that the asserted secular purpose may overlap with what some may see as a religious objective does not render it unconstitutional.

Id. at 43-44 (citations omitted).

[56] David Barton points out that, "Madison did not believe viewing the Ten Commandments was a violation of the Constitution; in fact, he believed that obeying them was its very basis! The Court declared unconstitutional the very tenet that the "Chief Architect of the Constitution" said was our basis." BARTON, *supra* note 19, at 154-55 (quoting James Madison in Stephen K. McDowell & Mark A. Beliles, AMERICA'S PROVIDENTIAL HISTORY 221 (1988)).

[57] Wallace v. Jaffree, 472 U.S. 38 (1985).

[58] *Id.* at 61. The Alabama statute read:

prayer during an appropriate moment of silence during the schoolday" is, by itself, permissible under the First Amendment.[59] But the Court took issue with the statement of an Alabama state senator, made several years after the enactment of the statute, in which he described his motive for sponsoring the law. Senator Donald G. Holmes, in an evidentiary hearing at the District Court level, testified that he, as the bill's "prime sponsor," advanced it as an effort to return voluntary prayer to the state's public schools[60] and to allow children to share in the spiritual heritage of Alabama.[61] David Barton aptly noted the bizarre result produced by *Lemon*'s purpose prong in *Wallace*:

> Having established the legislator's intent when [Holmes] authored the bill, and the intent of the people of Alabama and of the legislature by approving and passing the bill, the Court declared the statute:
>
> > Invalid because the sole purpose . . . was an effort on the part of the State of Alabama to encourage a religious activity. [It] is a law respecting the establishment of religion within the meaning of the First Amendment.
>
> Even though the statute itself was constitutionally acceptable, it became unconstitutional because the sponsor's motive was "wrong"![62]

Like *Engel*, *Abington*, and *Stone*, the Court's decision in *Wallace* applied a separationist view of the Establishment Clause at the expense of the Clause's intended meaning.

In *Lee v. Weisman*,[63] the Court continued to apply its Establishment Clause doctrine to religious observances in the public schools. In *Lee*, the Providence, Rhode Island school district maintained a policy of permitting school principals to select a member from the clergy to offer a prayer and benediction at middle and high school graduation ceremonies.[64] In June of 1989, Deborah Weisman was set to graduate from a Providence middle school that had scheduled a clergyman to pray during the ceremony.[65] Deborah, through her father, Daniel Weisman, sought to stop the school from inviting the clergyman to pray by seeking a temporary restraining order.[66] The court denied Weisman's request

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> At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

ALA. CODE § 16-1-20.1 (1981).

59 *Wallace*, 472 U.S. at 59.

60 *Id.* at 43.

61 *Id.* at 43 n.22.

62 BARTON, *supra* note 19, at 159 (quoting *Wallace*, 472 U.S. at 41-42).

63 Lee v. Weisman, 505 U.S. 577 (1992).

64 *Id.* at 580.

65 *Id.* at 581.

66 *Id.* at 584.

due to a lack of adequate time to consider it, and the school proceeded with its graduation according to plan.[67] Daniel Weisman then amended his complaint to seek a permanent injunction of the school district's policy.[68]

In an opinion for a 5-4 majority, Justice Kennedy phrased the issue before the Court as "whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment."[69] The Supreme Court answered that question in the negative by applying the precedent it had established since its 1947 decision in *Everson*.[70] In doing so, the Court rejected a sound argument made by both the school board and the United States, which supported the school as *amicus curiae*:[71]

> these short prayers and others like them at graduation exercises are of profound meaning to many students and parents throughout this country who consider that due respect and acknowledgment for divine guidance and for the deepest spiritual aspirations of our people ought to be expressed at an event as important in life as a graduation.[72]

The Court concluded that, because the school board maintained the policy of permitting school principals to invite clergymen to offer prayers and benedictions at various school graduations, any principal's choice "is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur."[73] Thus, the Court held that the policy failed to pass muster under the Establishment Clause because the school compelled students to be involved in a religious ceremony.[74]

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[67] *Id.*

[68] *Id.* at 586.

[69] *Id.* at 580.

[70] Everson v. Bd. of Educ., 330 U.S. 1 (1947).

[71] *Lee*, 505 U.S. at 583.

[72] *Id.* at 583-84.

[73] *Id.* at 587.

[74] *Id.* at 598-99. It should be noted that the Court's decision in *Lee* did not ban *all* prayer at high school graduations. *See* Jones v. Clear Creek Indep. Sch. Dist., 977 F.2d 963 (5th Cir. 1992) (holding that nonsectarian, nonproselytizing, student-led, student-initiated prayer at high school graduations was permissible). The *Lee* decision did, however, ban the practice of school officials selecting members of the clergy to offer prayers at graduations. *See Lee*, 505 U.S. at 599.

Justice Scalia, in his pointed dissent in *Lee*, took the majority to task for applying a form of "psycho therapy" in arriving at its decision: "whatever the merit of [the school prayer] cases, they do not support, much less compel, the Court's psycho-journey." *Id.* at 643 (Scalia, J., dissenting). In the final paragraph of his dissent, Justice Scalia commented on the uniting effect common prayer has on a group of believers and the senselessness of a policy prohibiting that for the sake of avoiding a "minimal inconvenience" on the part of a nonbeliever. He stated:

> I *must add one final observation:* The Founders of our Republic knew the fearsome potential of sectarian religious belief to generate

Finally, in 2000, the Supreme Court decided *Santa Fe Independent School District v. Doe*,[75] its most recent opinion limiting religious exercise by students in American public schools. In *Santa Fe*, the issue before the Court was whether a school board policy permitting student-led, student-initiated prayer at high school football games violated the Establishment Clause.[76] Justice Stevens, setting out the facts of the case, noted that in the years prior to 1995, the Santa Fe High School student council chaplain delivered a prayer over the school's public address system immediately before the start of every football game.[77] This practice, along with several others, was challenged as a violation of the

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> civil dissension and civil strife. And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration -- no, an affection -- for one another than voluntarily joining in prayer together, to the God whom they all worship and seek. Needless to say, no one should be compelled to do that, but it is a shame to deprive our public culture of the opportunity, and indeed the encouragement, for people to do it voluntarily. The Baptist or Catholic who heard and joined in the simple and inspiring prayers of Rabbi Gutterman on this official and patriotic occasion was inoculated from religious bigotry and prejudice in a manner that cannot be replicated. To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.

Id. at 646 (Scalia, J., dissenting).

75 Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000).

76 *Id.* at 301. The policy read:

> STUDENT ACTIVITIES:
> PRE-GAME CEREMONIES AT FOOTBALL GAMES
> The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.
>
> Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

Id. at 298 n.6. The policy also stated that, "[i]f the District is enjoined by a court order from the enforcement of this policy," a new policy would go into effect. The only real difference would be changing "statement or invocation" to "message or invocation," and the addition of, "Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing" to the end of the policy. *Id.*

77 *Id.* at 294.

Establishment Clause.[78] While the case was pending at the district court level, the school board modified its policy permitting prayer at football games to the policy set forth above.[79] On appeal, the Fifth Circuit reversed and held that the football prayer policy, even as modified, violated the Establishment Clause.[80]

On appeal to the Supreme Court, the school district's primary argument was that prayer offered at the games was private speech in that it was student-led and student-initiated.[81] Rejecting this contention, the Court held that the prayers offered at the football games "are authorized by a government policy and take place on government property at government-sponsored school-related events."[82] The school district responded by stating that, in accordance with the Court's holding in *Rosenberger v. Rector and Visitors of the University of Virginia*,[83] an individual's private speech on a government-created public forum does not necessarily constitute government-sponsored speech.[84] The Court rebuffed the district's argument and held that the pre-game ceremony in the present action involved a substantially different type of forum than did *Rosenberger*. "The Santa Fe school officials simply do not 'evince either 'by policy or by practice,' any intent to open the [pregame ceremony] to 'indiscriminate use,' . . . by the student body generally.' Rather, the school allows only one student . . . to give the invocation."[85]

To reinforce its holding, the Court added that

> the District has failed to divorce itself from the religious content in the invocations. It has not succeeded in doing so, either by claiming that its policy is "one of neutrality rather than endorsement" or by characterizing the individual student as the "circuit-breaker" in the process. Contrary to the District's repeated assertions that it has adopted a "hands-off" approach to the pregame invocation, the realities of the situation plainly reveal that its policy involves both *perceived and actual endorsement of religion*. In this case, as we found in *Lee*, the "degree of school involvement" makes it clear that the

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[78] *Id.* at 295.

[79] *Id.* at 294.

[80] *Id.*

[81] *Id.* at 302. As the Court pointed out, the school district reminded them that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* (citing Bd. of Educ. v. Mergens, 496 U.S. 226, 250 (1990)). However, the Court added, "[w]e certainly agree with that distinction, but we are not persuaded that the pre-game invocations should be regarded as 'private speech.'" *Id.*

[82] *Id.*

[83] Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995).

[84] *Santa Fe*, 530 U.S. at 302-03.

[85] *Id.* at 303 (quoting Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983)) (citation omitted).

> pregame prayers bear "the imprint of the State and thus put school-age children who objected in an untenable position."[86]

Thus, along with school prayer, daily Bible readings, and the posting of the Ten Commandments for any non-secular purpose, student-initiated and student-led prayer at extracurricular activities, which the Court determines bears the imprint of the state in any way, was held to be unconstitutional in American public schools under the Court's interpretation of the Establishment Clause.

III. A SURVEY OF THE EARLY COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE

The Supreme Court's First Amendment jurisprudence, as summarized above, has not always been the status quo. At one time, the Supreme Court interpreted the First Amendment with the historically accurate view that American law was based upon "general Christianity; . . . not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men."[87] With that in mind, this Part will outline various Supreme Court decisions, beginning with an 1844 decision entitled *Vidal v. Girard's Executors*,[88] that contradict the First Amendment jurisprudence produced so readily by today's Court.

At issue in *Vidal v. Girard's Executors* was the proper probate of the estate of Stephen Girard, a French immigrant to the United States and a student of the French Enlightenment.[89] As a result of his "enlightened" background, Mr. Girard believed morality could be taught without teaching religion and therefore desired to will his entire estate, valued at over $7 million, to the city of Philadelphia in order to establish a college in which no clergy were permitted to be on campus.[90] In arguing against "a requirement . . . unprecedented in America,"[91] those challenging the will stated that "[t]he plan of education proposed is anti-christian, and

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86 *Id.* at 305 (quoting Lee v. Weisman, 505 U.S. 577, 590 (1992)) (emphasis added).

87 Church of the Holy Trinity v. United States, 143 U.S. 457, 470 (1892) (quoting Updegraph v. The Commonwealth, 11 Serg. & Rawle 394, 400 (Pa. 1824)).

88 Vidal v. Girard's Ex'rs, 43 U.S. (2 How.) 127 (1844).

89 BARTON, *supra* note 2, at 25.

90 *Id.* at 19-20. Specifically, Girard stated:

> I enjoin and require that no ecclesiastic, missionary, or minister of any sect whatsoever, shall ever hold or exercise any station or duty whatever in the said college; nor shall any such person ever be admitted for any purpose, or as a visitor, within the premises. . . .
>
> . . . [M]y desire is, that all the instructors and teachers in the college shall take pains to instil [sic] into the minds of the scholars the purest principles of morality.

Vidal, 43 U.S. at 133.

91 BARTON, *supra* note 19, at 61.

therefore repugnant to the law."[92] They added, in an argument that lasted three days before the Court,[93] that the importance of instruction in religion is recognized in both the Old and New Testaments and that "[n]o fault can be found with Girard for wishing a marble college to bear his name for ever [sic], but it is not valuable unless it has a fragrance of Christianity about it."[94]

In his opinion for a unanimous Court, Justice Story unequivocally stated:

> Christianity . . . is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public. . . . It is unnecessary for us, however, to consider the establishment of a school or college, for the propagation of . . . Deism, or any other form of infidelity. Such a case is not to be presumed to exist in a Christian country.
>
> . . . .
>
> Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college – its general precepts expounded, its evidences explained and its glorious principles of morality inculcated? . . . Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament?[95]

Concerning the Court's holding, David Barton notes that the "opinion of the Supreme Court was delivered by Justice Joseph Story – appointed to the Court by President James Madison, the 'Chief Architect of the Constitution.'"[96] Thus, the case of *Vidal v. Girard's Executors* provides a clear example of the once unanimous opinion of the very Supreme Court that now subscribes to a separationist view of the Establishment Clause.

Following *Vidal*, in 1892 the Supreme Court heard *Church of the Holy Trinity v. United States*,[97] which involved a federal law prohibiting the importation of, or assistance in the importation of, immigrants to the United States that were under contract to perform services.[98] In 1887, a

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92 *Vidal*, 43 U.S. at 143.

93 BARTON, *supra* note 2, at 20.

94 *Vidal*, 43 U.S. at 175.

95 *Id.* at 198, 200.

96 BARTON, *supra* note 19, at 62.

97 Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

98 The statute read:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens,

New York church, the Church of the Holy Trinity, employed an Englishman to serve as the church's pastor and was charged with violating the statute.[99] In striking down the church's alleged violation of the statute, Justice Brewer's majority opinion stated that "no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people."[100] Justice Brewer continued an elegant discourse on the intent of the Founders in their drafting of the First Amendment when he cited an 1824 case of the Pennsylvania Supreme Court, *Updegraph v. The Commonwealth*.[101] There, the court stated "Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; . . . not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men."[102] Further, citing an 1811 case from the highest court in New York, Justice Brewer commented that:

> Chancellor Kent, the great commentator on American law, speaking as Chief Justice of the Supreme Court of New York, said: "The people of this State, in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but, even in respect to the obligations due to society, is a gross violation of decency and good order. . . . The free, equal and undisturbed enjoyment of religious opinion, whatever it may be, and free and decent discussions on any religious subject, is granted and secured; but to revile, with malicious and blasphemous contempt, the religion professed by almost the whole community; is an abuse of that right.[103]

Finally, in concluding his opinion, Justice Brewer cited *Vidal*:

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foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia.

Id. at 458.

[99] BARTON, *supra* note 19, at 48.

[100] *Church of the Holy Trinity*, 143 U.S. at 465. As David Barton points out, "[t]he first half of the Court's decision dealt with what it termed 'absurd' application of laws," referring to "cases where an interpretation by the letter of the law and not by the spirit or intent of its framers would lead to absurd results." BARTON, *supra* note 19, at 48. Thus, the Court reviewed the Congressional records of the law and found that it "was enacted solely to preclude an influx of cheap and unskilled labor for work on the railroads." *Id.* Therefore, Barton concludes, "the church's alleged violation was . . . within the letter of the law, [but] it was not within its spirit" and "[t]he Court concluded that only an 'absurd' application of the Constitution would allow a restriction on Christianity." *Id.*

[101] Updegraph v. The Commonwealth, 11 Serg. & Rawle 394 (Pa. 1824).

[102] *Church of the Holy Trinity*, 143 U.S. at 470 (quoting *Updegraph*, 11 Serg. & Rawle at 400).

[103] *Id.* at 470-71 (quoting People v. Ruggles, 8 Johns. 290, 294-95 (N.Y. Sup. Ct. 1811)).

> And in the famous case of *Vidal* . . . this court . . . observed: "It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania."
>
> If we pass beyond these matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, "In the name of God, amen;" the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town and hamlet; the multitude of charitable organizations existing every where under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances *that this is a Christian nation*.[104]

Three years prior to *Church of the Holy Trinity*, the Court heard *Davis v. Beason*,[105] a case dealing with Samuel Davis, a Mormon man convicted of the crimes of bigamy and polygamy.[106] As David Barton points out, "[u]nder United States laws, bigamy and polygamy were crimes, but an Idaho statute went further and made it illegal for anyone who even taught or encouraged it, much less committed it, to vote or to hold any public office within the Territory [of Idaho]."[107] In appealing his conviction, Davis argued that the laws against bigamy and polygamy violated the Free Exercise Clause.[108] The Court, led by Justice Field, upheld Davis's conviction and stated that the crimes of bigamy and polygamy:

> are crimes by the laws of all civilized and *Christian* countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of

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[104] *Id.* at 471 (quoting Vidal v. Girard's Ex'rs, 43 U.S. (2 How.) 127, 198 (1844)) (emphasis added). Regarding the argument that modern First Amendment jurisprudence is incorrect and that the Founders intended for "general Christianity" to be fostered, David Barton notes that Justice Brewer's opinion in *Church of the Holy Trinity*, "quoted from eighteen sources, alluded to over forty others, and acknowledged 'many other' and 'a volume' more from which selections could have been made." BARTON, *supra* note 19, at 50 (quoting *Church of the Holy Trinity*, 143 U.S. at 471).

[105] Davis v. Beason, 133 U.S. 333 (1889).

[106] *Id.* at 341.

[107] BARTON, *supra* note 19, at 67.

[108] *Id.*

> society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their advocacy a tenet of religion is to offend the common sense of mankind.[109]

Justice Field's majority opinion continued:

> There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes as prompted by the passions of its members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretence that, as religious beliefs, their supporters could be protected in their exercise by the Constitution of the United States.[110]

In stark contrast to the Court's statements in *Davis*, under the doctrines of the modern Court, "[l]iterally hundreds of magazine, film publishers, and other groups 'advocating promiscuous intercourse of the sexes' now operate under the Court's 'constitutional' protection."[111] David Barton rightly concludes:

> The contemporary Court is a party to the decline of America's morality. It has upheld the "rights" of groups to propagate teachings on immorality and has prohibited schools from presenting Biblical teachings on morality. With the Court protecting groups who "advocate promiscuous intercourse," immorality has become . . . much a part of our society . . . .[112]

In *Murphy v. Ramsey*,[113] the Supreme Court dealt with another case involving bigamy and polygamy. The issue before the Court in *Murphy* was the validity of a statute that stripped any bigamist or polygamist, and any woman cohabiting with a bigamist or polygamist, of their right to vote.[114] Justice Matthews, writing for the Court, commented on the validity and importance of legislation, like the statute at issue, which is intended to protect the moral union of the family:

> For certainly no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth, fit to take rank as one of the coordinate States of the Union, than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that

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109 *Davis*, 133 U.S. at 341-42 (emphasis added).

110 *Id.* at 343.

111 BARTON, *supra* note 19, at 69 (quoting *Davis*, 133 U.S. at 342).

112 *Id.* at 70 (quoting *Davis*, 133 U.S. at 342).

113 Murphy v. Ramsey, 114 U.S. 15 (1885).

114 *Id.* at 38.

> reverent morality which is the source of all beneficent progress in social and political improvement. And to this end, no means are more directly and immediately suitable than those provided by this act, which endeavors to withdraw all political influence from those who are practically hostile to its attainment.[115]

The Court's holding in *Murphy* provides another clear example of what once was the predominant view of Christianity and morality in American law and society. Unfortunately, as evidenced by modern First Amendment jurisprudence, that view no longer prevails.

The Supreme Court decided two cases during the twentieth century in which it used language reminiscent of the earlier Court's jurisprudence, providing some hope that a return to a proper interpretation of the First Amendment's Establishment Clause is possible. First, in 1931, the Court heard *United States v. Macintosh*.[116] In *Macintosh*, a Canadian born man sought citizenship in the United States but was denied "upon the ground that, since [he] would not promise in advance to bear arms in defense of the United States unless he believed the war to be morally justified, he was not attached to the principles of the Constitution."[117] On appeal, the Circuit court reversed and directed the District court to admit the man as a U.S. citizen.[118]

The U.S. Supreme Court granted *certiorari* and stated:

> [t]he burden was upon the applicant to show that his views were not opposed to "the principle that it is a duty of citizenship, by force of arms when necessary, to defend the country against all enemies, and that [his] opinions and beliefs would not prevent or impair the true faith and allegiance required by the [Naturalization] Act." We are of the opinion that he did not meet this requirement.[119]

Of significance to the present issue is a statement the Court made in arriving at its decision, an insight into the reasoning the Supreme Court adhered to less than 75 years ago:

> We are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God. But, also, we are a Nation with the duty to survive; a Nation whose Constitution contemplates war as well as peace; whose government must go forward upon the assumption, and safely can proceed upon no other, that unqualified allegiance to the Nation and submission and obedience to the laws of the land, as well those made for war as those made for peace, are not inconsistent with the will of God.[120]

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[115] *Id.* at 45.

[116] United States v. Macintosh, 283 U.S. 605 (1931).

[117] *Id.*

[118] *Id.*

[119] *Id.* at 626 (quoting United States v. Schwimmer, 279 U.S. 644, 653 (1929)).

[120] *Id.* at 625 (citing Church of the Holy Trinity v. United States, 143 U.S. 457, 470-71 (1892)).

David Barton, commenting on the Court's language in *Macintosh*, stated, "[t]his case . . . occurred more than 140 years after the ratification of the Constitution, yet the Court was still articulating the same message . . . ."[121]

Finally, in 1952, the Supreme Court decided *Zorach v. Clauson*.[122] *Zorach* involved a "released time" program in New York City's public schools, which permitted students, contingent upon parental approval, to be released from school at a specified time during the school day in order to attend "religious centers for religious instruction or devotional exercises."[123] Though *Zorach* was decided after *Everson*, the case announcing the strict "separation between church and State" doctrine,[124] the *Zorach* Court set forth language that reads in stark contrast to *Everson*:

> The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concern or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other -- hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths -- these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."[125]

The Court further noted:

> We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That

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121 BARTON, *supra* note 19, at 76.

122 Zorach v. Clauson, 343 U.S. 306 (1952).

123 *Id.* at 308.

124 *See infra* Section IV.

125 *Zorach*, 343 U.S. at 312-13.

> would be preferring those who believe in no religion over those who do believe.[126]

The Court, despite its strong language in *Zorach* apparently consistent with more traditional Supreme Court precedent, did not overturn the decision it handed down in *Everson* only five years prior. Rather, it attempted to clarify that holding by acknowledging that

> [t]here cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute.[127]

The Court then added that "[t]he First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concern or union or dependency one on the other."[128]

Thus, the Supreme Court in *Zorach* appeared to strike a compromise between the Court's earlier precedent and the strict "separationist" doctrine it set forth in *Everson*. The language the *Zorach* Court used in reaching that apparent compromise helps to show that the Court, even after *Everson*, maintained a strong understanding of the religious foundation of this country and "was still light-years away from the position" it now holds.[129]

IV. A SURVEY OF THE "FORK IN THE ROAD"

Having considered the state of modern Supreme Court Establishment Clause jurisprudence as well as the Court's earlier approach to such cases, it is necessary to examine where the proverbial "fork in the road" occurred. The analysis in this Part will focus on *Everson v. Board of Education*.[130]

In *Everson*, the Supreme Court reviewed a New Jersey statute that authorized state school districts "to make rules and contracts for the transportation of children to and from schools."[131] Acting pursuant to that statute, one school district passed a resolution authorizing a "reimbursement to parents of money expended by them for the bus transportation of their children on regular buses operated by the public

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[126] *Id.* at 313-14.

[127] *Id.* at 312.

[128] *Id.*

[129] BARTON, *supra* note 19, at 77.

[130] Everson v. Bd. of Educ., 330 U.S. 1 (1947).

[131] *Id.* at 3.

transportation system."[132] The resolution, however, included in its plan reimbursements to parents of children that were bused to and from parochial schools.[133] The issue before the Court was the validity of the New Jersey statute and the school district resolution under the U.S. Constitution.[134]

Though the Court in *Everson* held that the statute was constitutional, its holding marked the start of a shift in the Court's First Amendment jurisprudence. It was in *Everson* that the Court institutionalized the phrase "a wall of separation between church and State" by using "the Fourteenth Amendment as a tool to apply the First Amendment *against* the individual states. Never before had the Fourteenth Amendment been used to forbid religious practices from the public affairs and public institutions of the individual states. This action by the 1947 Court was without precedent."[135]

In discussing the origin of the phrase "separation of church and State," David Barton has noted:

> At the time of the Constitution, although the states encouraged Christianity, no state allowed an exclusive state-sponsored denomination. However, many citizens did recall accounts from earlier years when one denomination ruled over and oppressed all others. Even though those past abuses were not current history in 1802, the fear of a recurrence still lingered in some minds.
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> It was in this context that the Danbury Baptist Association of Danbury, Connecticut, wrote to President Jefferson. Although the statesmen and patriots who framed the Constitution had made it clear that no one Christian denomination would become the official denomination, the Danbury Baptists expressed their concern over a rumor that a particular denomination was soon to be recognized as the national denomination. On January 1, 1802, President Jefferson responded to the Danbury Baptists in a letter. He calmed their fears by using the now infamous phrase to assure them that the federal government would not establish any single denomination of Christianity as the national denomination:
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> > I contemplate with [sovereign] reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State.[136]

Barton goes on to note that the "wall of separation" was "originally introduced as, and understood to be a one-directional wall protecting the

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[132] *Id.*

[133] *Id.*

[134] *Id.* at 5.

[135] BARTON, *supra* note 19, at 13.

[136] *Id.* at 41 (quoting THOMAS JEFFERSON, JEFFERSON WRITINGS 510 (Merrill D. Peterson ed., Literary Classics of the United States, Inc. 1984) (1802)).

church from the government,"[137] an understanding shared by Jefferson as evidenced by several statements he made regarding the First Amendment.[138] However, contrary to 150 years of precedent and Jefferson's own interpretation of the First Amendment, the *Everson* Court held that federal courts have the power, via the Fourteenth Amendment, to rule on state decisions concerning religion, a duty both prior courts and the Founding Fathers had intended to leave squarely to the states.[139] The Court's misapplication of Jefferson's "separation" statement in *Everson* set the stage for its widespread use in subsequent Establishment Clause cases.

Jefferson's "separation" statement had been largely forgotten until 1878 when the Supreme Court refered to it in *Reynolds v. United States*.[140] In *Reynolds*, the Court faced a challenge by Mormons to the federal prohibitions on polygamy and bigamy.[141] The plaintiffs claimed that the "First Amendment's 'free exercise of religion' promise and the 'separation of church and state' principle should keep the United States . . . from making laws prohibiting their 'religious' exercise of polygamy."[142] David Barton points out that

> [u]sing Jefferson's address [in its correct context], the Court showed that while the government was <u>not</u> free to interfere with opinions on religion, which is what frequently distinguishes one denomination from another, it <u>was</u> responsible to enforce civil laws according to general Christian standards. In other words, separation of church and state pertained to denominational differences, not to basic Christian principles. Therefore, and on that basis, the Court ruled that the Mormon practice of polygamy and bigamy was a violation of the Constitution because it was a violation of basic Christian principles.[143]

The *Everson* Court, however, failed to consider the context in which the "separation" phrase was used by the *Reynolds* Court and, as a result, used the phrase to set the groundwork for a predominantly "separationist" jurisprudence.

In sum, the blame for modern separationist Establishment Clause jurisprudence falls on the *Everson* Court:

> Nearly 70 years after the *Reynolds* case . . . the Court excerpted eight words out of Jefferson's address ("a wall of separation between church and state") and adopted that phrase as its new battle cry. It announced for the first time the *new* meaning of separation of church

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[137] *Id.* at 42.

[138] *Id.* (citing the Kentucky Resolutions of 1798, Second Inaugural Address, 1805, and Letter to Samuel Miller, 1808).

[139] *Id.* at 42-43.

[140] Reynolds v. United States, 98 U.S. 145 (1878).

[141] *Id.* at 161-62.

[142] BARTON, *supra* note 19, at 43.

[143] *Id.*

> and state – a separation of basic religious principles from public arenas. When the Court excerpted Jefferson's words in the *Everson* case, it did not bother to present the context in which the phrase had originally been used, nor reveal that it had been applied in an opposite manner in previous Supreme Court cases. Those eight words, now taken out of context, concisely articulated the Court's plan to divorce Christianity from public affairs.[144]

V. CONCLUSION

A survey of modern Supreme Court Establishment Clause jurisprudence reveals that little by way of religion, let alone Christianity, may be introduced into public schools in America. In stark contrast, however, a survey of earlier Supreme Court cases reveals that the Court played a vital role in "preaching" the importance of Christianity in American culture and the need for the American youth to be educated in the tenets of Christianity. The divergence between these two schools of thought, the proverbial "fork in the road" of Establishment Clause jurisprudence, had its birth in the Supreme Court's 1947 decision in *Everson v. Board of Education*. There, rather than adhering to the precedent many courts before it had laid down, the Supreme Court altered the course of American legal thought with a flawed interpretation of a letter written by Thomas Jefferson. In so doing, the Court laid the foundation for a "separationist" jurisprudence that has resulted in a largely impenetrable "wall of separation between church and State."

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[144] *Id.* at 43-44.

A SUPREME COURT THAT IS "WILLING TO START DOWN THAT ROAD": THE SLIPPERY SLOPE OF *LAWRENCE V. TEXAS*

I. INTRODUCTION

Liberty. It is at the very heart of every American soul. Today's liberty, however, is very different than the liberty contemplated by our Founding Fathers. Today's Supreme Court has declared that the governing majority's view of morality is not a rational basis for laws. For hundreds of years, elected legislatures have made laws based on the morals of society. In 2003, however, in deciding *Lawrence v. Texas*,[1] the Court overruled *Bowers v. Hardwick*[2] and held that a Texas sodomy statute was unconstitutional because morality is not a rational basis for the law.[3] In his dissent, Justice Scalia expressed the implications of the majority's opinion:

> [O]verruling . . . *Roe* . . . would simply have restored the regime that existed for centuries before 1973, in which the permissibility of and restrictions upon abortion were determined legislatively State-by-State. . . .
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> . . . .
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> [But overruling *Bowers* discards] [c]ountless judicial decisions and legislative enactments [that] have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation . . . . State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers'* validation of laws based on moral choices. Every single one of these laws is called into question by [the *Lawrence*] decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.[4]

The majority in *Bowers* feared that if the right to homosexual sodomy was defined as "the voluntary sexual conduct between consenting adults, it would be difficult . . . to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the

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[1] Lawrence v. Texas, 123 S. Ct. 2472 (2003).

[2] Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by Lawrence*, 123 S. Ct. at 2483.

[3] *Lawrence*, 123 S. Ct. at 2483.

[4] *Id.* at 2490-91 (Scalia, J., dissenting) (citing Williams v. Pryor, 240 F.3d 944, 949 (11th Cir. 2001)).

home."[5] At that time, the Supreme Court was "unwilling to start down that road."[6]

Seventeen years later, the Court was not only willing to "start down that road," but it was also willing to disregard the principle of stare decisis to do so. In deciding *Lawrence,* the Court recognized that its decision was controlled by *Bowers*.[7] The principle of stare decisis requires that a court generally follow its own decisions, and that lower courts must follow the decisions of higher courts. But stare decisis is not an absolute command, so the Supreme Court can reconsider its decisions.[8] For example, if the Court finds that facts it relied on in a decision are untrue, it may overrule that decision.[9] The Court has stated that it will strictly adhere to its decision, however, when the recognized rights have been incorporated into the "very fabric of society," when there has been reasonable reliance by individuals on the rule's continued application, or if the rule has become part of the American culture.[10]

> In overturning *Bowers*, the Court asserted that the
> holding in *Bowers* . . . has not induced detrimental reliance compared to some instances where recognized individual rights are involved. Indeed, there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so. *Bowers* itself causes uncertainty, for the precedents before and after its issuance contradict its central holding.[11]

Contrary to the Court's assertion, however, there has been "overwhelming" societal reliance on *Bowers*.[12]

The majority in *Lawrence* based its justification for its circumvention of the principle of stare decisis on this supposed lack of reliance. This Note will demonstrate the overwhelming reliance that state and federal courts, as well as legislatures, have placed on *Bowers.* Part II will review the Court's due process analysis framework, including how that framework was applied in both *Bowers* and *Lawrence.* Part III will review the numerous decisions that relied on *Bowers,* demonstrating the overwhelming reliance of individuals and society. These cases will be analyzed further under the rationale the Court used in *Lawrence* to show the detrimental implications of overruling *Bowers.* The major categories of cases that relied on *Bowers* are examined: sodomy, adultery, rape,

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5 *Bowers*, 478 U.S. at 195-96.

6 *Id.*

7 *Lawrence*, 123 S. Ct. at 2490-91.

8 Helvering v. Hallock, 309 U.S. 106, 119 (1940).

9 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 855 (1992) (O'Connor, J., plurality).

10 *Id.* at 855-56.

11 *Lawrence*, 123 S. Ct. at 2483.

12 *Id.* at 2490 (Scalia, J., dissenting).

incest, prostitution, indecency statutes, gays in the military, same-sex marriage, gay adoption and custody cases, and Equal Protection Clause cases involving homosexuals. These and other cases specifically relied on the *Bowers* method of due process analysis and not its central holding as it related to homosexual sodomy. Finally, Part IV will conclude with a summary of the implications of *Lawrence*.

II. DUE PROCESS ANALYSIS

In determining substantive due process liberty and privacy rights under the Fourteenth Amendment, the Court has identified two primary factors. First, the Court requires a "careful description of the asserted fundamental liberty interest."[13] Second, the Court uses objective guideposts to help determine if the right is a fundamental liberty. These include freedoms that are "implicit in the concept of ordered liberty"[14] and those that are "deeply rooted in this Nation's history and tradition."[15] Thus, the Court must examine precedent and legal traditions as well as the Nation's history to determine if an asserted right is fundamental. The Court's review of the history and traditions of the asserted right includes reviewing laws at the time the nation was founded, and also those existing at the time the Fourteenth Amendment was ratified. Additionally, the Court reviews its Due Process Clause precedent to determine the extent of the rights protected. This analysis usually starts at the beginning of substantive due process with *Lochner v. New York*.[16]

Lochner v. New York introduced a period in which the Supreme Court began applying the doctrine of substantive due process to "increasingly controversial situations."[17] In this era, the Court protected economic liberty under substantive due process. This narrow view of liberty was expanded, however, when the Court decided *Meyer v. Nebraska*[18] and stated that liberty includes the right to marry, raise children, and worship God. Further, in *Pierce v. Society of Sisters*,[19] the Court struck down a state law that required all children to attend public school. At the time of these rulings, the First Amendment (freedom of speech, religion, press, and assembly) had not been applied to the states,

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[13] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

[14] *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

[15] *Id.* (quoting Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977)).

[16] Lochner v. New York, 198 U.S. 45 (1905).

[17] Brett J. Williamson, *The Constitutional Privacy Doctrine after* Bowers v. Hardwick*: Rethinking the Second Death of Substantive Due Process*, 62 S. CAL. L. REV. 1297, 1307-08 (1989).

[18] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[19] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

so the rationales were at least partly based on substantive due process "liberty." Then, in the late 1930s, the Court rejected the interventionist substantive due process approach taken in *Meyer* and *Pierce* regarding personal liberties.[20] This was exemplified in the following decades in which the Court refused to recognize unenumerated liberty interests under substantive due process.

But a revival of personal liberties occurred in 1965 when the Court decided the landmark case, *Griswold v. Connecticut*.[21] In *Griswold*, the Court held that the right to privacy included the right of married couples to receive information about contraceptives. This right to privacy, though nowhere stated in the Constitution, was found by the Court in the First, Third, Fourth, and Fifth Amendments that "have penumbras, formed by emanations from those guarantees that help give them life and substance."[22] Seven years later, in an Equal Protection Clause case, *Eisenstadt v. Baird*,[23] the Court held that the right to privacy included the right of an individual, whether married or single, to have access to contraceptives. One year later, the Court decided *Roe v. Wade*[24] (later solidified in *Planned Parenthood v. Casey*[25]), which held that the right to privacy includes the right to decide whether to have an abortion. In *Roe*, the Court rejected the penumbra approach of *Griswold* and decided that the right to privacy falls under the Due Process Clause of the Fourteenth Amendment.[26] In the years following *Roe*, the Court further specified privacy rights to include the right of non-nuclear family members to live together (*Moore v. City of East Cleveland*[27]) and the right to marry (*Zablocki v. Redhail*[28]). In 1986, however, the Court decided *Bowers* and chose not to extend the broadening privacy rights any further by holding that there is no fundamental right to engage in homosexual sodomy.[29]

A. Due Process Analysis in Bowers

In *Bowers*, the Supreme Court held that the United States Constitution does not confer a fundamental right to engage in homosexual sodomy.[30] The *Bowers* Court relied on precedent during its

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20 *See* United States v. Carolene Prod. Co., 304 U.S. 144 (1938).

21 Griswold v. Connecticut, 381 U.S. 479 (1965).

22 *Id.* at 484.

23 Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

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

25 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

26 *Roe*, 410 U.S. at 152-53.

27 Moore v. City of E. Cleveland, 431 U.S. 494 (1977).

28 Zablocki v. Redhail, 434 U.S. 374 (1978).

29 Bowers v. Hardwick, 478 U.S. 186 (1986).

30 *Id.* at 195-96.

due process analysis under the Fourteenth Amendment.[31] First, the Court defined the right at stake as the "right to engage in homosexual sodomy."[32] This specific delineation of the asserted right satisfied the first due process requirement, subsequently announced in *Glucksberg*: a "careful description of the asserted liberty interest."[33] Next, the Court used its own guideposts to analyze the liberty interest, which included: those rights "implicit in the concept of ordered liberty"[34] and "deeply rooted in this Nation's History and tradition."[35] Thus, as in other due process cases, the Court examined its own precedent as well as the history of the asserted right. The Court noted that, according to precedent, fundamental rights decided under the Due Process Clause include subjects relating to family, marriage, or procreation.[36] The Court found no connection between this precedent and homosexual sodomy.[37] It explained that due process precedent does not stand for the proposition that any kind of adult, private sexual conduct, such as sodomy, is protected from state proscription.[38] The Court then examined the legal history of sodomy in the United States and found that it was a criminal offense at common law, proscribed by all the original thirteen states when the Bill of Rights was ratified,[39] and proscribed by all but five of the thirty-seven states existing at the time the Fourteenth Amendment was ratified.[40] Thus, the Court concluded that there was no history or tradition of protecting the practice of homosexual sodomy.[41]

Next, the Court discussed the possibility of expanding the due process fundamental rights to include new rights in the Due Process Clause.[42] The Court said that it is "most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[43] Finding new privacy rights just because the acts occur in the privacy of the home would open up the door to protecting numerous

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[31] *Id.* at 190.

[32] *Id.* at 191.

[33] Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

[34] *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

[35] *Bowers*, 478 U.S. at 191-92 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977)).

[36] *Id.* at 191.

[37] *Id.* at 190-91.

[38] *Id.*

[39] *Id.* at 192.

[40] *Id.* at 192-93.

[41] *Id.*

[42] *Id.* at 195.

[43] *Id.* at 194.

crimes such as adultery, drug use, incest, and other sexual crimes.[44] The Court definitively stated that it was "unwilling to start down that road."[45] Finally, the Court analyzed the asserted right under rational basis review and found that laws based on notions of morality are valid.[46] The Court explained that the law is "constantly based on . . . morality" and the moral decisions of the electorate, and concluded that invalidating laws based on morality would cause the judiciary to "be very busy indeed."[47]

B. Due Process Analysis in Lawrence

Just seventeen years later, the Court overruled *Bowers* in *Lawrence*.[48] Both cases considered whether state laws proscribing homosexual sodomy violate the Due Process Clause.[49] As in every due process case, the Court must first define the right asserted. In *Lawrence*, the Court re-defined the right in question from the "'careful description' of the asserted"[50] right of homosexual sodomy to the broader right for "adults [to] choose to enter into . . . relationship[s] in the confines of their homes."[51] Then the Court, following due process analysis guideposts, examined the history of sodomy laws in the United States.[52] The Court emphasized that sodomy laws applied historically to same-sex and opposite-sex couples, and only recently have laws "target[ed]" same-sex couples.[53] Thus, the Court concluded that *Bowers*'s historical analysis was flawed.[54] The Court failed to recognize, however, that differentiation between same-sex and opposite-sex couples is irrelevant when examining history and tradition.[55] Homosexual sodomy was criminalized, and the fact that there was not a distinction between same-sex and opposite sex couples does not suddenly establish a tradition of protecting this practice as "deeply rooted in this Nation's history and tradition."[56] The Court's examination of history and tradition, as well as precedent, should have concluded the due process analysis.

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44 *Id.* at 195-96.

45 *Id.* at 196.

46 *Id.*

47 *Id.*

48 Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003).

49 *Id.* at 2477.

50 Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

51 *Lawrence*, 123 S. Ct. at 2478.

52 *Id.*

53 *Id.*

54 *Id.* at 2480.

55 *Id.* at 2493-94 (Scalia, J., dissenting).

56 *Id.*

But the Court in *Lawrence* expanded its due process analysis after quoting *City of Sacramento v. Lewis*.[57] In his concurring opinion, Justice Kennedy stated, "history and tradition are the starting point but not in all cases the ending point of substantive due process inquiry."[58] The Court then announced two more considerations for due process analysis: (1) emerging recognition and trends, and (2) international court decisions.[59] First, the Court said that there is an "emerging recognition" of protection of adults' private sexual relationships.[60] The Court continued by asserting, "[w]e think that our laws and traditions in the past half century are . . . most [relevant] here."[61] The Court emphasized the recent trend of decriminalizing sodomy.[62] Second, the Court considered "[o]f even more importance" that an international court had decided a similar case and come to the opposite conclusion.[63] Thus, in addition to United States history and traditions, the Court also considers emerging trends and international court decisions in interpreting the United States Constitution.[64]

Finally, after finishing its "expanded" due process analysis, the Court considered the principle of stare decisis.[65] The Court considered whether the *Bowers* decision caused individual or societal reliance.[66] Without analyzing or examining case law, the Court declared that there was no individual or societal reliance that would prevent overruling the case.[67] The Court stated that there was no rational basis for the state statute barring homosexual sodomy and declared it unconstitutional.[68] The Court quoted Justice Stevens's dissent from *Bowers* in which he concluded "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."[69] Thus, the majority in *Lawrence* concluded that this morals-based legislation proscribing homosexual sodomy was invalid.[70] More specifically, the Court declared that a state's governing majority's belief that certain sexual behavior is

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57 City of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring).

58 *Id.*

59 *Lawrence*, 123 S. Ct. at 2480-82.

60 *Id.* at 2480.

61 *Id.*

62 *Id.*

63 *Id.* (citing Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. 52 (1981)).

64 *Id.* at 2481.

65 *Id.*

66 *Id.* at 2483.

67 *Id.*

68 *Id.*

69 *Id.* (quoting Bowers v. Hardwick, 478 U.S. 186, 195-96 (1986)).

70 *Id.*

immoral is not a rational basis for regulation.[71] As a result of this analysis, the Court overruled *Bowers* and declared the sodomy statute unconstitutional.

C. Differences in the Due Process Analysis of Bowers *and* Lawrence

There are five major differences between the analysis in *Bowers* and *Lawrence*. First, the right asserted is defined in much broader terms in *Lawrence* (right for adults to enter into relationships in the confines of their homes) as compared with the carefully asserted right defined in *Bowers* (right to homosexual sodomy). Second, the history and tradition of protecting the asserted right were considered in a narrower context in *Lawrence* by only looking at homosexual sodomy rather than the criminalization of sodomy in general as in *Bowers*. Third, the Court in *Lawrence* considered recent trends and the last fifty years of history relevant to the analysis. Fourth, the Court in *Lawrence* considered international judicial decisions relevant to the analysis, at least as persuasive authority, as to whether the right is protected by the Constitution. Finally, the *Lawrence* Court declared that morality is not a valid basis under rational basis review for upholding the sodomy statute. Since many laws of our nation are based on morality, this creates uncertainty as to the validity of many existing laws. These differences in the Court's due process analysis and decision in *Bowers* and *Lawrence* could have a profound effect on the constitutionality of many state laws. Those effects will now be examined by reviewing the cases that relied on *Bowers* and then analyzing these cases under *Lawrence*.

III. CASES RELYING ON *BOWERS* AND IMPLICATIONS OF THE *LAWRENCE* DECISION

A. Sodomy Statutes

In a number of cases regarding state sodomy statutes, courts have directly relied on *Bowers* as binding authority when finding the statutes constitutional.[72] In upholding their state statutes under rational basis review, the courts held that the standard was satisfied by the fact that the laws reflect the morality of the majority of the electorate.[73] Based on

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[71] *Id.*

[72] Virginia v. Wolfe, 48 Va. Cir. 554, 555 (1999); Virginia v. Davidson, 48 Va. Cir. 542, 548 (1999); *see also* Missouri v. Walsh, 713 S.W.2d 508, 511-12 (Mo. 1986); Ohio v. Thompson, No. 99-A-0070, 2000 Ohio App. LEXIS 6090, at *20-21 (Ohio Ct. App. Dec. 22, 2000). *But see* Kentucky v. Wasson, 842 S.W.2d 487, 494 (Ky. 1992) (striking down a sodomy statute on state constitutional grounds).

[73] *Walsh*, 713 S.W.2d at 511-12; *Wolfe*, 48 Va. Cir. at 555; *Davidson*, 48 Va. Cir. at 548.

Bowers, the courts held that there is no fundamental right to homosexual sodomy, and that the statutes pass rational basis review.[74]

By applying the holding in *Lawrence* to these cases, the outcome would be different. The cases most directly affected by *Lawrence* are those in which a state statute is similar to the ones in *Bowers* and *Lawrence*; *Bowers*, which upheld a state statute criminalizing sodomy, was overruled by *Lawrence*. Based on the controlling precedent of *Lawrence*, the result of numerous cases[75] that upheld state sodomy laws would be the exact opposite: the laws would now be found unconstitutional. States will no longer be able to criminalize sodomy based on the morals of the majority.

B. Adultery Statutes

Adultery, like sodomy, is criminalized by states based on morals. There have been a number of challenges to adultery statutes on the basis that there is a right protected by the Constitution.[76] Courts have strongly relied on the *Bowers* holding and rationale in asserting that adultery is not a protected constitutional right and may be proscribed based on societal morals. These courts have used the Supreme Court's framework from *Bowers* in concluding that adultery is not a fundamental right that is protected by the United States Constitution.[77] For example, in *City of Sherman v. Henry*,[78] the Supreme Court of Texas stated, "[b]ecause homosexual conduct is not a fundamental right under the United States Constitution, adultery likewise cannot be a fundamental right." The courts have relied on two main propositions from *Bowers*: (1) its analysis of Supreme Court precedent and (2) its method of due process analysis.[79]

First, in examining the Court's precedent regarding the right to privacy, the *Bowers* Court stated there was no connection between the Court-identified rights of privacy, which concerned marriage, procreation, and family, and the alleged right of homosexual sodomy.[80] Relying on this, courts have also held that adultery, like homosexual

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[74] *Wolfe*, 48 Va. Cir. at 555; *Davidson*, 48 Va. Cir. at 548; *see also Walsh*, 713 S.W.2d at 511-12; *Thompson*, 2000 Ohio App. LEXIS 6090, at *20-21.

[75] *Id.*

[76] Marcum v. McWhorter, 308 F.3d 635 (6th Cir. 2002); Caruso v. City of Cocoa, 260 F. Supp. 2d 1191 (M.D. Fla. 2003); Mercure v. Van Buren Twp., 81 F. Supp. 2d 814 (E.D. Mich. 2000); Oliverson v. W. Valley City, 875 F. Supp. 1465 (D. Utah 1995); City of Sherman v. Henry, 928 S.W.2d 464 (Tex. 1996).

[77] *Marcum*, 308 F.3d at 635; *Caruso*, 260 F. Supp. 2d at 1191; *Mercure*, 81 F. Supp. 2d at 814; *Oliverson*, 875 F. Supp. at 1465; *City of Sherman*, 928 S.W.2d at 464.

[78] *City of Sherman*, 928 S.W.2d at 470-71.

[79] *Marcum*, 308 F.3d at 641; *Caruso*, 260 F. Supp. 2d at 1207; *Mercure*, 81 F. Supp. 2d at 821-22; *Oliverson*, 875 F. Supp. at 1476-85; *City of Sherman*, 928 S.W.2d at 469.

[80] Bowers v. Hardwick, 478 U.S. 186, 195-96 (1986).

sodomy, is unrelated to family, contraception, marriage, and procreation.[81] In fact, the Texas Supreme Court asserted that adultery is the "antithesis of marriage and family."[82] The Sixth Circuit took note of the *Bowers* Court's rejection of the proposition that "any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription."[83] Further, the court relied on the *Bowers* Court's rejection of an expanded view of new fundamental rights and acknowledged that the Court nears "illegitimacy" when creating constitutional law that has no recognizable roots in the language or structure of the Constitution.[84]

Second, in analyzing whether homosexual sodomy should be recognized as a substantive due process right, the *Bowers* Court stated that only rights "implicit in the concept of ordered liberty"[85] such that "neither liberty nor justice would exist if [they] were sacrificed,"[86] or those liberties that are "deeply rooted in this Nation's history and tradition"[87] receive constitutional protection under due process.[88] By reviewing the history of the legal treatment of homosexual sodomy in this nation and the fact that it was a criminal offense in all the original states and a majority of states at the time of ratification of the Fourteenth Amendment, the *Bowers* Court concluded that homosexual sodomy was not "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition."[89] Again, relying on the *Bowers* reasoning and analysis, the courts have found that, like homosexual sodomy, adultery is not "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition."[90] Like the *Bowers* Court, the various courts reviewed the history of the criminalization of adultery in the states at the time of Fourteenth

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[81] *Marcum*, 308 F.3d at 642; *Caruso*, 260 F. Supp. 2d at 1208; *Mercure*, 81 F. Supp. 2d at 825; *Oliverson*, 875 F. Supp. at 1479; *City of Sherman*, 928 S.W.2d at 469.

[82] *City of Sherman*, 928 S.W.2d at 470.

[83] *Marcum*, 308 F.3d at 641 (quoting *Bowers*, 478 U.S. at 191).

[84] *Id.*

[85] *Bowers*, 478 U.S. at 191-92 (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

[86] *Id.*

[87] *Id.* (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977)).

[88] City of Sherman v. Henry, 928 S.W.2d 464, 469 (Tex. 1996) (quoting *Bowers*, 478 U.S. at 191-92).

[89] *Bowers*, 478 U.S. at 191-92.

[90] Marcum v. McWhorter, 308 F.3d 635, 641 (6th Cir. 2002); Caruso v. City of Cocoa, 260 F. Supp. 2d 1191, 1207-08 (M.D. Fla. 2003); Mercure v. Van Buren Twp., 81 F. Supp. 2d 814, 821-24 (E.D. Mich. 2000); Oliverson v. W. Valley City, 875 F. Supp. 1465, 1478-83 (D. Utah 1995); *City of Sherman*, 928 S.W.2d at 470.

Amendment ratification and today.[91] As in *Bowers*, the courts found that adultery was considered a crime at the time the Fourteenth Amendment was ratified and by half of the states today.[92] One court noted that states' repealing laws criminalizing adultery and making adulterous conduct no longer illegal does not "cloak it with constitutional protection."[93] The courts have also cited the *Bowers* Court for being "unwilling to start down that road" of opening the door of constitutional protection to adultery, incest, and other sexual crimes.[94]

Based on *Lawrence*, adultery statutes that were justified under *Bowers* will likely not withstand rational basis review. First, to start the due process analysis for the right to adultery, courts must define the right asserted. Following *Bowers*, the right is defined narrowly and specifically (right to homosexual sodomy), and, thus, the courts defined the right to adultery as the right to engage in a consensual, sexual relationship with the spouse of another.[95] However, as in *Lawrence*, the asserted liberty interest could be re-defined in broader terms than *Bowers*. As a result, the right of adultery could be re-defined as the right to enter into relationships in the privacy of a home, not the right to have sexual intercourse outside of marriage. Under that description of the claimed right, the right would be practically identical to the right asserted in *Lawrence*. Since this broad right was protected under *Lawrence*, it is likely to be protected in these cases as well.

Second, after the right of adultery has been defined, the courts examine the due process precedent. Under *Bowers*, Due Process Clause precedent relates to marriage and family so homosexual sodomy is excluded. However, according to *Lawrence*, the precedent relates to the rights of an individual rather than the confines of marriage and family.[96] This view of the right to privacy opens the door to protection of adultery which is simply two individuals consenting to a sexual relationship in private.

Third, the courts deciding the adultery cases examined the history and traditions of our nation. The courts reviewed the history and tradition of adultery and compared it with the history and tradition of sodomy from *Bowers*. Like *Bowers*, the courts found that adultery was considered a crime at the time the Fourteenth Amendment was ratified

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91 *Marcum*, 308 F.3d at 641; *Caruso*, 260 F. Supp. 2d at 1207-08; *Mercure*, 81 F. Supp. 2d at 821-24; *Oliverson*, 875 F. Supp. at 1478-83; *City of Sherman*, 928 S.W.2d at 470.

92 *Id.*

93 *City of Sherman*, 928 S.W.2d at 470.

94 *Id.* at 470 (quoting *Bowers*, 478 U.S. at 191-92 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977)).

95 *Oliverson*, 875 F. Supp. at 1477.

96 Lawrence v. Texas, 123 S. Ct. 2472 (2003).

and by half the states today.[97] Courts also stated that the recent repealing of these laws does not change history and suddenly add constitutional protection.[98] However, based on *Lawrence*, the court would have to not only consider the history but also the recent emerging trends of today's society.[99] In fact, the *Lawrence* Court seems to give *more* relevance to the laws of the last fifty years than the history and traditions of the nation.[100] This analysis would likely change the outcome of the adultery statute cases since the "emerging trend" is the repeal of the adultery statutes.[101]

Finally, the courts have relied on *Bowers* to justify adultery statutes on the basis of morality. After finding that adultery is not a fundamental right, the courts reviewed this right under rational basis review.[102] The courts held that the state's interest in supporting the family, including providing a base for intimacy and the morality of society, was valid.[103] But based on *Lawrence*'s holding that morality cannot provide a rational basis for state law, the "family interests" and the "morality of society" bases would be seriously questioned. Thus, if *Lawrence* were applied to these cases today, the courts would likely strike down the adultery statutes as unconstitutional.[104]

C. Rape

There are two types of rape cases that have relied on *Bowers*: (1) rape cases that rely on sexual perversion and sodomy statutes to charge the offender and (2) statutory rape cases. Prosecutors often charge sex offenders with state sodomy and sexual perversion crimes because they

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[97] *City of Sherman*, 928 S.W.2d at 470; *see also Marcum*, 308 F.3d at 641; *Caruso*, 260 F. Supp. 2d at 1207-08; *Mercure*, 81 F. Supp. 2d at 821-24; *Oliverson*, 875 F. Supp. at 1478-83.

[98] *See id.*

[99] *Lawrence*, 123 S. Ct. at 2484.

[100] *See id.*

[101] *City of Sherman*, 928 S.W.2d at 470.

[102] *Oliverson*, 875 F. Supp. at 1485; *see also Marcum*, 308 F.3d at 641-42; *Caruso*, 260 F. Supp. 2d at 1207-08; *Mercure*, 81 F. Supp. 2d at 821-24; *City of Sherman*, 928 S.W.2d at 470-72.

[103] *Oliverson*, 875 F. Supp. at 1485.

[104] *But see Lawrence*, 123 S. Ct. at 2484. In dicta, the Court stated that *Lawrence* did not "involve persons who might be injured or coerced." *Id.* It could be argued that in adultery there is a third party who is "injured." However, the Court also stated that the holding in *Lawrence* did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* In the first same-sex marriage case decided since *Bowers* was overruled, the Massachusetts Supreme Judicial Court cited *Lawrence* numerous times and held that the Massachusetts legislature had no rational basis for prohibiting people of the same sex from marrying each other. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

are easier to prove than non-consensual offenses since proof of the offense does not require absence of consent from the victim.

For example, in *Schochet v. Maryland,*[105] the Court of Appeals of Maryland relied on the *Bowers* holding in finding that the Maryland statute that charged the defendant with an "unnatural and perverted sexual practice" was constitutional.[106] Eight charges were filed against the defendant, six of which were for various non-consensual, sexual acts including rape.[107] The two charges that were appealed, anal intercourse and fellatio, did not require proof of force or absence of consent.[108] The defendant raised the issue of the constitutionality of the Maryland statute on the grounds that proscribing the consensual acts violates the right to privacy.[109] The Maryland Court of Appeals reviewed the right to privacy precedent from *Griswold* through *Bowers* and held that the right to privacy embraces sexual intimacy within marriage, parental decisions in child rearing, procreation, contraception, and abortion, but not sexual activity per se.[110] Thus, the sexual activity proscribed in the Maryland statute was not constitutionally protected.[111] Further, the court relied on the *Bowers* holding that legislative regulation of sexual behavior based on morality passed rational basis review to rule the statute constitutional.[112]

Similarly, in *Louisiana v. Smith,*[113] the Supreme Court of Louisiana relied on *Bowers* in finding a Louisiana statute prohibiting "crime[s] against nature" constitutional.[114] The defendant in the case was charged with one count of rape and one count of a "crime[s] against nature."[115] The defendant asserted that the Louisiana statute prohibiting unnatural carnal copulation, including anal and oral sex, was unconstitutional.[116] The Louisiana Supreme Court reviewed the history of statutes proscribing sodomy and directly relied on *Bowers*, noting that there was no federal constitutional right to engage in the acts proscribed by the statute.[117] The court agreed with the assertion in *Bowers* that, if a statute's constitutionality depended upon whether anyone besides the

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105 Schochet v. Maryland, 541 A.2d 183 (Md. 1988).

106 *Id.* at 184, 197-98.

107 *Id.* at 184.

108 *Id.*

109 *Id.*

110 *Id.* at 187-88, 195.

111 *Id.*

112 *See id.* at 197-98, 206.

113 Louisiana v. Smith, 766 So. 2d 501 (La. 2000).

114 *Id.* at 504.

115 *Id.*

116 *Id.*

117 *Id.* at 505-06.

consenting adults were harmed by the illegal act, then states would no longer be able to proscribe incest, fornication, drugs, and prostitution.[118] The court also stated that the laws passed rational basis review because "[t]here has never been any doubt that the legislature . . . has the authority to criminalize the commission of acts which . . . are considered immoral."[119]

Statutory rape cases also have relied on *Bowers*. In *Fleisher v. City of Signal Hill*,[120] the Ninth Circuit used *Bowers* in determining that the right of privacy does not extend to acts amounting to statutory rape.[121] The defendant was terminated from his job as a police cadet after admitting to engaging in consensual sexual activity that constituted statutory rape.[122] The court reasoned that, as in *Bowers*, the defendant was not married when engaging in sexual intercourse so none of the privacy cases grounded in the sanctity of marriage are applicable.[123] Thus, the right to privacy did not protect acts amounting to statutory rape.[124]

Also, in *Phagan v. Georgia*,[125] Justice Sears of the Supreme Court of Georgia cited *Bowers* when stating that child molestation and statutory rape statutes were not unconstitutional because the right of privacy does not preclude states from proscribing certain private sexual conduct between consenting adults.[126] Under an equal protection analysis, the Supreme Court of Georgia affirmed the trial court's holding that Georgia's statutory rape laws were constitutional because there was a rational basis for providing varied punishments based on the perpetrator's age.[127] The court also stated that, despite the right to privacy, the state has a compelling interest in protecting its children from immoral or indecent acts.[128] As a result, the court upheld the statutory rape laws.[129]

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[118] *Id.* at 509 (citing Bowers v. Hardwick, 478 U.S. 186, 195-96 (1986).

[119] *Id.*

[120] Fleisher v. City of Signal Hill, 829 F.2d 1491 (9th Cir. 1987).

[121] *Id.* at 1498.

[122] *Id.* at 1493.

[123] *Id.* at 1497.

[124] *See id.*

[125] Phagan v. Georgia, 486 S.E.2d 876 (Ga. 1997).

[126] *Id.* at 886 (Carley, J., concurring).

[127] *Id.* at 880.

[128] *Id.* at 879; *see also* Flaskamp v. Dearborn Pub. Sch., 232 F. Supp. 2d 730, 741 (E.D. Mich. 2002) (holding that a teacher's relationship with a former student was not constitutionally protected, whether homosexual in nature or not, and citing *Bowers* as controlling precedent that a relationship between close friends, even if sexual, is not the type of relationship that receives constitutional protection).

[129] *Phagan*, 486 S.E.2d at 880.

Under *Lawrence*, the outcome of the first type of rape case would be different because they rely on sexual perversion and sodomy statutes to charge the offender. Since the Texas sodomy statute in *Lawrence* was held unconstitutional, any identical or similar statute, like the ones used in the rape cases, would also be unconstitutional. The result will be that accused rapists will no longer be charged under these statutes. For example, if the *Schochet* court had followed *Lawrence*, the outcome likely would have been different. The accused rapist challenged the "unnatural and perverted sexual practice" statute. The Maryland court relied heavily on *Bowers* to limit the privacy right to such categories as sexual intimacy within marriage, procreation, abortion, and not sexual activity per se.[130] Following *Lawrence*, the court could have defined the right more broadly to include the right of a consensual, sexual relationship within the privacy of the home. This definition would fit closely within the *Lawrence* precedent. Further, the Maryland court relied on *Bowers* for the proposition that legislative regulation of sexual behavior based on morals would pass rational basis review.[131] Under *Lawrence*, such morals-based legislation would not withstand rational basis scrutiny. Thus, if *Schochet* were decided under *Lawrence,* it is likely the statute would be declared unconstitutional.

In addition to seriously putting into question the validity of charging any accused rapist with these crimes, the *Lawrence* decision also jeopardizes statutory rape laws.[132] In *Fleisher v. City of Signal Hill*, a police cadet asserted that acts amounting to statutory rape are protected by the right of privacy.[133] The Ninth Circuit reviewed the Supreme Court precedent dealing with the right to privacy and specifically relied on *Bowers* for the proposition that not all sexual conduct is protected.[134] After *Lawrence*, the court may have defined the right of the cadet in a broader context—the right of two individuals to enter into a consensual relationship in private. Under a broader assertion of the right, the Ninth Circuit would be more likely to include this right under the right to privacy. In addition, since *Lawrence* further

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130 Schochet v. Maryland, 541 A.2d 183, 195 (Md. 1988).

131 *See id.* at 197-98, 206.

132 *But see* Lawrence v. Texas, 123 S. Ct. 2472, 2484 (2003). The Court stated that the *Lawrence* decision does not involve minors. However, the Court also stated that the holding in *Lawrence* did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." *Id.* Within months of the *Lawrence* decision, the Massachusetts Supreme Judicial Court cited *Lawrence* numerous times and held that the Massachusetts legislature had no rational basis for prohibiting homosexuals to marry. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). Thus, the Court's statement that the *Lawrence* holding does not involve minors will not necessarily prevent the decision's use as precedent in that context.

133 Fleisher v. City of Signal Hill, 829 F.2d 1491, 1498 (9th Cir. 1987).

134 *Id.*

separates the right to privacy from the sanctity of marriage and family, this attenuation could serve to support the claim that the right is protected, especially since the right was that of a boyfriend and girlfriend who had consensual sexual relations. Further, the primary basis for the statutory rape laws, such as the one in *Fleisher*, is morality.[135] Under *Lawrence*, the governing majority's belief that certain sexual behavior is immoral is not a rational basis for regulation. *Lawrence*, then, also puts statutory rape laws into question.

D. Incest

The Supreme Court's decision in *Lawrence* also calls incest laws into question. One such example is in *Wisconsin v. Allen*.[136] There, the Court of Appeals of Wisconsin followed the *Bowers* Court in holding that incest is not a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.[137] The court stated that there is "no question that the state may legitimately say that no one can marry his or her sibling."[138] The court relied on the *Bowers* due process rationale that fundamental rights must be a "deeply rooted . . . tradition[]"[139] and that morality provides a legitimate reason for enacting laws.[140] Thus, the court of appeals concluded that incest is not a deeply rooted tradition, but state laws against it are.[141]

If *Lawrence* had been decided prior to the decision in *Allen*, the court of appeals may have declared the Wisconsin incest statute unconstitutional. The right to adult incest might have been asserted as the same broad right under *Lawrence*: the right for adults to choose to enter into relationships in the confines of their homes. Under the rational basis review of the *Lawrence* decision, the legislature may not use the power of the state to enforce its views of morality through criminal statutes.[142] Analyzing the right of incest in terms of *Lawrence*,

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[135] *But see* Phagan v. Georgia, 486 S.E.2d 876, 879 (Ga. 1997). Besides morality, the Georgia Supreme Court found a compelling interest in "safeguarding the physical and psychological well-being of a minor." *Id.* (quoting Aman v. Georgia, 409 S.E.2d 645 (Ga. 1991)).

[136] Wisconsin v. Allen, 571 N.W.2d 872 (Wis. Ct. App. 1997).

[137] *Id.* at 877.

[138] *Id.*

[139] *Id.* (quoting Zablocki v. Redhail, 434 U.S. 374, 399 (1978)).

[140] *Id.*

[141] *Id.*

[142] Lawrence v. Texas, 123 S. Ct. 2472, 2480 (2003). Morality is not the only rationale for incest statutes. The possibility of genetic disorders of a child born as a product of an incestuous relationship could also be a rationale for incest laws. *Allen*, 571 N.W.2d at 874. *But see* Carolyn S. Bratt, *Incest Statutes and the Fundamental Right of Marriage: Is Oedipus Free to Marry?*, 18 FAM. L.Q. 257, 267-81 (1984) (disputing the belief that consanguineous mating causes offspring with genetic disorders as "simply inaccurate").

it is probable that a court would declare a state incest statute unconstitutional.

E. Prostitution

Like incest laws, state laws proscribing prostitution are also called into question by *Lawrence*. The strong reliance on *Bowers* in upholding prostitution laws is exemplified in *Roe II v. Butterworth*.[143] In that case, the United States District Court for the Southern District of Florida followed *Bowers* when the constitutionality of a state statute prohibiting prostitution was challenged.[144] The district court said it was bound by *Bowers* until the opinion was overruled.[145] First, the court reviewed the specificity with which the right was asserted in *Bowers*.[146] Since the Court in *Bowers* defined the asserted right as that of homosexual sodomy, "it is clear that the Court does not inevitably limit its inquiry to general, overriding principles of privacy."[147]

Next, the court considered whether prostitution is "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if [it] were sacrificed" or if it is "deeply rooted in this Nation[]'s history and tradition."[148] The district court acknowledged that there is a long history of prostitution, but, because society generally regards it as immoral and evil, it has also been proscribed throughout history.[149] There is a long history of laws prohibiting prostitution in the United States, and every state has some sort of prohibition against prostitution.[150] Thus, the practice of protecting prostitution is not implicit in liberty or deeply rooted in this nation's history.[151] Further, based on *Bowers*, the fact that the consenting sexual acts occurred in the privacy of one's home does not make prostitution a protected right under the Constitution.[152] Following the reasoning and analysis of the Court in *Bowers*, the district court found that there is no fundamental right to prostitution[153] and that the state's interest in protecting the morals of its citizens is legitimate.[154] The court stated that it was:

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143 Roe II v. Butterworth, 958 F. Supp. 1569 (S.D. Fla. 1997).

144 *Id.* at 1578-79.

145 *Id.* at 1578.

146 *Id.* at 1574.

147 *Id.*

148 *Id.* at 1577 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.* at 1578 (citing Bowers v. Hardwick, 478 U.S. 186, 193 (1986)).

153 *Id.* at 1578-79.

154 *Id.* at 1583.

> [not the c]ourt's place to tell . . . [the majority of the citizens of Florida] that they are wrong . . . [and, although] this moral judgment obviously will offend and aggravate a few, including Petitioner, it does not implicate the Fourteenth Amendment. The dictate of the Constitution is clear: "For protection against abuses by legislatures the people must resort to the polls, not to the courts."[155]

Roe II relied heavily on *Bowers* in declaring that prostitution is not a fundamental right. *Lawrence* would affect the outcome of this case in three ways. First, the court specifically relied on *Bowers* for defining the right narrowly.[156] Under *Lawrence*, the right might now be defined more broadly in terms of a right of consensual sexual intercourse within the privacy of a home. Framing the right so broadly allows prostitution to fall under this umbrella of private sexual relationships defined by *Lawrence*. The second way *Lawrence* affects this case relates to the privacy of one's home for sexual activity.[157] In *Roe II*, the court relied on *Bowers* in holding that state laws can reach into the privacy of one's home, even for "victimless crimes."[158] *Lawrence* rejected this proposition and found that the state cannot reach into the "most private human conduct, sexual behavior, and in the most private of places, the home."[159] Third, even if the right is not subjected to a higher level of scrutiny, it may not pass rational basis review. The court in *Roe II* acknowledged that society regards prostitution as immoral[160] and that the "collective decision of the citizens of Florida" may prohibit prostitution.[161] Under *Lawrence*, this morals-based legislation would not pass rational basis review. Thus, unless the Florida legislature has another reason for prohibiting prostitution, the statute would be declared unconstitutional.[162] States would not be able to make prostitution illegal.

F. Indecency Statutes

State statutes related to indecency are generally enacted because of the state's interest in morality. One example is in *Williams v. Pryor*.[163]

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[155] *Id.* at 1583 (quoting Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483, 487 (1955)).

[156] *Id.* at 1569, 1574.

[157] *See id.* at 1578.

[158] *Id.*

[159] Lawrence v. Texas, 123 S. Ct. 2472, 2478 (2003).

[160] *Roe II*, 958 F. Supp. at 1577.

[161] *Id.* at 1580.

[162] *But see Lawrence*, 123 S. Ct. at 2484. The Court stated that the case does not involve prostitution. However, just after that statement, the Court stated that the case "does involve two adults who, with full and mutual consent from each other, engaged in sexual practices." *Id.* One could argue that prostitution involves two adults who mutually consent to engage in sexual practices together.

[163] Williams v. Pryor, 229 F.3d 1331 (11th Cir. 2000), *withdrawn*, Jan. 1, 2001; *see also* Ohio v. Meadows, 503 N.E.2d 697, 712 (1986) (Wright, J., concurring) (citing *Bowers*

There, the Eleventh Circuit relied on *Bowers* in determining whether there is a fundamental right to use sexual devices (sex toys) which would invalidate an Alabama statute banning the distribution and possession of them.[164] The Eleventh Circuit stated that the *Bowers* Court did not construe the constitutional right to privacy broadly enough to include all forms of private, consensual, adult sexual activity.[165] Thus, the Alabama statute did not violate the Constitution because it was rationally related to the government's interest in morality.[166]

The Court's decision in *Lawrence* likely affected the constitutionality of indecency statutes. First, in *Williams*, the Eleventh Circuit specifically construed the constitutional right narrowly in light of *Bowers*.[167] Under *Lawrence*, a court could construe the right more broadly: the right to private consensual sexual activity. This broader version of the right more easily includes the uses of sexual devices between consenting adults because it is private consensual sexual activity. Once this right is included within the broad right that *Lawrence* asserted, the state's use of morality as the government interest would render the statute invalid. In *Williams*, the state statute was based on the elected legislature's view of morality.[168] Under *Bowers*, this was a valid basis for legislation, but under *Lawrence*, morality does not provide a rational basis for legislation and the indecency statute would likely be held unconstitutional.

G. Gays in the Military

The military discharges homosexuals from military service based on a policy that is often challenged; courts have relied on *Bowers* to justify the policy.[169] Generally, the plaintiffs' complaints state that the United States military violated their right to privacy when it discharged them from military service for homosexuality or bisexuality.[170] For example,

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for the proposition that any right to privacy in one's own home is not absolute when the defendant was convicted of illegally possessing child pornography); Barnes v. Glen Theatre, 501 U.S. 560, 575 (1991) (Scalia, J., concurring) (citing *Bowers* when considering if nude dancing may be prohibited by state statutes based on morality and a majority of the electorate). Obscenity and public indecency statutes further a substantial government interest in protecting morality, and, thus, laws may be based on morality. *Id.* at 569 (plurality opinion).

[164] *Williams*, 229 F.3d at 1333, 1340-41.

[165] *Id.* at 1341.

[166] *Id.* at 1343; *see also Barnes*, 501 U.S. at 569 (plurality opinion).

[167] *Williams*, 229 F.3d at 1341.

[168] *Id.* at 1343.

[169] Schowengerdt v. United States, 944 F.2d 483 (9th Cir. 1991); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989); Hrynda v. United States, 933 F. Supp. 1047 (M.D. Fla. 1996); Watson v. Perry, 918 F. Supp. 1403 (W.D. Wash. 1996).

[170] *Schowengerdt*, 944 F.2d at 490; *Woodward*, 871 F.2d at 1074; *Hrynda*, 933 F. Supp. at 1054-55; *Watson*, 918 F. Supp at 1417.

the policy of the United States Navy provides that "a propensity to engage in homosexual conduct . . . seriously impairs the accomplishment of the military mission [so] . . . [s]uch persons shall normally be separated from the naval service."[171] In their analysis, the courts have recognized that *Bowers* identified only certain fundamental rights that are subject to heightened scrutiny.[172] These include those "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed."[173] Further, the courts also took note of the *Bowers* Court's emphasis that the "right of privacy concerned matters of the family, marriage and/or procreation"[174] and that the privacy right "did not reach so far" as homosexuality.[175] Thus, based on *Bowers*, the courts have found that homosexuality is not a protected right under the Constitution, and it may be used as a criterion for referring a service member for review or discharge from active duty.[176]

There have been numerous challenges to the military's policy requiring the discharge of individuals who are homosexuals.[177] In upholding the policy, *Bowers* is frequently cited to show that statutes proscribing homosexual sodomy are not unconstitutional, and the right of homosexual sodomy is not protected under the right to privacy.[178] If *Lawrence* were followed in these cases, the validity of the military's discharge of homosexuals under the Department of Defense's policy would be in question. Relying on *Bowers*, the courts have denied numerous privacy rights claims related to the military's policy because homosexuality is not a protected right.[179] Under *Lawrence*, homosexual sodomy has not been raised to a fundamental right, but statutes prohibiting it are now unconstitutional.[180] This, at the very least, erodes part of the rationale that courts have used to uphold the military policy. The conduct for which these military members are discharged can no longer be criminalized. Further, since the *Lawrence* Court considered legal developments in other countries to be persuasive authority, courts

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[171] *Schowengerdt*, 944 F.2d at 490 n.7 (quoting Secretary of the Navy Instructions 1900.9D).

[172] *Woodward*, 871 F.2d at 1074; *see Schowengerdt*, 944 F.2d at 490; *Hrynda*, 933 F. Supp. at 1054-55; *Watson*, 918 F. Supp at 1417.

[173] *Woodward*, 871 F.2d at 1074 (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)).

[174] *Id.*

[175] *Id.* at 1075 (quoting Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

[176] *Schowengerdt*, 944 F.2d at 490; *Woodward*, 871 F.2d at 1074; *Hrynda*, 933 F. Supp. at 1054-55; *Watson*, 918 F. Supp at 1417.

[177] *Schowengerdt*, 944 F.2d at 483; *Woodward*, 871 F.2d at 1068; *Hrynda*, 933 F. Supp. at 1047; *Watson*, 918 F. Supp. at 1403.

[178] *Id.*

[179] *Id.*

[180] Lawrence v. Texas, 123 S. Ct. 2472, 2478 (2003).

now may take note that foreign nations, through their laws and policies, are increasingly allowing homosexuals in the military.[181] This trend of foreign countries, along with the decriminalization of sodomy, does weaken the various courts' rationales for the policy. The reason for the policy is not morality-based, however, so it may be more likely to withstand rational basis review than morality-based laws.[182]

H. Same-Sex Marriage

Same-sex marriage is another issue in which *Bowers* has been cited and relied upon.[183] In *Dean v. District of Columbia*,[184] the Court of Appeals for the District of Columbia refered to *Bowers* in determining whether same-sex marriage is a fundamental right under the Constitution. The court of appeals examined the Supreme Court precedent concerning fundamental rights and determined that the fundamental right to marry is linked to procreation, and same-sex marriage is not deeply rooted in the history or traditions of this country.[185] The court held that there is no fundamental right to same-sex marriage.[186]

In *Shahar v. Bowers*,[187] the Eleventh Circuit concluded that a woman's federal constitutional rights were not violated when her job offer was revoked because she married another woman. The woman was employed by the state's chief criminal prosecutor.[188] Since the job included enforcing the law against homosexual sodomy, which was upheld in *Bowers,* the court of appeals ruled that hiring the employee could cause confusion and credibility issues.[189] The court reasoned that

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[181] U.S. GEN. ACCOUNTING OFFICE REP. TO THE HONORABLE JOHN W. WARNER, U.S. SENATE, HOMOSEXUALS IN THE MILITARY – POLICIES AND PRACTICES OF FOREIGN COUNTRIES (June 1993), *at* http://dont.stanford.edu/regulations/GAO.pdf [hereinafter ACCOUNTING OFFICE REP.]. Out of twenty-five countries reviewed, eleven have policies and laws that allow homosexuals in the military, eleven have policies that do not, and three do not address the issue. *Id.* at 3.

[182] The policy requiring discharge of those who engage in homosexual conduct serves the legitimate state interest of maintenance of morale, order, discipline, national security, and mutual trust among members. *Woodward*, 871 F.2d at 1076-77.

[183] Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997); Dean v. Dist. of Columbia, 653 A.2d 307 (D.C. App. 1995) (plurality opinion); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). *But see* Baker v. Vermont, 744 A.2d 864 (Vt. 1999) (upholding same-sex unions on state constitutional grounds).

[184] *Dean*, 653 A.2d at 332.

[185] *Id.* at 332-33.

[186] *Id.* at 333.

[187] *Shahar,* 114 F.3d at 1097.

[188] *Id.* at 1100.

[189] *Id.*

one who is in a homosexual marriage could reasonably be perceived as violating the state's sodomy law.[190]

In 2002, the superior court of Massachusetts decided whether there was a fundamental right for same-sex couples to marry.[191] In its substantive due process analysis, the court relied on *Bowers* in deciding whether the claimed right was "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[192] Citing *Bowers*, the court noted how important it is to analyze carefully the history and tradition of the asserted right.[193] In applying this careful analysis, the court found that there was no history or tradition of same-sex marriage, and, thus, no fundamental right.[194]

The impact of *Lawrence* on the claimed right to same-sex marriage does not need to be predicted; such a case has already been decided. Just months after *Lawrence* was decided, the Supreme Judicial Court of Massachusetts heard the appeal of *Goodridge v. Department of Public Health*.[195] The Court vacated the 2002 judgment and remanded to the trial court for entry of judgment, which was stayed for 180 days to allow the legislature to take such action as it deemed appropriate. In the first same-sex marriage case decided since *Bowers* was overruled, the Massachusetts Supreme Judicial Court held that the Massachusetts legislature had no rational basis for prohibiting same-sex couples from marrying.[196] The Commonwealth presented three reasons for reserving marriage for heterosexual couples: (1) providing "a favorable setting for procreation," (2) ensuring the optimal setting for child rearing, which is a two parent heterosexual couple, and (3) preserving limited state financial resources.[197] The Supreme Judicial Court rejected all three reasons. Not surprisingly, *Lawrence* was cited numerous times in the opinion. The Massachusetts Supreme Judicial Court quoted *Lawrence* for the proposition that it is not the government's job to legislate morality.[198] The Court also followed the *Lawrence* Court's holding that "the core concept of common human dignity protected by the Fourteenth Amendment of the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner" and that

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[190] *Id.* at 1105 n.17.

[191] Goodridge v. Dep't of Pub. Health, 14 Mass. L. Rep. 591 (Mass. Super. Ct. 2002), *overruled by* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[192] *Id.* at 596 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[193] *Id.*

[194] *Id.* at 597.

[195] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[196] *Id.* at 948.

[197] *Id.* at 961.

[198] *Id.* at 948.

"decisions whether to marry or have children bear in shaping one's identity."[199] The Court then stated that the Massachusetts Constitution is even more protective of individual liberty and equality than the U.S. Constitution. As a result, prohibition of same-sex marriage arbitrarily deprives a person who enters into an intimate, exclusive union with another of the same-sex of one of the most "rewarding and cherished institutions."[200]

Shortly after the ruling, the Massachusetts Supreme Judicial Court issued an opinion to the Massachusetts Senate which reviewed the constitutionality of a bill that prohibited same-sex couples from entering into marriage, but allowed them to form civil unions with all the benefits, protections, and rights of marriage.[201] The Court held that the bill violated the equal protection and due process requirements of the state's constitution.[202] The Court stated that the elected majority, under the "guise" of protecting traditional values, may not prohibit same-sex marriages based on its values and morals.[203] The Court said that, for the bill to be constitutional, same-sex couples must be allowed to enter into a "marriage," not just a "civil union," even though the benefits, rights, and protections are the same. It is evident that *Lawrence* had a persuasive, if not compelling, effect on the Massachusetts Supreme Judicial Court. Both *Lawrence*'s broad definition of privacy and its refusal to accept morality as a justification for prohibition under rational basis review certainly influenced the Massachusetts court to define the right broadly and find that the state's objectives did not survive rational basis review. As a result, on May 17, 2004, same-sex marriages were legalized in Massachusetts, and a number of other state courts have already considered cases that seek invalidation of similar marriage laws.[204]

I. Adoption and Custody Cases

Courts have also cited *Bowers* in family law cases when considering an individual's sexual orientation as a factor in deciding whether to allow a parent to adopt or have custody of a child.[205] In *Appeal in Pima*

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[199] *Id.* (citing Lawrence v. Texas, 123 S. Ct. 2472, 2481 (2003)).

[200] *Id.*

[201] Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

[202] *Id.* at 572.

[203] *Id.* at 570.

[204] *See generally* Cheryl Wetzstein, *Courts Set to Hear Arguments on Same-sex "Marriage"; Missouri Vote, Massachusetts Authority at Issue*, WASH. TIMES, June 1, 2004, at A3; Ashbel S. Green, *Marriage Case Moves Closer to High Court*, OREGONIAN, July 16, 2004, at C1; Lornet Turnbull & Sanjay Bhatt, *Gay-Marriage Fight Heats up After Ruling*, SEATTLE TIMES, Aug. 8, 2004, at A1.

[205] *In re* Appeal in Pima County Juvenile Action B-10489, 727 P.2d 830 (Ariz. Ct. App. 1986); S.B. v. L.W., 793 So. 2d 656 (Miss. Ct. App. 2001).

County,[206] the Court of Appeals of Arizona held that the trial court did not err when it considered the bisexuality of an applicant for adoption because the court must consider the child's best interests. The Court stated that, while bisexuality alone does not make someone an unfit parent, it is a relevant factor because bisexual conduct violates state law and proscribing this conduct is constitutional as announced in *Bowers*.[207] It would be contradictory to proscribe homosexual conduct yet give parenting rights to those who practice that unlawful behavior.[208] Similarly, in *S.B. v. L.W.*,[209] an appellate court held that the chancellor could consider the mother's bisexual lifestyle as a factor in a decision regarding custody.

By applying *Lawrence*, it is likely that the homosexuality or bisexuality of an applicant for adoption or custody would no longer be a permissible consideration. Since the rationale for considering bisexuality or homosexuality as a factor in adoption or custody was that sodomy was against the law, this rationale is no longer valid under *Lawrence*. Thus, under *Lawrence*, the bisexuality or homosexuality of an applicant for adoption or custody could no longer be considered.

J. Equal Protection Clause Cases

Courts have relied on *Bowers* in a large number of Equal Protection Clause cases.[210] The Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[211] The Equal Protection Clause, as interpreted by the United States Supreme Court, prohibits the government from arbitrarily or invidiously discriminating against classes of people.[212] In order to determine if the government's discrimination is so arbitrary that it is unconstitutional, the Supreme Court analyzes Equal Protection Clause cases according to a three-tiered model that consists of three levels of review: strict, intermediate, and rational basis. Courts considering Equal Protection Clause challenges have relied on *Bowers* to conclude that

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[206] *Pima County*, 727 P.2d at 835.

[207] *Id.*

[208] *Id.*

[209] *S.B.*, 793 So. 2d at 656.

[210] *See* High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989); Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987); Hrynda v. United States, 933 F. Supp. 1047 (M.D. Fla. 1996); Watson v. Perry, 918 F. Supp. 1403 (W.D. Wash. 1996); Steffan v. Cheney, 780 F. Supp. 1 (D.D.C. 1991); Doe v. Sparks, 733 F. Supp. 227 (W.D. Pa. 1990); Missouri v. Walsh, 713 S.W.2d 508 (Mo. 1986); Ohio v. Thompson, No. 99-A-0070, 2000 Ohio App. LEXIS 6090 (Ohio Ct. App. Dec. 22, 2000); Baker v. Vermont, 744 A.2d 864 (Vt. 1999).

[211] U.S. CONST. amend. XIV, § 1.

[212] ALLAN IDES & CHRISTOPHER MAY, CONSTITUTIONAL LAW INDIVIDUAL RIGHTS 184 (2d ed. 2001).

homosexuality is not a suspect class and is analyzed under rational basis review.[213] Although *Bowers* is a Due Process Clause case, the doctrines supporting both the Equal Protection Clause analysis and Due Process Clause analysis are similar.[214]

> When conduct, either by virtue of its inadequate foundation in the continuing traditions of our society or for some other reason, such as lack of connection with interests recognized as private and protected, is subject to some government regulation, then analysis under the substantive due process clause proceeds in much the same way as analysis under the lowest tier of equal protection scrutiny. A rational relation to a legitimate government interest will normally suffice to uphold the regulation. At the other extreme, where the government seriously intrudes into matters which lie at the core of interests which deserve due process protection, then the compelling state interest test employed in equal protection cases may be used by the Court to describe the appropriate due process analysis.[215]

Since the Supreme Court held that there is no fundamental right to engage in homosexual sodomy, then under both Equal Protection Clause analysis and Due Process Clause analysis a statute or policy "must be upheld if there is a rational relationship between the policy and a legitimate governmental purpose."[216] The Equal Protection Clause challenges involve such subjects as gays in the military,[217] sexual misconduct statutes,[218] the Department of Defense policy of expanded background checks,[219] Federal Bureau of Investigation (FBI) hiring policies,[220] and same-sex marriage.[221] Courts deciding these cases relied on *Bowers* for justification in their rational basis scrutiny.

One example of how courts have relied on *Bowers* in Equal Protection Clause cases involving gays in the military is *Woodward v.*

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[213] Equal. Found. of Greater Cincinnati v. City of Cincinnati, 128 F.3d 289, 292-93 (6th Cir. 1997); *High Tech Gays*, 895 F.2d at 563, 573; Ben-Shalom v. Marsh, 881 F.2d 454, 464-65 (7th Cir. 1989); *Woodward*, 871 F.2d at 1068, 1075; *Padula*, 822 F.2d at 102-03; *see also* Opinion of the Justices, 530 A.2d 21, 24 (N.H. 1987) (stating that for equal protection analysis, homosexuals are not a suspect class nor is there a fundamental right to homosexual sodomy according to *Bowers*). *But see* Baker v. Vermont, 744 A.2d 864 (Vt. 1999).

[214] *Watson*, 918 F. Supp. at 1416.

[215] *Id.* at 1416 (quoting Beller v. Middendorf, 632 F.2d 788, 808 (9th Cir. 1980)).

[216] *Id.*

[217] *Woodward*, 871 F.2d at 1068; Hrynda v. United States, 933 F. Supp. 1047 (M.D. Fla. 1996); *Watson*, 918 F. Supp. at 1403; Steffan v. Cheney, 780 F. Supp. 1 (D.D.C. 1991).

[218] Missouri v. Walsh, 713 S.W.2d 508 (Mo. 1986); Ohio v. Thompson, No. 99-A-0070, 2000 Ohio App. LEXIS 6090 (Ohio Ct. App. Dec. 22, 2000).

[219] High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990).

[220] Padula v. Webster, 822 F.2d 97, 97 (D.C. Cir. 1987).

[221] Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997); Dean v. Dist. of Columbia, 653 A.2d 307 (D.C. Cir. 1995) (plurality opinion); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003); Baker v. Vermont, 744 A.2d 864 (Vt. 1999).

United States.[222] There, the Federal Circuit stated that, although *Bowers* was a due process case, it was "equally persuasive, if not dispositive" of the Equal Protection Clause argument that a Navy service member asserted.[223] The Federal Circuit relied on *Bowers* and reasoned that, since the Court held that there is no fundamental right to homosexual sodomy, there is no need to consider if this Equal Protection Clause claim would be analyzed under suspect class (strict level) scrutiny.[224] The Federal Circuit also cited *Bowers* when it declined to elevate homosexuality to a quasi-suspect (intermediate level) class.[225] Thus, the court held that the Navy policy regarding homosexuals only had to be rationally related to a permissible government interest.[226] The Navy's interests included, among other things, morale, mutual trust, recruitment issues, security breach issues, and maintenance of discipline.[227] The court found that these specific considerations of the armed forces passed the rational basis test.[228]

Besides cases relating to the Department of Defense's policy discharging gays, the Department's national security policy also has come under attack under the Equal Protection Clause.[229] In *High Tech Gays v. Defense Industrial Security Clearance Office*,[230] the Ninth Circuit rejected an Equal Protection Clause claim brought by homosexual applicants for employment with the Department of Defense. The plaintiffs alleged that the top security clearance policy of the Department of Defense, which subjected homosexual applicants for top security clearance to expanded investigations, violated the Equal Protection Clause.[231] In its analysis, the Ninth Circuit relied on *Bowers*[232] to determine the appropriate level of scrutiny under the Equal Protection Clause.[233] The court reasoned that, if there is no fundamental right to homosexual sodomy under the Due Process Clause, then the Equal Protection Clause cannot include homosexual conduct as a

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[222] *Woodward*, 871 F.2d at 1068; *see also Hrynda*, 933 F. Supp. at 1047; *Watson*, 918 F. Supp. at 1403; *Steffan*, 780 F. Supp. at 1.

[223] *Woodward*, 871 F.2d at 1075.

[224] *Id.*

[225] *Id.* at 1076.

[226] *Id.*

[227] *Id.* at 1076-77.

[228] *Id.* at 1077.

[229] High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990).

[230] *Id.*

[231] *Id.* at 569.

[232] *Id.* at 571. The Ninth Circuit also cited *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989), *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), and *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987). *Id.*

[233] *Id.*

fundamental right either.[234] The court concluded that, based on the *Bowers* holding, since the Constitution "confers no fundamental right upon homosexuals to engage in sodomy, and because homosexual conduct can thus be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes."[235] Under rational basis review, the Ninth Circuit concluded that the government's statement that hostile intelligence groups target homosexuals is a legitimate, if not compelling, justification for the Department of Defense's expanded investigations for top security clearance.[236]

In a similar case, *Padula v. Webster*,[237] the D.C. Circuit held that the FBI's hiring policy did not violate the Equal Protection Clause. The plaintiff claimed that the FBI did not hire her as a special agent because the routine background check revealed she was homosexual.[238] The FBI's hiring policy treated homosexuality as a factor in hiring decisions,[239] but the FBI explained that the reason for the policy was that agents perform duties that involve top secret matters related to national security and, further, to employ agents who engage in the criminalized conduct of homosexuality would undermine the FBI's law enforcement purpose.[240] In deciding whether homosexuals compromised a class deserving heightened scrutiny, the D.C. Circuit concluded that the Court's reasoning in *Bowers*[241] was controlling and rejected such a classification.[242] The court stated that it would be contradictory "to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause."[243] Further, the D.C. Circuit explained that, if the Supreme Court did not object to state laws criminalizing behavior that defines the class, then certainly a lower court does not have the power to declare that the class needs protection.[244] Thus, the D.C. Circuit examined the Equal

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234 *Id.*

235 *Id.*

236 *Id.* at 578.

237 *Padula,* 822 F.2d at 104; *see also* City of Walls v. Petersburg, 895 F.2d 188, 193 (4th Cir. 1990) (holding that *Bowers* is controlling when considering whether homosexual conduct may be questioned on an employment background questionnaire).

238 *Padula*, 822 F.2d at 98.

239 *Id.* at 98-99.

240 *Id.* at 104.

241 The court also relied on Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984), which was an equal protection case decided two years before *Bowers*. The *Dronenburg* court based its rational basis analysis on the fact that the constitutional right to privacy did not protect homosexual conduct.

242 *Padula*, 822 F.2d at 103.

243 *Id.*

244 *Id.*

Protection Clause argument under rational basis review.[245] The court concluded that the FBI's specialized counterintelligence duties related to national security rationally justified its consideration of homosexual conduct that could compromise the agency's functions.[246]

A number of Equal Protection Clause cases relied on *Bowers* as justification for applying rational basis review.[247] The courts relied on two general propositions from *Bowers* that justify rational basis scrutiny: (1) homosexual sodomy is not a protected fundamental right, and (2) statutes that criminalize homosexual sodomy are constitutional. The courts reasoned that, if there is no right to homosexual sodomy under the Due Process Clause, then the Equal Protection Clause cannot elevate homosexuals to a quasi-suspect or suspect class.[248] The courts also concluded that, since states can criminalize homosexual sodomy, homosexual conduct cannot constitute a quasi-suspect or suspect class.[249]

Under *Lawrence*, homosexual sodomy has not been deemed a fundamental right, but statutes proscribing homosexual sodomy have been declared unconstitutional. Thus, the rationale that courts used for their Equal Protection Clause rational basis scrutiny has eroded.[250] Further, since courts considered the Due Process Clause case of *Bowers* when assigning the level of Equal Protection Clause scrutiny, it is logical to assume that courts will now consider *Lawrence* and its "expanded" due process analysis with respect to Equal Protection Clause claims. The *Lawrence* Court deemed current trends and foreign nations' laws and judicial opinions as relevant in interpreting the Constitution; it is logical that courts will consider these factors in Equal Protection Clause cases as well. One example is the ban on gays in the military. In applying *Lawrence* to an Equal Protection Clause case, a court could conceivably examine current trends and international laws and policies when making its decision. In fact, more countries are allowing gays in the military with most of the provisions being changed in just the last

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[245] *Id.*

[246] *Id.* at 104.

[247] High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989); *Padula*, 822 F.2d at 97; Hrynda v. United States, 933 F. Supp. 1047 (M.D. Fla. 1996); Watson v. Perry, 918 F. Supp. 1403 (W.D. Wash. 1996); Steffan v. Cheney, 780 F. Supp. 1 (D.D.C. 1991); Doe v. Sparks, 733 F. Supp. 227 (W.D. Pa. 1990); Missouri v. Walsh, 713 S.W.2d 508 (Mo. 1986); Ohio v. Thompson, No. 99-A-0070, 2000 Ohio App. LEXIS 6090 (Ohio Ct. App. Dec. 22, 2000).

[248] *High Tech Gays*, 895 F.2d at 571.

[249] *Id.* at 571; *Padula*, 822 F.2d at 103-04.

[250] *But see* Romer v. Evans, 517 U.S. 620 (1996). In striking down a Colorado constitutional amendment that prohibited all legislative, judicial, or executive action designed to protect homosexual persons from discrimination, the Court never cited *Bowers* to support the rational basis review.

twenty years.[251] Since the Court in *Lawrence* found the history of the last fifty years relevant in examining an asserted constitutional right, this international trend could certainly impact a court deciding an Equal Protection Clause case.

In sum, the courts deciding Equal Protection Clause cases have used *Bowers* to justify rational basis review for homosexuals. In light of *Lawrence*, the justification for rational basis review has eroded because homosexual sodomy statutes are now unconstitutional. The courts may also consider other factors such as recent trends and international laws in making their decisions.

K. Cases Relying on Bowers*'s Method of Due Process Analysis*

Finally, there are numerous cases that cited *Bowers*, not for its holding that the Constitution does not prohibit states from proscribing homosexual sodomy or similar acts, but for its method of determining a fundamental right.[252] In *Mullins v. Oregon*,[253] grandparents claimed that their substantive due process rights were violated because they, as grandparents, had a fundamental interest in adopting their grandchildren after the natural parents lost parental rights. The Ninth Circuit considered whether the biological connection alone would give a grandparent a substantive due process right to adopt a grandchild.[254] In making its decision, the court reviewed the Supreme Court's Fourteenth Amendment Due Process Clause analysis.[255] The court relied on *Bowers* when it limited the substantive due process rights to those that "we as a society traditionally have protected."[256] Further, the court cautioned against expanding substantive due process based on opinions of the judiciary rather than traditional societal rights.[257] Thus, the court rejected the invitation to find a new fundamental right of grandparents to adopt their grandchildren.[258]

Similarly, in *Doe v. Wigginton*,[259] a prisoner claimed a fundamental right to on-demand HIV testing.[260] Relying on *Bowers*'s analysis of

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[251] ACCOUNTING OFFICE REP., *supra* note 181.

[252] Mullins v. Oregon, 57 F.3d 789 (9th Cir. 1995); Doe v. Wigginton, 21 F.3d 733 (6th Cir. 1994); Flores v. Meese, 934 F.2d 991 (9th Cir. 1990); Charles v. Baesler, 910 F.2d 1349 (6th Cir. 1990); Henne v. Wright, 904 F.2d 1208 (8th Cir. 1990); Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988).

[253] *Mullins*, 57 F.3d at 793-94.

[254] *Id.* at 791.

[255] *Id.* at 793.

[256] *Id.*

[257] *Id.*

[258] *Id.* at 794-95. In *Troxel v. Granville*, 530 U.S. 57 (2000), the Supreme Court came to a similar conclusion but did not cite *Bowers* in rejecting a right of grandparents to visit their grandchildren.

[259] Doe v. Wigginton, 21 F.3d 733, 740 (6th Cir. 1994).

"history and traditions," the Sixth Circuit held that on-demand HIV testing is not a fundamental right because it is not protected in this nation's history and traditions.[261] The Sixth Circuit also relied on *Bowers*'s rationale in *Charles v. Baesler*[262] in rejecting a fire department captain's asserted fundamental right to promotion. To determine if a contractual right to promotion was a protected fundamental right under the Due Process Clause, the court relied on *Bowers* for its analysis of the deeply rooted history and traditions that define fundamental rights.[263] Just as the *Bowers* Court found that protection of homosexual sodomy was not deeply rooted in history, the Sixth Circuit found that any claim to a right of promotion is not deeply rooted in history or tradition.[264]

In another case, *Henne v. Wright*,[265] the Eighth Circuit relied on *Bowers* in rejecting a claim that Nebraska's restrictions on the choice of surnames that can be given to a child at birth violated a fundamental right under the Due Process Clause. Specifically, the court examined if the parental right to train and educate recognized by *Meyer v. Nebraska*[266] and *Pierce v. Society of Sisters*[267] should be extended to include the parental right to choose a non-parental surname.[268] Relying on *Bowers*'s fundamental rights analysis, the Eighth Circuit found no such tradition in the history of the nation.[269]

In *Flores v. Meese*,[270] the Ninth Circuit relied on *Bowers* in rejecting a claim that a fundamental right was violated by an Immigration and Naturalization Services (INS) policy which stated that no detained alien minor may be released except to a parent or lawful guardian. The court considered whether to define the alleged right broadly (right of physical liberty), which is more likely to be a fundamental right, or narrowly (right to be released to an unrelated adult), which is less likely to be a fundamental right.[271] In its analysis, the court contrasted the *Bowers* majority's method of construing the right at stake narrowly (fundamental right to engage in homosexual sodomy) with the dissenting opinion's method of construing the right at stake broadly (right to be let

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[260] *Id.* at 739-40.

[261] *Id.* at 740 (citing Bowers v. Hardwick, 478 U.S. 186, 192 (1986).

[262] Charles v. Baesler, 910 F.2d 1349, 1353 (6th Cir. 1990).

[263] *Id.*

[264] *Id.* at 1353.

[265] Henne v. Wright, 904 F.2d 1208, 1215 (8th Cir. 1990).

[266] Meyer v. Nebraska, 262 U.S. 390 (1923).

[267] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[268] *Henne*, 904 F.2d at 1214.

[269] *Id.* at 1214-15.

[270] Flores v. Meese, 934 F.2d 991, 1007-08 (9th Cir. 1990).

[271] *Id.* at 1007 n.3.

alone).[272] The Ninth Circuit concluded that the majority in *Bowers* "properly rejected this broad characterization of the right in favor of the narrower formulation."[273] The court stated that *Bowers* provided "solid support for our decision to characterize the substantive due process right narrowly."[274] Based on the narrow definition of the right at issue, the Ninth Circuit found that no fundamental right was implicated.[275] Under rational basis review, the court held that the state's regulation was rationally related to a legitimate state interest.[276]

Finally, in *Cruzan v. Harmon*,[277] the Supreme Court of Missouri considered whether the right of privacy under the Due Process Clause extends to the decision of a patient or his guardian to direct the withdrawal of food and water. The court relied on *Bowers* in asserting that the privacy right should not be expanded beyond its "common theme of procreation and relationships within the bonds of marriage."[278] Thus, based on *Bowers* and the right to privacy decisions of the Supreme Court, the Missouri Supreme Court held that the state's interest in the preservation of life outweighed any rights invoked on the patient's behalf to have food and water withdrawn.[279] Two years later, the United States Supreme Court affirmed this decision.[280]

The *Lawrence* decision could have far reaching effects on many cases not even related to sexual privacy rights, as cases unrelated to sexual relationships or homosexuality relied on *Bowers*'s method of due process analysis.[281] The two main propositions that *Bowers* stood for with respect to these cases were (1) the history and tradition analysis and (2) the defining of the right asserted narrowly rather than broadly. Under *Lawrence*, the analysis and outcomes of many of these cases would be different. After *Lawrence*, the analysis of an asserted right would still consist of an examination of "deeply rooted history and traditions," but the courts may also consider emerging trends in the United States, international court precedent, and whether the rationale for a statute was based on morality. The broad definition of the right asserted in

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[272] *Id.*

[273] *Id.*

[274] *Id.*

[275] *Id.* at 1009.

[276] *Id.* at 1010.

[277] Cruzan v. Harmon, 760 S.W.2d 408, 412 (Mo. 1988), *aff'd*, 497 U.S. 261 (1990).

[278] *Id.* at 418.

[279] *Id.* at 418-19.

[280] Cruzan v. Harmon, 497 U.S. 261 (1990).

[281] Mullins v. Oregon, 57 F.3d 789 (9th Cir. 1995); Doe v. Wigginton, 21 F.3d 733 (6th Cir. 1994); Flores v. Meese, 934 F.2d 991 (9th Cir. 1990); Charles v. Baesler, 910 F.2d 1349 (6th Cir. 1990); Henne v. Wright, 904 F.2d 1208 (8th Cir. 1990); *Cruzan*, 760 S.W.2d at 408.

Lawrence could influence outcomes as well. For example, in *Cruzan*, the court relied on *Bowers* for the proposition that the privacy right should not be expanded beyond procreation and marriage rights.[282] Based on *Lawrence*, however, the right has been significantly broadened to protect private adult relationships and the dignity of the individual. Certainly, the right to die case of *Cruzan* could be affected by defining the right so broadly.[283] *Flores* is another example; the court relied on *Bowers* in defining the right narrowly, but under *Lawrence*, the right that the plaintiff claimed would now be viewed broadly. Thus, *Lawrence* has implications for all due process cases, not just those related to sexual privacy.

IV. CONCLUSION

Based on the principle of stare decisis, the Supreme Court must strictly adhere to its decisions when there has been reasonable reliance by individuals and society on its continued application. When the Court overruled *Bowers* and did not follow the principle of stare decisis, it declared that the *Bowers* holding had not induced such reliance. But, to the contrary, the reliance on *Bowers* has been "overwhelming."[284] Numerous judicial decisions and legislative enactments have relied on the holding, rationale, and principles set forth in *Bowers*, especially the proposition that laws based on notions of morality are valid. Numerous state laws which prohibit adultery, prostitution, adult incest, statutory rape, indecency, and same-sex marriage, as well as the Department of Defense's and FBI's security policies regarding homosexuals, are called into question. Further, numerous decisions not even related to sexual behavior have relied on *Bowers* for its method of due process analysis. Decisions dealing with the asserted fundamental rights of adoption, HIV testing, employment promotions, and the right to die have all relied on *Bowers*. In deciding *Lawrence,* the Court overruled *Bowers* and called into question every one of these decisions. The Court has opened the door and started down the road that it was so unwilling to start down seventeen years earlier. The descent down the slippery slope has begun.

Sarah Catherine Mowchan

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[282] *See supra* note 278 and accompanying text.

[283] *But see* Washington v. Glucksberg, 521 U.S. 702, 721-23 (1997). In substantive due process cases, the Supreme Court requires a "careful description" of the asserted fundamental liberty interest. *Id.* In defining the right so broadly in *Lawrence*, which was decided after *Glucksberg,* the "'careful description' of the asserted" right requirement may be eroding in favor of a broader view of substantive due process rights. *See id.* at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

[284] Lawrence v. Texas, 123 S. Ct. 2472, 2490 (2003) (Scalia, J., dissenting).

CHOICE OF LAW UNDER THE MULTIPARTY, MULTIFORUM TRIAL JURISDICTION ACT OF 2002

I. INTRODUCTION

"A single transportation or building catastrophe can generate a thousand lawsuits."[1] Consider for a moment the complexity of consolidating a thousand lawsuits in a single court. When a catastrophe occurs that takes the lives of hundreds of people, the legal result is hundreds of plaintiffs filing lawsuits against multiple defendants based on various causes of action. Traditionally, in such cases, lawsuits were filed in every jurisdiction connected to the catastrophe or any of the parties involved. The same issues were litigated over and over in federal and state courts. Often, many of the cases could be consolidated in federal court; others could not because of the requirement of complete diversity for federal diversity jurisdiction.[2] Of the cases that were amenable to consolidation, one can only imagine the choice of law labyrinth that the consolidation of hundreds of suits can foster. In a case resulting from an airline crash in Chicago that killed a total of 273 people, the court summed up the confounding choice of law dilemma in this way:

> The crash and consequent deaths occurred in Illinois. Plaintiffs and their decedents were and are residents of California, Connecticut, Hawaii, Illinois, Indiana, Massachusetts, Michigan, New Jersey, New York, Puerto Rico, and Vermont, as well as Japan, the Netherlands and Saudi Arabia. At the time of the crash, American Airlines, Inc. . . . a Delaware corporation, had its principal place of business in New York. . . . American [recently] moved its principal place of business to Texas. At the time of the crash, American's operations base was in Texas, and its maintenance department was headquartered in Oklahoma. Defendant McDonnell Douglas Corporation . . . a Maryland corporation, had its principal place of business in Missouri. The DC-10 aircraft was designed and built by MDC in California. Defendant MDC argues that this Court should apply the law of Illinois, the place of the injury, to all actions. . . . Defendant American argues that the law of Illinois should be applied to actions originally filed in Illinois and Michigan, and that of New York should be applied to actions originally

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[1] Thomas M. Reavley & Jerome W. Wesevich, *An Old Rule for New Reasons: Place of Injury as a Federal Solution to Choice of Law in Single-Accident Mass-Tort Cases*, 71 TEX. L. REV. 1, 2 (1992).

[2] 28 U.S.C. § 1332(a) (2000); 28 U.S.C. § 1407(a) (2000); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

> filed in New York and California. . . . The plaintiffs take various [other] positions.[3]

Congress began considering ideas for federal consolidation of multiforum, mass-tort litigation in the late 1970s. From the beginning, the proposed bills included some attempt at a federal solution to the choice of law quandary that necessarily attends such cases. It seemed natural that, if federal courts were given original jurisdiction over all cases resulting from a mass-disaster, there should be some mechanism in place for the court to decide what substantive law would apply in the litigation.

In November 2002, Congress passed the Multiparty, Multiforum Trial Jurisdiction Act of 2002 ("MMTJA"). The MMTJA gives federal district courts original jurisdiction over any case arising from a single-accident catastrophe that takes the lives of at least seventy-five people, so long as there is minimal diversity between the opposing parties.[4] Additionally, it expands defendants' right to remove cases arising out of such single-accident catastrophes to federal court, and also the right of plaintiffs to intervene in such cases.

The MMTJA, surprisingly, is completely silent on the issue of how the single federal court is to determine what substantive tort law applies to the cases. This fact is astounding considering the vigorous debate that raged for almost two decades both in Congress and in academia specifically over the best way to deal with the choice of law dilemma in this legislation.

Although the MMTJA allows for consolidation of multiple cases arising from single-accident catastrophes, the court will have to apply different conflict of laws rules to the various cases depending on where they originated. Various choice of law provisions were proposed in earlier versions of the MMTJA, most of which directed the federal court to select the law of a single jurisdiction to apply to all the consolidated cases. These approaches were in keeping with the legislation's goals of increased efficiency and consistency. A new choice of law statute for MMTJA litigation should be enacted requiring the court to apply a single substantive standard to the entire litigation. In keeping with the way federal courts have handled choice of law issues for decades, the rule should direct the MMTJA court to apply the substantive law of the state in which it sits.

This Note will analyze the jurisdictional, removal, and intervention provisions of the MMTJA, and how the choice of law issue is and should be determined under the statute. Part II will discuss the relevant parts

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[3] *In re* Air Crash Disaster Near Chicago, Ill., on May 25, 1979, 500 F. Supp. 1044, 1047 (N.D. Ill. 1980).

[4] 28 U.S.C.A. § 1369(a) (Supp. 2004).

of the MMTJA and the statute's legislative history. Part III will examine choice of law under the MMTJA, with a review of past proposals for a choice of law provision. The Note concludes with a recommendation that Congress enact a choice of law statute which would require the court in MMTJA litigation to apply a single legal standard to all of the parties.

II. THE MULTIPARTY, MULTIFORUM TRIAL JURISDICTION ACT OF 2002

A. The General Jurisdictional Rule

28 U.S.C. § 1369(a), the general jurisdictional rule of the MMTJA, reads:

> The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location, if (1) a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place; (2) any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States; or (3) substantial parts of the accident took place in different States.[5]

The general rule, then, consists of five requirements that must be met for the federal court to have original jurisdiction over the case. The first four requirements are conjunctive: there must be (1) minimal diversity between the adverse parties in litigation arising from (2) a single accident that (3) claimed the lives of at least seventy-five people (4) at a discrete location.[6] The final element is disjunctive requiring the parties to satisfy at least one of three requirements: (1) the defendant must be a resident of a state other than the one in which the accident took place, (2) any two of the defendants must be residents of different states, or (3) "substantial parts" of the accident must have taken place in different states.[7]

First, there must be "minimal diversity between adverse parties."[8] This requirement is in contrast to the requirement of complete or total diversity in cases under 28 U.S.C. § 1332.[9] The term "minimal diversity" is defined in the statute itself: "minimal diversity exists between adverse parties if any party is a citizen of a State and any adverse party is a citizen of another State, a citizen or subject of a foreign state, or a

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5 *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 28 U.S.C. § 1332(a) (2000); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).

foreign state as defined in section 1603(a) of this title . . . ."[10] "Citizenship" suggests the section 1332 requirement of domicile.[11] Under section 1369, so long as at least one plaintiff is the domiciliary of a state within the United States, and at least one defendant is the domiciliary of a different state or is not a United States citizen at all, or vice versa, then the minimal diversity requirement is met.[12]

Second, the litigation must have "arise[n] from a single accident."[13] According to the statute itself, "the term 'accident' means a sudden accident, or a natural event culminating in an accident."[14] The scope of section 1369 is limited to cases arising from single catastrophic events

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[10] 28 U.S.C.A. § 1369(c)(1).

[11] 28 U.S.C. § 1332(a) (setting out the citizenship requirements for diversity jurisdiction); 13B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3611 (2d ed. 1984) (explaining the construction of "citizen" in § 1332 as "domicile"). Given that this statute is addressing a form of diversity jurisdiction, and the term "citizen" in the federal diversity jurisdiction statute has long been construed as requiring domicile, the term "citizen," as used in this statute, should be construed as requiring domicile. Domicile is simply "that place where [a] person has a true, fixed, and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom." CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 26 (6th ed. 2002).

[12] Section 1369 requires, for minimal diversity, either diversity of domicile of states, or diversity between a domiciliary of one state and a "citizen or subject of a foreign state, or a foreign state as defined in section 1603(a) of [Title 28]." 28 U.S.C.A. § 1369(c)(1). The language "citizen or subject of a foreign state," as used in 28 U.S.C. § 1332, has been universally construed as requiring merely that the person "is accorded that status by the laws or government of [the foreign] country." WRIGHT ET AL., *supra* note 11. The phrase "citizen or subject of a foreign state" should not be construed any differently in section 1369.

Section 1603(a)-(b) reads as follows:

> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity-
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> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(a)-(b) (2000).

In contrast to 28 U.S.C. § 1332, and earlier proposed versions of the MMTJA, section 1369 contains no amount in controversy requirement. Peter Adomeit, *The Station Nightclub Fire and Federal Jurisdictional Reach: The Multidistrict, Multiparty, Multiforum Jurisdiction Act of 2002*, 25 W. NEW ENG. L. REV. 243, 249 (2003); H.R. REP. NO. 107-14, at 8 (2001).

[13] 28 U.S.C.A. § 1369(a).

[14] 28 U.S.C.A. § 1369(c)(4).

and does not include progressive or multiple tort cases such as asbestos litigation.[15]

Third, "at least 75 natural persons [must] have died in the accident."[16] The language of this element is unambiguous. The restriction of this requirement to seventy-five "natural persons" is obviously meant to avoid misuse of the statute in cases of the death of a corporate entity or artificial person. The requirement that the seventy-five, or more, deaths take place "in the accident,"[17] is explored below. The clear requirement of the third element, then, is that a minimum of seventy-five human beings must have died as an immediate result of the accident.

Fourth, at least seventy-five deaths must have taken place "at a discrete location."[18] "Discrete location" clearly refers to an individual geographic site. The only possible ambiguity is the question of what must have occurred at the discrete location. The structure of the sentence indicates that the seventy-five, or more, deaths must have occurred at an individual location. The accident, by contrast, is not restricted to a discrete location.[19]

The fifth requirement to meet the general rule consists of three disjunctive elements; if any one of these three elements is met, then the fifth requirement is satisfied. The first element is that "a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place . . . ."[20] A single defendant need only be a resident of a state other

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[15] An "accident" is "[a]n unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated." BLACK'S LAW DICTIONARY 15 (8th ed. 2004). As defined, the second requirement, that the litigation be the result of a single accident, drastically limits the reach of the Act. Most mass-tort litigation is excluded by this requirement.

[16] 28 U.S.C.A. § 1369(a).

[17] *Id.*

[18] *Id.*

[19] The first two requirements described in subsection (a) are divided from the third and fourth by a comma. After the elements of (1) minimal diversity and (2) single accident, there is a comma, and the rule then continues "where at least 75 natural persons have died in the accident at a discrete location." *Id.* An accident could conceivably occur in more than one location and still fall within the scope of section 1369. For example, an airplane could sustain an explosion over one state, then fall to the ground in another, killing all on board.

This would seem to indicate that the deaths must be immediate, or almost immediate, in conjunction with the accident. Consequently, if fewer than seventy-five persons died in the accident, but the total number of deaths that resulted from the accident equaled seventy-five or more, the cases would not fall within section 1369. However, if at least seventy-five died in the accident, plaintiffs who died at some later time as a result of the accident would still have their claims included in the section 1369 litigation. 28 U.S.C.A. § 1369(d).

[20] 28 U.S.C.A. § 1369(a)(1).

than that in which a "substantial part" of the accident occurred. The statute requires that a "substantial part of the accident" occur in a state different than one in which a defendant is a resident.[21] It apparently requires, then, that some significant aspect of the accident occur in a state other than one that is the sole residence of every defendant. In this vein, if the accident substantially occurs in a state in which all defendants reside, this element is met if one defendant also resides in another state.

The second element of the disjunctive fifth requirement is that "any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States."[22] This is the simplest of diversity schemes; it requires merely a difference in state residence between any two parties on one side of the litigation—the defense.

The final element of the disjunctive fifth requirement is that "substantial parts of the accident took place in different States."[23] If the accident occurs to a large extent in more than one state, this element is met. One example might be: two airplanes collide in mid-air above Virginia, one of which is carrying seventy-five passengers; the passenger plane then crashes to the ground in North Carolina, killing all on board. In this instance, a "substantial part" of the accident, the collision between the airplanes, occurred in one state, while a second "substantial part," the collision between the plane and the earth, occurred in a second state. In such a case, this third element of the disjunctive fifth requirement would be met.[24]

It is also noteworthy that the venue provision of the MMTJA describes the acceptable location for an MMTJA court. "A civil action in which jurisdiction of the district court is based upon section 1369 of this title may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place."[25]

B. The Jurisdictional Exception

The exception to the general rule of section 1369 reads as follows: "[T]he district court shall abstain from hearing any civil action described in subsection (a) in which—(1) the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also

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[21] *Id.* The language "substantial part" in the statute is another indication that the entire accident need not have taken place at a single discrete location.

[22] 28 U.S.C.A. § 1369(a)(2).

[23] 28 U.S.C.A. § 1369(a)(3).

[24] Again, the accident need not have occurred at a discrete location, but rather the deaths that resulted from the accident. 28 U.S.C.A. § 1369(a).

[25] 28 U.S.C.A. § 1391(g) (Supp. 2004).

citizens; and (2) the claims asserted will be governed primarily by the laws of that State."[26] In stark contrast to the precise, limiting language of the general rule, the exception is extremely ambiguous. The reason for this difference is that the wording of the general rule was debated and refined over a span of twenty years, while the exception was a hastily drafted addition to the statute that was inserted in an effort to make an earlier bill satisfactory to concerned members of the Senate Judiciary Committee.[27]

The exception provides that a district court must "abstain from hearing" a case otherwise within the purview of section 1369 if two very indefinite elements are met.[28] The first element, that the "substantial majority" of plaintiffs and the "primary defendants" be citizens of the same state, has two possible points of contention.[29] There is no indication in the statute itself, or the legislative history, of how the court is to quantify a "substantial majority" of the plaintiffs. Similarly, it is unclear how the court is to determine who the "primary defendants" are.

The second element is that the claims in the case are "governed primarily by the laws of" the state that the "substantial majority" of plaintiffs and "primary defendants" are citizens of.[30] The concern in the Senate that led to the addition of the exception was likely that the minimal diversity requirement was too broad and needed softening. Federalism concerns may also have led to the addition of this provision. The exception, then, is probably aimed at ensuring that cases that are not of an interstate character are not automatically brought into federal court. Because of the ambiguous wording of the exception, one commentator "wonders how much litigation will result over how a 'substantial majority' of plaintiffs would be quantified, or who the 'primary defendant' is."[31]

Section 1369 is generally aimed at single-accident, mass-disaster litigation that was previously comprised of many lawsuits filed all over the country. Thus, the most conservative reading of the statute is that the exception generally encompasses cases that do not present these problems: cases that are clearly intrastate. But, as a result of its clumsy wording, and its mandatory requirement that the federal court "abstain

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[26] 28 U.S.C.A. § 1369(b).

[27] H.R. REP. NO. 107-14, at 8 (2001). "[The exception] was one of three changes proffered to the Senate in an effort to develop greater support for H.R. 2112 in the waning days of the 106th Congress." *Id.*

[28] 28 U.S.C.A. § 1369(b).

[29] 28 U.S.C.A. § 1369(b)(1).

[30] 28 U.S.C.A. § 1369(b)(2).

[31] Georgene Vairo, *An Important Act with Two Antecedents More Controversial than the Original*, NAT'L L.J., Dec. 16, 2002, at B7.

from hearing" the case, the exception could easily lend itself to complicated collateral litigation.

The first example of such litigation is *Passa v. Derderian*,[32] a consolidation of five cases arising from the 2003 nightclub fire in Rhode Island that claimed the lives of 100 people and injured over 200 more.[33] "In the wake of this tragedy, numerous lawsuits have been filed throughout southern New England in both state and federal courts."[34] *Passa* dealt with five of those cases, two of which were filed in the United States District Court for the District of Rhode Island, and three more that were removed from Rhode Island state court. Two of the defendants filed motions to dismiss for lack of jurisdiction with regard to the two cases originally filed in federal court, and motions to remand the other three to state court.[35] The *Passa* court was the first to construe the MMTJA's jurisdictional exception.

After determining that the facts of the cases brought them within section 1369's jurisdictional parameters and reviewing the MMTJA's legislative history, the court addressed whether the cases fell within the statute's exception. The court determined that subsection 1369(b) is a "mandatory abstention clause;"[36] if a case falls within the exception, the district court does not have jurisdiction to hear it. The court turned its attention to the first requirement of the exception, that "the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens."[37] The court held that "all plaintiffs" refers to all potential plaintiffs, that is, all the parties that suffered death or injury as a result of the single-accident catastrophe (in this case, the nightclub fire), rather than just those plaintiffs before the court. This reading, the court argued, "is consistent with Congress' desire to consolidate all cases arising from one major disaster in one federal court."[38]

The court determined that, of all those killed or injured in the fire, 44 percent were residents of Rhode Island, while the remaining victims were from various other states. Thus, the court concluded, "[w]hile it is true that Rhode Islanders make up the largest group of potential plaintiffs, it cannot be said that they constitute a 'substantial majority of all plaintiffs.'"[39]

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32 Passa v. Derderian, 308 F. Supp. 2d 43 (D.R.I. 2004).

33 *Id.* at 46.

34 *Id.*

35 *Id.* at 48.

36 *Id.* at 56.

37 28 U.S.C.A. § 1369(b)(1).

38 *Passa*, 308 F. Supp. 2d at 60.

39 *Id.* at 61.

The court also held that "primary defendants" refers to "all defendants sued directly in a cause of action," as opposed to "those parties sued under theories of vicarious liability, or joined for purposes of indemnification or contribution."[40] The court determined that some of the defendants sued directly in three of the cases, the band members alleged to have caused the fire and their tour manager, were not residents of Rhode Island. Another defendant sued directly in two of the cases, Anheiser-Busch, was likewise a resident of another state. Thus, "the substantial majority of all plaintiffs" were not "citizens of a single State of which the primary defendants are also citizens."[41] Because the first requirement of the jurisdictional exception was not met, the court concluded that it had jurisdiction over the cases under the MMTJA.

C. Removal

The removal provision of the MMTJA reads:

> (1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—
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> (A) the action could have been brought in a United States district court under section 1369 of this title; or
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> (B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.[42]

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[40] *Id.* at 62.

[41] *See* 28 U.S.C.A. § 1369(b)(1).

[42] 28 U.S.C.A. § 1441(e) (Supp. 2004). Subsection 1441(e) also includes several other provisions on removal:

> (1) . . . . The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.
>
> (2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.
>
> (3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the

There are two ways a case may be removed to the MMTJA federal court under this statute. First, a plaintiff who meets the requirements of subsection 1369(a) might have chosen to file her claim in state court. Under subsection 1441(e)(1)(A), the defendant has the right to remove the case to the federal district court when it could have been filed in that court originally under section 1369.

The second way that section 1441(e) enables a defendant to remove to the MMTJA court expands the statute's reach even beyond the requirements of section 1369. Under subsection 1441(e), a defendant can remove a state case to the MMTJA federal court even when the case could not have been brought in that court originally. If the defendant is already party to an MMTJA suit, or one that could have been brought in federal court under the MMTJA, and is also party to a state court case arising from the same single-accident catastrophe, the defendant can remove the state case to the MMTJA court.

The removal provision of the MMTJA, then, allows consolidation of cases arising from the single-accident catastrophe that do not meet the requirements of section 1369. In this way, "the claims for relief subject to the [MMTJA] do not all themselves have to be claims for death, but can encompass claims for personal injury and property damage."[43] Furthermore, cases that do not even meet the minimal diversity requirement can be removed to federal court.

D. Intervention

The intervention provision of the MMTJA states:

> In any action in a district court which is or could have been brought, in whole or in part, under this section, any person with a claim arising from the accident described in subsection (a) shall be permitted to

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> determination of damages. An appeal with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.
>
> (4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.
>
> (5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.
>
> (6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

Id.

[43] JoEllen Lind, *"Procedural Swift": Complex Litigation Reform, State Tort Law, and Democratic Values*, 37 AKRON L. REV. 717, 742 (2004).

> intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter.[44]

Federal Rule of Civil Procedure 24(a)(1) allows any plaintiff "to intervene in an action . . . when a statute of the United States confers an unconditional right to intervene." Subsection 1369(d) clearly confers a right to intervene. This provision of the MMTJA is another mechanism to allow for consolidation of all cases arising from a single-accident catastrophe in a single federal court, even actions that do not fit within the elements of the general jurisdictional rule.[45]

E. Legislative History

The legislative history of Section 1369 spans over two decades. Legislation seeking to bring all cases stemming from mass torts into federal court was repeatedly proposed and defeated in Congress. Ten years before the passage of the MMTJA, its legislative predecessors were described as having "a phoenix-rising-from-the-ashes quality."[46] But, with each reincarnation of multiparty, multiforum legislation, the scope of the legislation differed slightly until the MMTJA was finally passed. The choice of law issue was the most hotly debated aspect of the bills that were proposed in Congress throughout the 1980s and 1990s.[47]

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[44] 28 U.S.C.A. § 1369(d).

[45] At least one commentator views this liberal allowance of intervention as a possible drawback to the MMTJA:

> Although it may be true that intervention is necessary to include all claims arising from the same accident in the same case, the splinter claims could make some lawsuits so complex and unwieldy that they would be unmanageable and ultimately could make courts very inefficient. In these situations, the intervening-parties provision operates as a catch-22, burdening the federal courts with one complex case in much the same way as separate actions in state and federal courts burden the entire judicial system.

Laura Offenbacher, *The Multiparty, Multiforum Trial Jurisdiction Act: Opening the Door to Class Action Reform*, 23 REV. LITIG. 177, 197 (2004).

[46] Linda S. Mullenix, *Federalizing Choice of Law for Mass-Tort Litigation*, 70 TEX. L. REV. 1623, 1661 (1992).

[47] *See, e.g., Multiparty, Multiforum Jurisdiction Act of 1989: Hearing Before the Subcomm. on Courts, Intellectual Prop., and the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong. 35-45, 65-85 (1989) (statement of the United States Department of Justice and joint statement of Robert A. Sedler and Aaron D. Twerski). Professors Sedler and Twerski continued their debate with Rep. Robert W. Kastenmeier over the choice of law proposals even after Rep. Kastenmeier left Congress. While Rep. Kastenmeier was Chairman of the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary during the 1980s, he consistently championed the cause of multiparty, multiforum legislation and was the sponsor of most of the proposals during the 1980s. For their part, Professors Sedler and Twerski fought tirelessly against any choice of law provision in Rep. Kastenmeier's bills. *See* Robert A. Sedler & Aaron D. Twerski, *The Case Against All Encompassing Federal Mass Tort Legislation: Sacrifice Without Gain*, 73 MARQ. L. REV. 76 (1989); Robert W. Kastenmeier &

"In the early 1970s, an ad hoc committee of judges, lawyers, professors, plaintiffs, defendants, and academics, formed by Judge Pearson Hall," worked specifically on legislation to give federal courts original jurisdiction in airplane accident cases.[48] The result of this group's work was a bill introduced in the 96th Congress that would have given federal courts original jurisdiction over cases arising from airplane crashes that take the lives of five or more people.[49] This bill represented an early attempt at solving the problem of multiparty, multiforum litigation resulting from single-accident, mass-disasters. At the same time, the idea of completely eliminating federal diversity jurisdiction had gained a great deal of support in Congress.[50] This movement spawned other proposals for federalizing mass-tort litigation.

In 1978, in Senate hearings during the 95th Congress, the Public Citizen Litigation Group urged the Senate Judiciary Committee to create an exception to its planned abolition of diversity jurisdiction.[51] The proposal was rather simple; its notable requirements were that at least twenty-five people suffer injury as a result of a "single event, transaction, occurrence or course of conduct," that the injuries be valued at at least $1,000 each, and that minimal diversity between the adverse parties exist.[52] It is noteworthy that the events covered by the bill included more than mass-disaster accidents; a "single event, transaction, occurrence or course of conduct"[53] could include forms of mass-tort litigation beyond merely single-accident catastrophes.

The 96th Congress again considered legislation to eliminate federal diversity jurisdiction.[54] In hearings on the proposed legislation in 1979, the Justice Department recommended an exception for multi-person

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Charles Gardner Geyh, *The Case in Support of Legislation Facilitating the Consolidation of Mass-Accident Litigation: A View from the Legislature*, 73 MARQ. L. REV. 535, 552 (1990).

[48] Kastenmeier & Geyh, *supra* note 47, at 552 (citing *Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Hearings on H.R. 1046 and H.R. 2202 Before the House Subcomm. on Courts, Civil Liberties, and the Admin. of Justice*, 96th Cong. 83 (1979) (statement of Rep. Danielson)).

[49] H.R. 231, 96th Cong. (1979); Kastenmeier & Geyh, *supra* note 47, at 552.

[50] *See Federal Diversity of Citizenship Jurisdiction: Hearings on S. 2094, S. 2389, and H.R. 9622 Before the Senate Subcomm. on Improvements in Judicial Mach. of the Comm. on the Judiciary*, 95th Cong. 179-80 (1978); *see also* Robert W. Kastenmeier & Michael J. Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEGIS. 301, 314-16 (1979).

[51] *Federal Diversity of Citizenship Jurisdiction: Hearings on S. 2094, S. 2389, and H.R. 9622 Before the Senate Subcomm. on Improvements in Judicial Mach. of the Comm. on the Judiciary*, 95th Cong. 180-82 (1978) (testimony of Alan B. Morrison, Director, Public Citizen Litigation Group).

[52] *Id.* at 181-82.

[53] *Id.* at 181.

[54] H.R. 2202, 96th Cong. (1979); H.R. 1046, 96th Cong. (1979).

injury cases.[55] The statute proposed by the Justice Department was largely the same as that propounded by the Public Citizen Litigation Group a year earlier. The proposal applied to injuries to twenty-five people which were valued at a minimum of $10,000 each; it was broadly worded so as to include all forms of mass-tort litigation.[56]

In 1983, in the 98th Congress, the House tried again to eliminate federal diversity jurisdiction[57] by introducing legislation that was based largely on the 1979 Justice Department proposal.[58] The next proposed legislation of this nature came three years later, in the 99th Congress, and for the first time, the idea of multiparty consolidation was introduced separate from a congressional attack on federal diversity jurisdiction.[59] The 1983 and 1986 bills were essentially the same; they prescribed original jurisdiction in federal court for "any civil action arising out of a single event, transaction, occurrence, or course of conduct that results in personal injury or injury to property of twenty-five or more persons."[60] Additionally, the bills required only minimal diversity between the adverse parties and that injuries be valued at more than $10,000 per plaintiff.[61]

In 1987, the 100th Congress proposed a revised version of the 1983 and 1986 bills.[62] Compared to the 1983 and 1986 proposals, this bill actually broadened the reach of the federal courts' jurisdiction. Whereas the earlier bills, based in large part on the 1979 Justice Department proposal, would have given the court jurisdiction over cases "arising out of a single event, transaction, occurrence, or course of conduct,"[63] the 1987 bill prescribed federal original jurisdiction in cases "arising out of the same transaction, occurrence, or series of related transactions or occurrences."[64] In this regard, the 1987 bill reverted to the 1979 Public

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[55] *Diversity of Citizenship Jurisdiction/Magistrates Reform—1979: Hearings on H.R 1046 and H.R. 2202 Before the House Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. on the Judiciary*, 96th Cong. 157-62 (1979) (statement of Daniel J. Meador, Assistant Attorney General). "Although [the Justice Dept.] support[s] abolition of the general diversity jurisdiction . . . [w]e have come to conclude that the so-called multi-person injury case should . . . be guaranteed a federal forum." *Id.* at 158.

[56] *Id.*

[57] H.R. 3690, 98th Cong. (1983).

[58] Kastenmeier & Geyh, *supra* note 47, at 554; *see* H.R. 3690, 98th Cong. (1983).

[59] Kastenmeier & Geyh, *supra* note 47, at 554; *see* H.R. 4315, 99th Cong. (1986).

[60] Kastenmeier & Geyh, *supra* note 47, at 554.

[61] *Id.*

[62] *Id.* at 556; *Court Reform and Access to Justice Act: Hearings on H.R. 3152 Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary*, 100th Cong. 913 (1987-88). The multiparty, multiforum provision was Title IV of the bill, which was a broad bill called the Court Reform and Access to Justice Act of 1987.

[63] Kastenmeier & Geyh, *supra* note 47, at 554.

[64] *Id.* at 556.

Citizen proposal in that it applied to virtually all mass-tort litigation, rather than being limited to that arising out of a single accident. In hearings on the bill, the Justice Department expressed its concern over the breadth of the bill's reach and stated its position that legislation of this kind should be limited to single-accident litigation.[65] The framers of the bill deferred to the Justice Department's wishes and a second version of the bill in the 100th Congress was so limited.[66] The revised 1987 bill again required twenty-five plaintiffs with minimal diversity existing between the adverse parties, but the amount in controversy per plaintiff was increased to $50,000.[67]

In 1989, in the 101st Congress, the 1987 bill was recycled verbatim as the Multipary, Multiforum Jurisdiction Act of 1989.[68] Although the 1989 bill "received the unqualified support of the Judicial Conference and the Department of Justice,"[69] it was heavily criticized by several commentators.[70] Criticism of the bill was primarily aimed at the choice of law provision, which is discussed in Part III. Commentators also criticized the bill's breadth by claiming that it applied to property damage and torts that are not single-accident mass-disasters.[71] In response to these concerns, the desired changes were made and the bill was passed in the House; the Senate rejected it, however, claiming that it did not have enough time left in the session to fully study the implications of the bill.[72]

In 1991, a bill identical to the 1989 bill[73] was introduced in the 102nd Congress.[74] The House again passed the bill and sent it to the Senate. This time, the Senate held subcommittee hearings on the bill, but let it die without bringing it to a vote.[75] The text of the 1991 bill was reintroduced in the House in 1993 in the 103rd Congress,[76] but never emerged from the subcommittee. In the 105th Congress, the same legislation was reintroduced in the House and passed as part of the

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65 *Id.* at 557.

66 *Id.*

67 *Id.* at 556.

68 *Id.* at 558; H.R. 3406, 101st Cong. (1989).

69 Kastenmeier & Geyh, *supra* note 47, at 558.

70 *Multiparty, Multiforum Jurisdiction Act of 1989: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Admin. of Justice of the House Comm. on the Judiciary*, 101st Cong. 65-85 (1989); *see also* Sedler & Twerski, *supra* note 47.

71 Kastenmeier & Geyh, *supra* note 47, at 559.

72 *Id.*

73 H.R. 2450, 102d Cong. (1991).

74 H.R. REP. NO. 102-373, at 5 (1991).

75 Robert J. Witte, . . . *Or Would You Rather Have What's Behind Door Number Two? Uniform Choice of Law Proposals: Big Deal of the Day or Just Another Zonk?*, 59 J. AIR L. & COM. 617, 647 (1994).

76 H.R. 1100, 103d Cong. (1993).

Judicial Reform Act of 1998.[77] But, this bill too was allowed to die in Senate subcommittee.

In the 106th Congress in 1999, the legislation that had previously been proposed in the 102nd, 103rd, and 105th Congresses, was introduced in the House as part of a bill[78] with another purpose—reversal of the Supreme Court's decision in *Lexecon, Inc. v. Milberg Weiss*.[79] In *Lexecon*, the Court held that that transferee courts acting under 28 U.S.C. § 1407, the multidistrict-litigation transfer statute, may not transfer multidistrict cases to themselves based on § 1404(a).[80] Since federal courts had been doing this for decades, thereby consolidating multiparty, multiforum cases, Congress sought to codify that action for multidistrict cases generally.[81] Additionally, it again tried to enact legislation that would give the courts original jurisdiction over single-accident, mass-disaster cases.[82] Again, though, the Senate was not completely satisfied with the bill, so the House made three important concessions in an effort to get the Senate to pass it.[83] First, an exception to the minimal diversity provision was added:[84] the federal court would refrain from hearing cases in which a "substantial majority" of the plaintiffs and the "primary defendants" are citizens of the same state and the case is "primarily" governed by state law.[85] This language is the same as the exception in section 1369. Second, the amount in controversy requirement was raised from $75,000 to $150,000.[86] The reason for these two changes was that they made "it more difficult to file or remove to Federal court."[87]

The third change was crucial: the House completely removed from the bill the choice of law provision.[88] The only rationale for this change on record is that "[t]he choice of law section was thought to confer too much discretionary authority on district judges to select the relevant law that would apply in a given case."[89] Every version of this legislation since the late 1970s had contained a choice of law provision, and the choice of law standard had been the most hotly debated aspect of the various bills

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77 H.R. REP. NO. 106-276, at 7 (1999).

78 H.R. 2112, 106th Cong. (1999).

79 Lexecon, Inc. v. Milberg Weiss, 523 U.S. 26 (1998).

80 *See* Vairo, *supra* note 31.

81 H.R. 2112, 106th Cong. § 2 (1999).

82 H.R. 2112, 106th Cong § 3 (1999).

83 H.R. REP. NO. 107-14, at 8 (2001).

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.*

in the hearings and in the academic literature. But, "in an effort to develop greater [Senate] support for H.R. 2112 in the waning days of the 106th Congress," the House simply eliminated the choice of law provision completely.[90] The changes apparently had no effect, however, as the bill still did not pass.

The 1999 bill was recycled once again in the 107th Congress as the Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001.[91] The House passed the 2001 bill, although it was apparently still not satisfactory to the Senate as it died in committee. Before the end of the 107th Congress, however, language substantially similar to the 2001 bill was added to the 21st Century Department of Justice Appropriations Authorization Act.[92] The language of the 2001 bill was trimmed even more, completely dropping the amount in controversy provision.[93] Furthermore, the number of persons requirement, which had remained twenty-five for a number of years, was increased to seventy-five.[94] In its newer form, the bill was made one section of the much larger Appropriations Act and was passed "with virtually no opposition" to become the new section 1369.[95]

III. CHOICE OF LAW UNDER THE MMTJA

Because the MMTJA does not address the question of which state's substantive law applies to the cases brought into the single federal court, the court must apply the traditional federal choice of law approach.

A. Conflict of Laws in Federal Court

When a federal court is faced with a case in which its jurisdiction is based on diversity of citizenship, the case often presents a thorny issue for the court as to which state's substantive law applies to the conflict. The states have their own rules for deciding whose law applies.[96] In federal diversity cases, the court must apply the choice of law rule of the state in which the federal court sits.[97] In cases transferred from one federal court to another, however, the transferee court must apply the conflicts of law rule of the transferor court, the court in which the case

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[90] *Id.*

[91] H.R. 860, 107th Cong. (2001).

[92] H.R. 2215, 107th Cong. § 11020 (2002).

[93] *Compare* H.R. 860, 107th Cong. (2001), *with* 28 U.S.C.A. § 1369.

[94] 28 U.S.C.A. § 1369.

[95] Vairo, *supra* note 31.

[96] GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE § 7.05 (3d ed. 2002).

[97] Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941).

was originally brought.[98] The purpose of these rules is to limit, as much as possible, forum shopping. The goal of the Supreme Court's conflict of law jurisprudence is to ensure that a plaintiff is judged by the same substantive tort law regardless of whether she files in state or federal court.[99]

The states employ a variety of conflict of laws rules. Furthermore, individual state courts often use a mix of theories, and the exact mix is often inconsistent throughout the case law in the same jurisdiction.[100] As a result, simply determining what a state's conflict of laws rule is, and how it works, can be a difficult task for a federal court.

It is important to keep in mind the nature of MMTJA litigation. Section 1369 is limited to litigation resulting from single-accident catastrophes like airplane crashes or building collapses.[101] A catastrophic event within the purview of the MMTJA will almost certainly result in lawsuits by hundreds of plaintiffs against a handful of defendants. By applying all the implicated state choice of law rules, the court will have to determine what state's substantive law each choice of law rule points to, and apply that substantive law to that particular plaintiff's case against the common defendants. This analysis must be done with regard to each state where a complaint was filed, and the state where the federal court sits for the plaintiffs who originally filed in the MMTJA court. The choice of law determination must also be made individually with regard to each issue in the case.

B. Choice of Law under the MMTJA

Throughout its legislative history, the main goals of the MMTJA were to increase efficiency in single-accident catastrophe cases by eliminating duplicative liability determinations in various state and federal courts, and to increase fairness through consistency of results. The repeated attempts to include a federal choice of law rule in the

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[98] Ferens v. John Deere Co., 494 U.S. 516, 532 (1990); Van Dusen v. Barrack, 376 U.S. 612, 639 (1964).

[99] Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945).

> [I]n all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.

Id.

[100] WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, UNDERSTANDING CONFLICT OF LAWS 270 (3d ed. 2002). "Four or five theories are in vogue among the various states, with many decisions using – openly or covertly – more than one theory. Inconsistency between the theoretical underpinnings of decisions in the same jurisdiction is also common . . . ." *Id.*

[101] The statute requires that the litigation be the result of a single accident in a single location that took the lives of at least seventy-five people. 28 U.S.C.A. § 1369(a).

MMTJA were in keeping with these goals. The choice of law problems that can attend consolidated mass-tort cases are well-documented. In its current form, the MMTJA's usefulness in achieving its goals of efficiency and fairness is tempered by the unresolved complexity of the choice of law issue.

The MMTJA has been likened to "a vacuum cleaner" that "can suck up all of the cases arising out of" a single-accident catastrophe "regardless of where filed" and deposit them in a single federal court.[102] The cases that wind up in a single federal court under section 1369 get there in one of four ways. First, a case may be filed in the MMTJA court based on the statute's grant of original jurisdiction over cases that meet its requirements.[103] Second, a case may be removed to the MMTJA court from state court under the statute's liberal removal provision.[104] Third, a party may intervene in an already existing case under the MMTJA's intervention provision.[105] Fourth, a case may be transferred from the federal court in which it was originally filed to the MMTJA court under 28 U.S.C. § 1404(a) or § 1407.[106]

In a case that is in federal court based on the court's diversity jurisdiction, the court is required to apply the choice of law rule of the state in which it sits, the forum state.[107] Presumably, this rule applies in cases originally filed in federal court based on section 1369's requirement of "minimal diversity."[108] The drafters assumed that this requirement of minimal diversity was sufficient to invoke the federal courts' diversity jurisdiction.

In cases that are removed to federal court, the *Klaxon* rule generally requires the court to apply the choice of law rule of the forum state.[109] Removal under the MMTJA is unlike conventional removal from state to federal court, however. Under the traditional rules of removal, a defendant cannot remove a case to federal court based on diversity jurisdiction if the plaintiff chose to file in state court in the defendant's

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[102] Adomeit, *supra* note 12, at 247; see also Lind, *supra* note 43, at 742 (discussing how the removal provision enables the MMTJA to "function as a kind of vacuum cleaner").

[103] 28 U.S.C.A. § 1369(a).

[104] 28 U.S.C. § 1441(e).

[105] 28 U.S.C.A. § 1369(d).

[106] 28 U.S.C. § 1404(a) (2000). Under 28 U.S.C. § 1369(e), a district court in which an MMTJA action is pending must notify the multidistrict litigation panel, which has the power to transfer cases to a multidistrict litigation court under 28 U.S.C. § 1407.

[107] Day & Zimmerman, Inc. v. Challoner, 423 U.S. 3 (1975); Klaxon Co. v. Stentor Elec. Mfg., 313 U.S. 487, 496 (1941).

[108] 28 U.S.C.A. § 1369(a).

[109] WRIGHT ET AL., *supra* note 11, at § 3723; *see also* Vestar Dev. II, LLC v. Gen. Dynamics Corp., 249 F.3d 958, 960 (9th Cir. 2001) (applying California law to a case removed from a California state court to a U.S. district court in California).

home state.[110] The reason usually given for this limitation is that removal exists to make federal court as available to the defendant as it is the plaintiff. In this way, the defendant can escape local bias if the plaintiff decides to sue in her own home state court. When the plaintiff brings the suit in state court in the defendant's home state, the defendant has no need to seek a more neutral forum.[111] There is no such limitation in the MMTJA removal provision. Subsection 1441(e) allows a defendant to remove cases to federal court even when the plaintiff filed in the defendant's home state court.[112] Beyond that, there is really no need for even minimal diversity between the adverse parties at all because the MMTJA enables a defendant to remove even cases that could not have been brought under the MMTJA originally.[113] Cases removed under the MMTJA are removed to "the district court . . . for the district and division embracing the place where the action is pending."[114] If that court keeps the case under the MMTJA, it must apply the choice of law rule of the forum state. If, however, the case is transferred under 28 U.S.C. § 1404 or § 1407, the court to which it is transferred must apply the choice of law rule of the transferor state.[115]

In cases in which a plaintiff intervenes, the choice of law rule by which the court is bound depends on how the case originally ended up in federal court. The court is bound by the choice of law rule of the forum state in diversity cases, and by that of the transferor forum in transferred cases. Like the removal provision, the MMTJA's intervention provision allows for cases in federal court in which there is not even

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[110] 28 U.S.C. § 1441(b).

[111] WRIGHT ET AL., *supra* note 11, at § 3723.

[112] 28 U.S.C.A. § 1441(e)(1)(A) (allowing removal of any action that "could have been brought in a United States district court under section 1369").

[113] 28 U.S.C.A. § 1441(e)(1)(B) allows removal if:

> the defendant is a party to an action which is or could have been brought . . . under section 1369 . . . and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

[114] 28 U.S.C.A. § 1441(e)(1).

[115] Van Dusen v. Barrack, 376 U.S. 612, 639 (1964) (holding that, in cases transferred under 28 U.S.C. § 1404(a), the court must apply the choice of law rule of the transferor forum); *see also* Ferens v. John Deere Co., 494 U.S. 516 (1990). 28 U.S.C. § 1407 empowers the multidistrict litigation panel to transfer cases from one federal court to another for consolidation. Federal courts have held that when this occurs, the rule of *Van Dusen* applies, requiring the transferee court to apply the choice of law rule of the transferor forum. *See, e.g.*, *In re* Air Crash Disaster at Boston, Mass. on July 31, 1973, 399 F. Supp. 1106, 1119-21 (D. Mass. 1975); Stirling v. Chem. Bank, 382 F. Supp. 1146, 1150 n.5 (S.D.N.Y. 1974); Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 552 (1996).

minimal diversity between the adverse parties.[116] Thus, even if the plaintiff has no connection to the forum, if she has a claim arising from the single-accident catastrophe that fostered the suit, she can intervene and will be subject to the substantive law as determined by the choice of law rule of the forum or transferor state.

Finally, as was noted previously, when a case is transferred to a federal court, the court must apply the choice of law rule of the transferor forum. Subsection 1369(e) requires an MMTJA court to "promptly notify the judicial panel on multidistrict litigation."[117] This requirement is apparently designed "to facilitate the transformation of an [MMTJA] matter into an MDL matter under 28 U.S.C. § 1407."[118] Under section 1407, the multidistrict litigation panel has the power to transfer various cases arising from the same facts to a single federal court for consolidation.[119] This transfer can be initiated by the panel or upon motion by one of the parties in the case to be transferred.[120] Thus, when a federal court has jurisdiction over a case based on the MMTJA, it must notify the multidistrict litigation panel, which could presumably transfer other federal cases that arose from the same single-accident catastrophe to the MMTJA court. The cases transferred to the MMTJA court under section 1407, or 1404(a), would be governed by the substantive law selected by the choice of law rule of the transferor forum.

C. The Need for a Single Source of Law

Two of the MMTJA's stated goals are hampered by the lack of a choice of law provision—"fairness and judicial efficiency."[121] A number of commentators have explained why a single choice of law rule is uniquely necessary for the MMTJA to improve fairness and efficiency in single-accident catastrophe cases.

The problem of fairness arises because all of the litigants in a MMTJA case were, by definition, involved in the same single-accident catastrophe. Their cases have been statutorily consolidated for a single determination of liability, yet that determination can lead to varying

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[116] 28 U.S.C.A. § 1369(d) (allowing for intervention by "any person with a claim arising from the accident . . . even if that person could not have brought an action in a district court as an original matter").

[117] 28 U.S.C.A. § 1369(e).

[118] Lind, *supra* note 43, at 743.

[119] 28 U.S.C. § 1407(a).

[120] 28 U.S.C. § 1407(c).

[121] H.R. REP. NO. 107-14, at 28 (2001) (statement of Rep. Sensenbrenner, author of the language of section 1369); *see also* H.R. REP. No. 101-515, at 4 (1990) (explaining that the purpose for the 1989 bill was to "improve[] the fairness and efficiency of the process by which [complex, multidistrict] cases are resolved").

substantive results for the individual litigants. Throughout the legislative history of the MMTJA, commentators and judges pointed out the unfairness of disparate substantive results for identically situated litigants.[122] The current choice of law system can lead to such a result in non-MMTJA litigation, but MMTJA plaintiffs are in a unique situation that warrants "unified recovery standards."[123] Plaintiffs in MMTJA litigation always share a factual commonality not necessarily present in other types of litigation.[124] Also, fairness calls for a single choice of law rule in MMTJA litigation because of the inherent interstate character of this type of litigation.[125] Throughout the legislative history of the MMTJA, there were various proposals for a single choice of law rule in MMTJA litigation to ensure that the determinations of liability lead to the same substantive result for each litigant.

In addition to ensuring fairness of result, another major reason for the enactment of the MMTJA was to create a more efficient system for the litigation of single-accident catastrophe cases.[126] The MMTJA does solve the problem of duplicative "trial[s] of the same liability issues in both state and federal court."[127] But, absent a choice of law provision, courts will become bogged down by trying to determine the conflict of laws rule of each jurisdiction implicated.[128] All of the time and money spent on choice of law litigation that is necessarily attenuated from the

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[122] Kastenmeier & Geyh, *supra* note 47, at 565-66; Reavley & Wesevich, *supra* note 1, at 23; Paul S. Bird, *Mass Tort Litigation: A Statutory Solution to the Choice of Law Impasse*, 96 YALE L.J. 1077, 1087-88 (1986-1987). *But see* Robert A. Sedler & Aaron D. Twerski, *State Choice of Law in Mass Tort Cases: A Response to "A View from the Legislature,"* 73 MARQ. L. REV. 625, 635-36 (1990); Kramer, *supra* note 115.

[123] Bird, *supra* note 122, at 1088.

[124] *Id.* at 1087.

> It is one thing to contemplate the disparate ways different state laws may resolve a given dispute; it is quite another to accept such disparities in the context of a mass tort suit consolidated in a single forum adjudicating, for example, the identical claims of passengers sitting side by side aboard an airplane.

Id.

[125] Reavley & Wesevich, *supra* note 1, at 22. "[T]he number of parties, combined with the amount of money at stake, in single-accident mass-tort cases gives these cases a uniquely national dimension." *Id.*

[126] H.R. REP. NO. 107-14, at 28 (2001).

[127] *Multidistrict, Multiparty, Multiforum Jurisdiction Act of 1999 and Federal Courts Improvement Act of 1999: Hearing Before the House Subcomm. on Courts and Intellectual Prop. of the Comm. on the Judiciary*, 106th Cong. at 138 (2000) (statement of John F. Nangle, Chairman, Judicial Panel on Multidistrict Litigation and United States District Judge, Southern District for Georgia).

[128] Kastenmeier & Geyh, *supra* note 47, at 541-42.

merits of the case would be saved if Congress enacted a single choice of law rule for federal courts in MMTJA litigation.[129]

Because the MMTJA was enacted without a choice of law provision, the debate over such a provision should resume and result in enactment of a choice of law statute to supplement it. It is thus necessary to consider the various single choice of law provisions that were proposed throughout the legislative history of the MMTJA.

D. Proposed Single Source of Law Provisions

Throughout the MMTJA's legislative history, there were a number of choice of law provisions proposed in the legislation and in the academic literature. Some of the proposals would have enabled the court to select more than one source of law to apply to different parties.[130] But multiple sources of substantive law would cut against the MMTJA's goals of fairness and efficiency. Thus, a choice of law provision should direct the court to apply a single source of substantive law to all of the parties. In fact, the idea of a single choice of law rule enjoyed widespread support throughout the MMTJA's legislative history.[131] However, there was disagreement among commentators and lawmakers on how the court should select the source of law.

Several proposals simply directed the court to choose a single source of law, without giving any guidance on how the selection should be made. Other proposals offered the court a list of factors to consider in selecting the single source of law. And, several proposals directed the court as to which implicated jurisdiction's law to apply to the cases.

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[129] *But see* Kramer, *supra* note 115, at 567-69 (admitting that the present system "makes consolidated litigation more expensive" but arguing that the choice of law determination is itself substantive, rather than merely "a matter of procedure," and therefore the added cost is acceptable).

[130] The 1987 bill included a choice of law provision giving the MMTJA court the power to choose the "source or sources" of substantive law, and including a list of ten factors to aid in the determination. Kastenmeier & Geyh, *supra* note 47, at 592 nn.72, 76. The 1991 bill contained a choice of law provision that allowed the court to apply the law of more than one jurisdiction to different cases and parties "[i]f good cause is shown in exceptional cases." H.R. REP. 102-373, at § 6, 102d Cong. (1991). The provision also included a list of five factors to aid in the choice of law determination. *Id.* This choice of law provision remained in the 1993 bill, H.R. 1100, 103d Cong. (1993), the 1998 bill, H.R. 1252, 105th Cong. (1998), and the 1999 bill, H.R. 2112, 106th Cong. (1999). It was stricken from the 1999 bill and no choice of law provision was included in later versions of the MMTJA.

[131] Kramer, *supra* note 115, at 547 (1996). "Consensus is increasingly rare in today's legal world. . . . Yet consensus there is—consensus, at least, that ordinary choice-of-law practices should yield in suits consolidating large numbers of claims and that courts should apply a single law in such cases." *Id.*

1. Source of Law Selected at the Court's Discretion

The 1979 Justice Department proposal included a choice of law provision:

> [I]n order to ensure consistent results, the transferee court shall determine the source of the substantive law. The same substantive law shall be applied to all cases . . . in the transferee court, and . . . the transferee court shall not be bound by the choice of law rules which . . . would otherwise apply in cases governed by state law.[132]

The provision would also have enabled the district court to ignore the choice of law rule of the state in which it sits, contrary to normal diversity jurisdiction practice.[133] But, it should be remembered that this bill as a whole would have completely eliminated federal diversity jurisdiction.[134]

The Justice Department explained its inclusion of this provision as a means of guarding against the possibility of the federal court applying different rules of law to different parties involved in the litigation.[135] As for the fact that the provision would have given the court no guidance on how to select the source of law, the Justice Department explained, "[i]t is expected that the transferee court shall make this choice based upon all the facts and circumstances available to it."[136]

The 1983 and 1986 bills included identical choice of law provisions, which provided that "the transferee court shall determine the source of the substantive law," and "[t]he same substantive law shall be applied to all cases."[137] The bills completely freed the federal court from the choice of law rules of any one state.[138] They would have given the court complete authority to decide which state's law would apply, with the only limit being that it had to choose one source of substantive law to be applied to every case.

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[132] *Diversity of Citizenship Jurisdiction / Magistrates Reform – 1979: Hearings before the Subcomm. On Courts, Civil Liberties and the Admin. of Justice on H.R. 1046 and H.R. 2202*, 96th Cong. 159 (1979).

[133] *Id.* Also in the 96th Congress, the Senate Judiciary Committee considered legislation to eliminate federal diversity jurisdiction. S. 679, 96th Cong. (1979). In committee hearings on the bill, an exception for multi-person injury cases was proposed; however, the proposal contained no choice of law provision. *Jurisdictional Amendments Act of 1979, S. 679: Hearings on S. 679 Before the Senate Comm. on the Judiciary*, 96th Cong. 179 (1979).

[134] *See supra* text accompanying notes 51-56.

[135] *Diversity of Citizenship Jurisdiction / Magistrates Reform – 1979: Hearings before the Subcomm. On Courts, Civil Liberties and the Admin. of Justice on H.R. 1046 and H.R. 2202*, 96th Cong. 161 (1979).

[136] *Id.*

[137] Kastenmeier & Geyh, *supra* note 47, at 555.

[138] *Id.*

Although these approaches would ensure that all parties are governed by the same substantive law, they would not necessarily increase judicial efficiency. Given the enormous discretion they give to the MMTJA court, the various federal circuits would undoubtedly develop their own approaches to the selection problem. These different approaches would likely have varying degrees of increased efficiency in comparison to the current system.

2. Statutory Guidance on Selecting the Source of Law

The 1989 bill, as introduced, included a choice of law provision that would have enabled the court to select multiple sources of substantive law to be applied to different parties.[139] In subcommittee hearings on the bill, however, there was contentious debate over the merits of the choice of law provision.[140] The result of the hearing was an amended bill with a new choice of law provision that required the district court to determine a single source of substantive law to be applied to all cases in the litigation.[141] The bill provided that the court would "not be bound by the choice of law rules of any State,"[142] and it included a list of eleven factors for the court to consider in selecting the source of substantive law:

> (1) the law that might have governed if the [new federal jurisdiction] did not exist;
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> (2) the forums in which the claims were or might have been brought;
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> (3) the location of the accident on which the action is based and the location of related transactions among the parties;
>
> (4) the place where the parties reside or do business;
>
> (5) the desirability of applying uniform law to some or all aspects of the action;
>
> (6) whether a change in applicable law in connection with removal or transfer of the action would cause unfairness;
>
> (7) the danger of creating unnecessary incentives for forum shopping;
>
> (8) the interest of any jurisdiction in having its law apply;
>
> (9) any reasonable expectation of a party or parties that the law of a particular jurisdiction would apply or would not apply;
>
> (10) any agreement or stipulation of the parties concerning the applicable law; and

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[139] *Multiparty, Multiforum Jurisdiction Act of 1989: Hearing Before the House Subcomm. on Courts, Intellectual Prop., and the Admin. of Justice of the Comm. on the Judiciary*, 101st Cong. 35-45, 65-85 (1989) (statement of the U.S. Department of Justice and Joint Statement of Robert A. Sedler and Aaron D. Twerski).

[140] *Id.*

[141] H.R. 3406, § 6, 101st Cong. (1989).

[142] *Id.*

(11) whether a change in applicable law in connection with removal or transfer of the action would cause unfairness.[143]

The federal court would not have been required to apply the eleven factors. The purpose of the factors was not to "attempt to legislate a single governing law or methodology" for how to select the source of substantive law.[144] Rather, the factors were included to show the court the issues that "may be relevant in [its] choice of law determinations," while at the same time "leaving this complex matter to judicial development."[145]

In hearings on the 1989 bill, this choice of law approach was vehemently attacked by professors Robert Sedler and Aaron Twerski.[146] Sedler and Twerski were primarily concerned by the fact that the provision directed the court to select a single source of substantive law, which they opposed on federalism grounds.[147] They further argued that, due to the constitutional requirement that a jurisdiction must have sufficient contacts with the litigation for its law to be applied, this choice of law provision would almost always lead the court to select the law of the jurisdiction in which the accident occurred or the jurisdiction in which the defendant is alleged to have committed the tortious act.[148] They found these options unacceptable because such a rule could result in a plaintiff who would have recovered under her state conflict of laws rule not recovering (or recovering less) under the law applied by the place of the injury or place of the wrong.

According to the 1989 bill's sponsor, "the 'unfairness' associated with depriving a party of the protection of state laws to which it might otherwise be entitled must be balanced against the unfairness associated with applying different sources of law to identically situated accident victims."[149] The Justice Department took the position that allowing one plaintiff to recover, while denying recovery to another, is a "far more anomalous and inequitable [result]" than the one mandated by the 1989 bill's choice of law provision.[150] Further, the Justice Department argued that, even if the court was limited to the law of the place of the injury or place of the wrong, "the accompanying gains in clarity, certainty and

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143 H.R. 3406, § 6(a), 101st Cong. (1989).

144 H.R. REP. NO. 101-515, at 13 (1990).

145 *Id.*

146 *Multiparty, Multiforum Jurisdiction Act of 1989*, 101st Cong. 65 (1989) (joint statement of Robert A. Sedler and Aaron D. Twerski).

147 *Id.* at 75-78.

148 *Id.* at 78-85.

149 Kastenmeier & Geyh, *supra* note 47, at 565-66.

150 *Multiparty, Multiforum Jurisdiction Act of 1989*, 101st Cong. 43 (1989) (letter from Bruce C. Navarro, Acting Assistant Attorney General to Rep. Robert W. Kastenmeier, sponsor of the 1989 bill).

predictability would far outweigh the disadvantages."[151] Thus, in the Justice Department's view, the choice of law provision in the 1989 bill would further the policy objective of ensuring fairness among the parties and greatly increase judicial efficiency in single-accident catastrophe cases.

3. Statutorily Mandated Source of Law

In the hearings on the 1989 bill, the Justice Department conceded that that choice of law provision, due to constitutional constraints, would often reduce the court's options for the source of substantive law to the place of the injury or place of the wrong.[152] In addition to defending the 1989 bill's choice of law provision, the Justice Department proposed that Congress simply codify the place of the injury rule or place of the wrong rule for single-accident catastrophe litigation.

In the early 1990s, Judge Thomas M. Reavley lobbied for the place of the injury choice of law rule in single-accident catastrophe litigation.[153] Judge Reavley's proposed rule read: "Actions that are, or could have been brought, in whole or in part, under section [1369] of this title are governed by the substantive law of the State where the greatest number of natural persons [have died] from an 'accident' as defined in section [1369(c)(4)]."[154] Since the entire MMTJA litigation is the result of a single accident, the substantive law of the state in which the accident occurred is the law that would be applied to all cases.

A place of the wrong rule, on the other hand, might require that multiple sources of law be applied in MMTJA litigation because there will virtually always be multiple defendants. Under this rule, each defendant would be judged by the substantive law of the state in which it is alleged to have committed the tort. For example, if an airplane crashes in Virginia, any action against the airline for the negligence of the pilot would be governed by Virginia tort law because that is the state where the pilot was allegedly negligent. But actions against the manufacturer of a defective part that contributed to the crash would be governed by the law of the state where the part was manufactured.

In the hearings on the 1989 bill, the Justice Department argued that there are several advantages to a rule that mandates the source of

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[151] *Id.* at 42.

[152] *Id.* at 41.

[153] Reavley & Wesevich, *supra* note 1; *The Multiparty, Multiforum Jurisdiction Act of 1991: Hearing Before the House Subcomm. on Courts and Admin. Practice of the Comm. on the Judiciary*, 102d Cong. 174 (statement of Judge Reavley).

[154] *The Multiparty, Multiforum Jurisdiction Act of 1991: Hearing Before the House Subcomm. on Courts and Admin. Practice of the Comm. on the Judiciary*, 102d Cong., at 177 (statement of Judge Reavley).

substantive law—fairness and increased efficiency.[155] It argued that fairness demands a single choice of law rule because "such a rule would produce equal treatment of identical claims."[156] Also, because single-accident catastrophe litigation is inherently interstate in character, the choice of substantive law should not be dictated by the domicile of each individual plaintiff.[157] And a place of the injury or place of the wrong rule would be more efficient than the current choice of law system because it would produce "greater certainty, predictability and ease of application," thus enabling plaintiffs to "receive prompt compensation for their injuries, with a minimum of litigating costs."[158]

Besides place of the injury and place of the wrong, there was one other notable proposal for a mandatory choice of law rule in single-accident catastrophe litigation. Robert S. Bird proposed the following rule:

> [T]he court shall: i) consider the laws of only those states with contacts to the mass tort such that a defendant could reasonably have foreseen it would be subject to those laws; ii) select from among the laws available the one most favorable to the plaintiffs; and iii) apply the same law to the claims of similarly situated parties.[159]

This rule would be fair in that a single standard would be applied to all parties. But it is unclear whether such a rule would increase efficiency because the court would still be required to address the conflict of laws rule of each state implicated in the litigation.

IV. CONCLUSION

One of the stated goals of the MMTJA was to create a system for single-accident catastrophe litigation that is fairer than the previous system of fractured litigation. Another goal of the MMTJA was to increase efficiency in single-accident catastrophe litigation. The MMTJA solves the problem of duplicative "trial[s] of the same liability issues in both state and federal court."[160] But once the various cases arising out of the single-accident catastrophe are brought together in a single federal court, the court must still apply different substantive legal standards to

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[155] *Multiparty, Multiforum Jurisdiction Act of 1989*, 101st Cong. 43-45 (1989) (letter from Bruce C. Navarro, Acting Assistant Attorney General to Rep. Robert W. Kastenmeier, sponsor of the 1989 bill).

[156] *Id.* at 43.

[157] *Id.* at 43-44.

[158] *Id.* at 44.

[159] Bird, *supra* note 122, at 1094.

[160] *Multidistrict, Multiparty, Multiforum Jurisdiction Act of 1999 and Federal Courts Improvement Act of 1999: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, 106th Cong. 138 (2000) (statement of John F. Nangle, Chairman, Judicial Panel on Multidistrict Litigation and United States District Judge, Southern District of Georgia).

the various parties' cases. Even though the liability issue is determined in one federal court, the legal results might be entirely different for different parties injured in the same accident.

Congress should enact a choice of law statute that requires the court in MMTJA litigation to apply a single legal standard to all parties in the litigation. Such a rule would ensure fairness as all parties would receive the same result and increase efficiency as the court would not be forced to discover and apply the conflict of laws rules of all implicated jurisdictions. As to how the rule should require the court to select the single source of law, a good place to start is to reconsider the various choice of law provisions that were proposed throughout the MMTJA's legislative history.

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