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AS GOES DOMA . . . DEFENDING DOMA AND THE STATE MARRIAGE MEASURES

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INTRODUCTION

On April 22, 2011, a commentator posting on the *Los Angeles Times* website alleged, "DOMA forces the federal government to discriminate

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against same-sex married couples and to treat their families as unworthy of protection or respect. A law that serves only to designate some families as second-class citizens has no principled defense."[1] This view—not merely that the Federal Defense of Marriage Act ("DOMA")[2] represents misguided public policy, but that it is a statute for which no principled defense can be made—increasingly animates the current efforts to invalidate or repeal DOMA and, at the same time, exerts an unjustified social pressure that serves to marginalize or to silence those who would defend marriage.[3]

By contrast, while advocates and many elite institutions assert that only irrationality or animus can explain objections to same-sex marriage, the American people have clearly taken steps in the opposite direction to defend marriage. Forty-one states have now adopted legal protections for marriage, with the vast majority having done so in the fifteen years since DOMA was adopted.[4] Moreover, since 1998, voters in thirty states

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[1] Maya Rupert, *Blowback: Nothing Defensible About DOMA*, L.A. TIMES OPINION (Apr. 22, 2011, 7:21 PM), http://opinion.latimes.com/opinionla/2011/04/blowback-nothing-defensible-about-doma.html?cid=6a00d8341c7de353ef014e8806f111970d. Ms. Rupert is the federal policy director for the National Center for Lesbian Rights. *Id.*

[2] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738C (2006)). DOMA defines marriage as the union of a husband and wife for purposes of federal statutes and also protects unwilling states from being forced to recognize same-sex marriages from other jurisdictions. *Id.*

[3] Particularly in today's world of sound bites and tweets, these allegations against DOMA—and against marriage more generally—in many cases do not rise to the level of a substantive argument. Rather, allegations that DOMA is "indefensible" often stand in as a substitute for actual argument.

[4] *See* ALA. CONST. art. I, § 36.03; ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. 83, § 1; CAL. CONST. art. I, § 7.5; COLO. CONST. art. II, § 31; FLA. CONST. art. I, § 27; GA. CONST. art. I, § IV, para. I; HAW. CONST. art. I, § 23; IDAHO CONST. art. III, § 28; KAN. CONST. art. 15, § 16; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. 14, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. 1, § 21; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13; ALA. CODE § 30-1-19 (1998); ALASKA STAT. § 25.05.013 (2010); ARIZ. REV. STAT. ANN. §§ 25-101(C), 25-112 (2000); ARK. CODE ANN. §§ 9-11-107(b), 9-11-109, 9-11-208(a)–(b) (2009); COLO. REV. STAT. § 14-2-104(1)(b), (2) (2010); CONN. GEN. STAT. § 46b-38nn (2009 & Supp. 2011) (repealed 2010), *invalidated by* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); DEL. CODE ANN. tit. 13, § 101(a), (d) (2009); FLA. STAT. § 741.212 (2010); GA. CODE ANN. § 19-3-3.1 (2010); HAW. REV. STAT. § 572-1 (2010); IDAHO CODE ANN. §§ 32-201, 32-209 (2006); 750 ILL. COMP. STAT. ANN. 5/212(a)(5) (West 1999); IND. CODE § 31-11-1-1 (2007); IOWA CODE § 595.2 (2001 & Supp. 2011), *invalidated by* Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); KAN. STAT. ANN. §§ 23-101(a), 23-115 (2007); KY. REV. STAT. ANN. §§ 402.005, 402.020(1)(d) (LexisNexis 2010); LA. CIV. CODE ANN. arts. 86, 89 (1999 & Supp. 2011); ME. REV. STAT. tit. 19-A, § 701 (1998 & Supp. 2010); MD. CODE ANN., FAM. LAW § 2-201 (LexisNexis 2006); MICH. COMP. LAWS ANN. § 551.1 (West 2005); MINN. STAT. § 517.03(a)(4), (b) (2006 & Supp. 2011); MISS. CODE ANN. § 93-1-1(2) (2004); MO. ANN. STAT.

have approved state constitutional amendments defining marriage, taking the strongest legal step available to them in protecting marriage against governmental redefinition.[5] By contrast, just six states and the District of Columbia have explicitly recognized same-sex unions as "marriages," and not once did these jurisdictions recognize same-sex marriages by popular vote.[6]

So, is DOMA defensible? Can a legitimate argument for the enduring constitutionality of DOMA be articulated? Or have circumstances changed to such an extent that the arguments made in

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§ 451.022 (West 2003); MONT. CODE ANN. § 40-1-401(1)(d), (4) (2009); N.C. GEN. STAT. ANN. § 51-1.2 (West 2000); N.D. CENT. CODE §§ 14-03-01, 14-03-08 (2009); OHIO REV. CODE ANN. § 3101.01(C) (LexisNexis 2008); OKLA. STAT. ANN. tit. 43, § 3.1 (West 2001); 23 PA. CONS. STAT. ANN. §§ 1102, 1704 (West 2010); S.C. CODE ANN. § 20-1-15 (Supp. 2010); S.D. CODIFIED LAWS § 25-1-1 (1999); TENN. CODE ANN. § 36-3-113 (2010); TEX. FAM. CODE ANN. §§ 2.001(b), 6.204 (West 2006); UTAH CODE ANN. §§ 30-1-2(5), 30-1-4.1 (LexisNexis 2007); VA. CODE ANN. §§ 20-45.2, 20-45.3 (2008); WASH. REV. CODE ANN. § 26.04.010(1) (West 2005); W. VA. CODE ANN. § 48-2-603 (LexisNexis 2009); WIS. STAT. ANN. §§ 765.001(2), 765.04 (West 2009); WYO. STAT. ANN. § 20-1-101 (2011). As indicated by the citations above, among these state efforts designed to provide legal protection for marriage, only the statutes in Iowa and Connecticut and the constitutional provision in California have been invalidated by courts. *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010); *Kerrigan*, 957 A.2d at 482; *Varnum*, 763 N.W.2d at 907.

[5] *See* ALA. CONST. art. I, § 36.03; ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. 83, § 1; CAL. CONST. art. I, § 7.5; COLO. CONST. art. II, § 31; FLA. CONST. art. I, § 27; GA. CONST. art. I, § IV, para. I; HAW. CONST. art. I, § 23; IDAHO CONST. art. III, § 28; KAN. CONST. art. 15, § 16; KY. CONST. § 233A; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; MISS. CONST. art. 14, § 263A; MO. CONST. art. I, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. 1, § 21; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. II, § 35; OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13.

Voters in Maine also rejected same-sex marriage in a referendum to repeal same-sex marriage adopted by the legislature, and have not been presented the opportunity to vote on a constitutional marriage amendment. *See* Kevin Miller & Judy Harrison, *Gay Marriage Rejected Yes on 1 Declares Victory; Repeal Opponents 'Will Regroup,'* BANGOR DAILY NEWS, Nov. 4, 2009, at A1.

[6] The District of Columbia, New Hampshire, New York, and Vermont have recognized same-sex marriage through legislative action. *See* Religious Freedom and Civil Marriage Equality Amendment Act of 2009, No. 18-248, sec. 2(b), § 1283(a), 57 D.C. Reg. 27 (Dec. 18, 2009); An Act Relative to Civil Marriage and Civil Unions, ch. 59, sec. 59:1, § 457:1-a, 2009 N.H. Laws 60; Marriage Equality Act, ch. 95, sec. 3, § 10-a, 2011-5 N.Y. Consol. Laws Adv. Legis. Serv. 29 (LexisNexis); An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage, secs. 5, 6, 12(a)(5), §§ 8, 1202(2), 1201(4), 2009 Vt. Adv. Legis. Serv. 3 (LexisNexis). Meanwhile, Connecticut, Iowa, and Massachusetts have recognized same-sex marriage only by judicial mandate. *See Kerrigan*, 957 A.2d at 482; *Varnum*, 763 N.W.2d at 907; Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

support of DOMA at the time of its adoption are now left illegitimate and irrational, if indeed they were ever valid in the first place?[7]

Part One of this Article outlines the history and current controversies surrounding DOMA, focusing on the pending federal litigation seeking to strike down the law as violative of the U.S. Constitution.[8] Parts Two and Three consider the various elements of the DOMA litigation, including the standard of review being applied by courts, the states' articulated interests in protecting marriage, and the legitimacy of federal efforts to impose a single definition of marriage across the federal statutes. In doing so, this Article suggests that despite the facial inadequacies of using sexual orientation discrimination as an analytical framework for marriage, courts have appropriately applied a rational basis standard to the marriage classification. This Article considers in depth Congress's own explanation for DOMA, a rationale that rests on neither animus nor irrationality, but on a respect for the institution of marriage and the human dignity of all people. Finally, Part Four looks historically at federal regulation and its interaction with state law, particularly in the field of domestic relations, and finds little support for the State of Massachusetts's argument that DOMA intrudes on an area of traditional state regulation.

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[7] "Changed circumstances" is an argument that seems to be gaining traction among same-sex marriage advocates. *See, e.g.*, E.J. Graff, *15 Years After DOMA, Hearing Reveals a Nation Transformed*, THE ATLANTIC (July 20, 2011, 6:06 PM), http://www.theatlantic.com/politics/archive/2011/07/15-years-after-doma-hearing-reveals-a-nation-transformed/242273/ ("The moral panic of the late 1980s and early 1990s left behind three major legacies: *Bowers v. Hardwick*, 'Don't Ask, Don't Tell,' and DOMA. The first two have fallen. And while states' laws and constitutional amendments have to be repealed as well, the federal DOMA is the most important brick in the wall. Today I could see that wall shaking."); *see also S.598, The Respect for Marriage Act: Assessing the Impact of DOMA on American Families: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 2–4 (2011) (statement of Joe Solmonese, President, The Human Rights Campaign); *id.* at 2–3 (statement of Evan Wolfson, Founder and President, Freedom to Marry).

[8] As will be clear, we do not come to the arguments as neutral bystanders, having individually or jointly represented amici curiae in most of the same-sex marriage litigation of the past decade. *See, e.g.*, Brief of *Amici Curiae* National Organization for Marriage et al., Perry v. Schwarzenegger, 591 F.3d 1147 (9th Cir. 2010) (No. 10-16696) (Duncan and Baker representing amici curiae); *Amicus Curiae* Brief of National Organization for Marriage California in Support of Intervenors Discussing International and National Consensus in Favor of Giving Democratic Institutions a Role in Making Marriage Policy, Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (No. S168047) (Baker and Duncan representing amicus curiae); *see also Legal Briefs*, MARRIAGE LAW FOUNDATION, http://www.marriagelawfoundation.org/briefs.html (providing links to briefs dating back as far as 2002).

I. DOMA: CONTENT AND CONTEXT

A. DOMA's Text

The Defense of Marriage Act was adopted in 1996 with overwhelming, bipartisan majorities in both the House and Senate[9] and was signed into law by President Clinton on September 21 in the same year.[10] The law was initially sparked by concerns that Hawaii might recognize same-sex marriages and that same-sex couples would attempt to export marriages performed in Hawaii to other states, creating a multitude of legal recognition conflicts.[11]

As enacted, DOMA consists of three sections: Section 1 entitling the act, "Defense of Marriage Act"; Section 2 regarding interstate recognition of marriage; and Section 3 affirming the definition of "marriage" and "spouse" for all purposes under federal law.[12] In relevant part, the Act reads as follows:

> SECTION 1. SHORT TITLE.
>
> This Act may be cited as the "Defense of Marriage Act".
>
> SEC. 2. POWERS RESERVED TO THE STATES.
>
> . . . .
>
> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or

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[9] The Defense of Marriage Act was adopted with a 342-67 majority in the House. 142 CONG. REC. 17,094 (1996). It was adopted with an even larger 85-14 majority in the Senate. 142 CONG. REC. 22,467 (1996).

[10] *See* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738C (2006)).

[11] In May 1993, the Hawaii Supreme Court ruled that Hawaii's marriage law constituted sex discrimination, subjected the statute to strict scrutiny, and remanded the case to the trial court. Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993). It was not until May 1996, however, when the Hawaii Senate voted to defeat a proposed constitutional amendment on marriage, that DOMA became an urgent national priority. As David Orgon Coolidge wrote,

> The failure of the proposed amendment was seen widely as presaging an almost certain victory for supporters of same-sex marriage. Alarm bells went off across the country, and within two weeks the Defense of Marriage Act was introduced in the United States Congress. Before May ended, President Clinton announced his support for the bill. By the end of summer, Congress passed the Defense of Marriage Act, and the President signed it into law.

David Orgon Coolidge, *The Hawai'i Marriage Amendment: Its Origins, Meaning and Fate*, 22 U. HAW. L. REV. 19, 38 (2000) (footnotes omitted). Ironically, after being remanded to the trial court, the *Baehr* litigation went to trial before Judge Kevin Chang on September 10, 1996, the same day DOMA was given final approval in the U.S. Senate. Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235, at *1 (Haw. Cir. Ct. Dec. 3, 1996), *aff'd*, 950 P.2d 1234 (Haw. 1997). Judge Chang ultimately struck down the marriage law, holding that the state had failed to meet the high burden of a strict scrutiny analysis. *Baehr*, 1996 WL 694235, at *21–22.

[12] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738C (2006)).

> judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.
>
> . . . .
>
> SEC. 3. DEFINITION OF MARRIAGE.
>
> . . . .
>
> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.[13]

Anticipating today's legal challenges, the House Report on the bill set forth four specific governmental interests advanced by the legislation: "(1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce government resources."[14] In particular, the Report includes a lengthy discussion regarding the first of these governmental interests advanced by Congress:

> H.R. 3396, is appropriately entitled the "Defense of Marriage Act." The effort to redefine "marriage" to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage. To understand why marriage should be preserved in its current form, one need only ask why it is that society recognizes the institution of marriage and grants married persons preferred legal status. Is it, as many advocates of same-sex "marriage" claim, to grant public recognition to the love between persons? We know it is not the mere presence of love that explains marriage, for as Professor Hadley Arkes testified:
>
> > There are relations of deep, abiding love between brothers and sisters, parents and children, grandparents and grandchildren. In the nature of things, those loves cannot be diminished as loves because they are not . . . expressed in marriage.
>
> No, as Professor Arkes continued:
>
> > The question of what is suitable for marriage is quite separate from the matter of love, though of course it cannot

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[13] *Id.* (internal quotation marks omitted).

[14] H.R. REP. NO. 104-664, at 12 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2916. State legislatures have made similar observations. For instance, the Michigan legislature stated in 1996, "Marriage is inherently a unique relationship between a man and a woman. As a matter of public policy, this state has a special interest in encouraging, supporting, and protecting that unique relationship in order to promote, among other goals, the stability and welfare of society and its children." MICH. COMP. LAWS ANN. § 551.1 (West 2005). *See also* ALA. CONST. art. I, § 36.03; TENN. CODE ANN. § 36-3-113(a) (2010).

> be detached from love. The love of marriage is directed to a different end, or it is woven into a different meaning, rooted in the character and ends of marriage.

And to discover the "ends of marriage," we need only reflect on this central, unimpeachable lesson of human nature:

> We are, each of us, born a man or a woman. The committee needs no testimony from an expert witness to decode this point: Our engendered existence, as men and women, offers the most unmistakable, natural signs of the meaning and purpose of sexuality. And that is the function and purpose of begetting. At its core, *it is hard to detach marriage from what may be called the "natural teleology of the body": namely, the inescapable fact that only two people, not three, only a man and a woman, can beget a child.*

At bottom, civil society has an interest in maintaining and protecting the institution of heterosexual marriage because it has a deep and abiding interest in encouraging responsible procreation and child-rearing. Simply put, government has an interest in marriage because it has an interest in children.

Recently, the Council on Families in America, a distinguished group of scholars and analysts from a diversity of disciplines and perspectives, issued a report on the status of marriage in America. In the report, the Council notes the connection between marriage and children:

> The enormous importance of marriage for civilized society is perhaps best understood by looking comparatively at human civilizations throughout history. Why is marriage our most universal social institution, found prominently in virtually every known society? Much of the answer lies in the irreplaceable role that marriage plays in childrearing and in generational continuity.

And from this nexus between marriage and children springs the true source of society's interest in safeguarding the institution of marriage:

> Simply defined, marriage is a relationship within which the community socially approves and encourages sexual intercourse and the birth of children. It is society's way of signaling to would-be parents that their long-term relationship is socially important—a public concern, not simply a private affair.

That, then, is why we have marriage laws. Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship. But, because America, like nearly every known human society, is concerned about its children,

> our government has a special obligation to ensure that we preserve and protect the institution of marriage.[15]

But, as explained in the Section below, it was not this governmental interest in promoting procreation and the formation of families that was the target for early challenges to DOMA.

B. Early Challenges to DOMA

Much of the early academic critique of DOMA centered on Section 2 of the Act, with several authors suggesting that Section 2 violated the Full Faith and Credit guarantee contained in Article IV, Section 1 of the U.S. Constitution.[16] Over time, however, something of a consensus seems to have developed among scholars that Section 2 of DOMA merely restates existing conflicts of law principles with respect to interstate recognition of a legal status or license, and as such, the provision is not constitutionally problematic.[17]

Professor Andrew Koppelman provides one example of this shift, arguing first in 1997, "An equal protection challenge to the definitional provision of DOMA, standing alone, would be a hard case. . . . It is the choice-of-law provision, and not the definitional provision, that is unrelated to any legitimate governmental interest and thus fails the *Romer* test."[18] By 2010, however, Professor Koppelman had reversed his views, explaining,

> I once wrote, on the basis of the reasoning just stated, "An equal protection challenge to the definitional provision of DOMA, standing alone, would be a hard case." I recant, disavow what I wrote, and repent. It is not such a hard case any more. I think the plaintiffs in *Gill* [*v. Office of Personnel Management*] have a pretty good chance of winning if their victory is appealed. The culture has shifted, in ways I had not anticipated.[19]

At the same time, Koppelman now also admits that Section 2's choice of law provision is largely uncontroversial: "The fears that prompted Congress to act [in adopting the choice of law provisions of DOMA] were based upon a massive misunderstanding of existing law. States have

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[15] H.R. REP. NO. 104-664, at 12–14 (1996) (footnotes omitted).

[16] *See, e.g.*, Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 18 (1997); Julie L.B. Johnson, *The Meaning of "General Laws": The Extent of Congress's Power Under the Full Faith and Credit Clause and the Constitutionality of the Defense of Marriage Act*, 145 U. PA. L. REV. 1611, 1638–43 (1997).

[17] *See, e.g.*, Patrick J. Borchers, *The Essential Irrelevance of the Full Faith and Credit Clause to the Same-Sex Marriage Debate*, 38 CREIGHTON L. REV. 353, 358–59 (2005); Mark D. Rosen, *Congress's Primary Role in Determining What Full Faith and Credit Requires: An Additional Argument*, 41 CAL. W. INT'L L.J. 7, 28 (2010).

[18] Koppelman, *supra* note 16, at 9.

[19] Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 DRAKE L. REV. 923, 940 (2010) (footnote omitted).

always had the power to decline to recognize marriages from other states, and they have been exercising that power for centuries."[20]

While academics have debated the validity of Section 2, the actual DOMA litigation to date has focused primarily on Section 3, alleging that the substantive definition of "marriage" contained in Section 3 of the Act and codified at Title 1, Section 7 of the United States Code violates various federal constitutional guarantees, including the Privileges and Immunities Clause of Article IV, Section 2, the Due Process Clause of the Fifth Amendment, the Equal Protection Guarantee of the Fifth Amendment, the Article I Spending Clause, and the reservation of powers to the states under the Tenth Amendment. Since DOMA's adoption in 1996, there have been at least fifteen lawsuits challenging its constitutionality on these grounds.[21] All but a handful, however, have been filed within the past three years, and at the time of this writing, at

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[20] *Id.* at 936 (footnotes omitted). Professor Lynn D. Wardle keenly noted that the scholarship on DOMA seems to fluctuate according to the political environment in Washington, with the federal marriage amendment in 2006 temporarily moderating support for same-sex marriage as prior opponents praised DOMA for its modesty. Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 DRAKE L. REV. 951, 964–65 (2010) ("The scholarship about DOMA has zigged and zagged, like the congressional politics. Some legal entities who favor interstate recognition of same-sex marriage initially opposed and criticized DOMA, suggesting it was unconstitutional under the structural provisions of the Constitution. Then, about a decade after Congress passed DOMA, proposals to amend the United States Constitution to prohibit same-sex marriage as a matter of constitutional law were introduced in Congress. . . . [T]he possibility of adoption of a marriage amendment to the Constitution of the United States banning same-sex marriage made DOMA seem like a very moderate compromise, and many of the scholars who testified or commented in opposition to the proposed marriage amendment were quick to point out DOMA provided sufficient protection against forced recognition of same-sex marriage and, therefore, there was no need for a constitutional amendment because DOMA was the law." (footnotes omitted)).

[21] *In re* Levenson, 587 F.3d 925, 928 (9th Cir. 2009); Smelt v. Cnty. of Orange, 447 F.3d 673, 676 (9th Cir. 2006); Matthews v. Gonzales, 171 F. App'x 120, 121 (9th Cir. 2006); Mueller v. Comm'r, 39 F. App'x 437, 438 (7th Cir. 2002); Lui v. Holder, No. 2:11-cv-01267-SVW-JCG, slip op. at 1 (C.D. Cal. Sept. 28, 2011); Dragovich v. U.S. Dep't of the Treasury, 764 F. Supp. 2d 1178, 1179 (N.D. Cal. 2011); Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 235–36 (D. Mass. 2010), *appeal docketed*, No. 10-2207 (1st Cir. Nov. 24, 2010); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 376 (D. Mass. 2010), *appeal docketed sub nom.* Massachusetts v. U.S. Dep't of Health & Human Servs., No. 10-2207 (1st Cir. Nov. 24, 2010); Torres-Barragan v. Holder, No. 2:09-cv-08564-RGK-MLG (C.D. Cal. Apr. 30, 2010), *appeal docketed*, No. 10-55768 (9th Cir. May 13, 2010); Bishop v. United States, No. 4:04-cv-848-TCK-TLW, slip op. at 1 (N.D. Okla. Nov. 24, 2009); Wilson v. Ake, 354 F. Supp. 2d 1298, 1301 (M.D. Fla. 2005); *In re* Balas, 449 B.R. 567, 571–72 (Bankr. C.D. Cal. 2011); *In re* Kandu, 315 B.R. 123, 130 (Bankr. W.D. Wash. 2004); Hara v. Office of Pers. Mgmt., No. PH-0831-08-099-I-2, 2008 MSPB LEXIS 6601 (M.S.P.B. Dec. 17, 2008), *appeal docketed*, No. 2009-3134 (Fed. Cir. Mar. 17, 2009); Complaint for Declaratory and Injunctive Relief at 4, Pedersen v. Office of Pers. Mgmt., No. 3:10-cv-01750-VLB (D. Conn. Nov. 9, 2010).

least eight are still pending at various stages within the federal court system.

Prior to *Goodridge v. Department of Public Health*,[22] DOMA was largely insulated from constitutional review, as no state recognized same-sex marriages, and thus no plaintiff could be held to have standing to challenge the statute that dealt only with recognition of existing marriages.[23] Put another way, an unmarried individual (even if that person is in a civil union) has no standing to sue for federal marriage recognition—unless there is a marriage to recognize. Persons are not married under federal law; DOMA simply determines whether a marriage valid under state law is recognized for purposes of federal law. If there is no valid marriage under state law, then Congress has no marriage to recognize.[24]

All this changed in 2003 when Massachusetts became the first American jurisdiction to issue marriage licenses to same-sex couples in response to the Supreme Judicial Court ruling in *Goodridge*.[25] Between 2003 and 2008, there were three challenges to DOMA resulting in a judgment on the merits.[26] All three cases were broad challenges to the constitutionality of the law. One arose in a bankruptcy proceeding, and the other two were direct challenges to the law by couples who wanted to

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

[23] As one same-sex marriage advocate posited following the *Goodridge* decision, "Now the time is ripe for a constitutional challenge to DOMA." Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117 HARV. L. REV. 2684, 2688 (2004). The author argued, "Until recently, DOMA was effectively unchallengeable by the individuals subjected to its stigma. No same-sex couple would secure a marriage license for nearly eight years after DOMA's passage. Accordingly, no potential plaintiff had suffered an injury sufficiently 'concrete and particularized' to establish standing to challenge either provision of DOMA, and a stigmatizing law was insulated for years after its enactment." *Id.* at 2687–88 (footnotes omitted).

[24] The Court of Appeals for the Seventh Circuit briefly addressed this point in 2002 in connection with a pro se petitioner who had filed a joint tax return with his same-sex partner:

> The Defense of Marriage Act presumptively denies federal recognition of same-sex marriages should any state choose to recognize such unions. But as the Commissioner argues, Mr. Mueller did not try to have his same-sex relationship recognized as a marriage under Illinois law, and thus the Defense of Marriage Act was not implicated. Instead Mr. Mueller's filing status depended only on whether he was legally married under Illinois law at the close of tax year 1996, which he admitted he was not. Therefore, the constitutionality of the Defense of Marriage Act is irrelevant.

Mueller, 39 F. App'x at 438 (citations omitted).

[25] *Goodridge*, 798 N.E.2d at 969–70 (finding that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution").

[26] Smelt v. County of Orange, 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005), *aff'd in part, vacated in part, remanded*, 447 F.3d 673 (9th Cir. 2006); *Wilson*, 354 F. Supp. 2d at 1309; *In re Kandu*, 315 B.R. at 148.

marry. All were brought by private attorneys rather than advocacy organizations. Most notably, all were unsuccessful.

The first of the three early cases was a 2004 bankruptcy proceeding in Washington state involving an American same-sex couple, Lee and Ann Kandu, who had traveled to British Columbia to get married in August 2003 and then filed a joint Chapter 7 bankruptcy petition back in Washington state two months later.[27] When the bankruptcy court objected to the joint filing by Lee and Kandu who were unmarried according to Washington law, the pro se petitioners challenged the constitutionality of DOMA on Fourth, Fifth, and Tenth Amendment grounds.[28]

Dealing first with the Tenth Amendment claim, the court held, "The Tenth Amendment is not implicated because the definition of marriage in DOMA is not binding on states and, therefore, there is no federal infringement on state sovereignty. States retain the power to decide for themselves the proper definition of the term marriage."[29] Turning briefly to the Fourth Amendment guarantee against unreasonable searches and seizures, the court continued, "More recently, the Fourth Amendment has been applied in the civil context as well. In its expansion, however, the Supreme Court indicated that the Fourth Amendment properly applies in the civil context only when the purpose of the governmental action is within the traditional meaning of search and seizure."[30]

Acknowledging its limited role as a trial court, the court opted to apply a rational basis analysis to the Fifth Amendment claims, expressing caution with respect to the affirmation of a "new fundamental right" to same-sex marriage[31] and rejecting claims for heightened scrutiny under an equal protection analysis as well.[32] In its rational basis analysis, the court again acknowledged its limited jurisdiction, deferring instead to the separate jurisdiction of Congress on matters of evidence and legislative policy:

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[27] *In re Kandu*, 315 B.R. at 130. Ann Kandu subsequently passed away in April 2004, but the litigation continued, and the court ruled that the petition was not moot in that her estate was then administered in the same way as if she were still living. *Id.* at 130 n.1.

[28] *Id.* at 131.

[29] *Id.* at 132.

[30] *Id.* at 134 (citations omitted).

[31] *Id.* at 141 ("A bankruptcy court is a trial court of limited jurisdiction and must be extremely cautious before creating on its own a new fundamental right based on what the Supreme Court *might* in the future decide.").

[32] *Id.* at 143 ("There is no evidence, from the voluminous legislative history or otherwise, that DOMA's purpose is to discriminate against men or women as a class. Accordingly, the marriage definition contained in DOMA does not classify according to gender, and the Debtor is not entitled to heightened scrutiny under this theory.").

> Authority exists that the promotion of marriage to encourage the maintenance of stable relationships that facilitate to the maximum extent possible the rearing of children by both of their biological parents is a legitimate congressional concern. This Court's personal view that children raised by same-sex couples enjoy benefits possibly different, but equal, to those raised by opposite-sex couples, is not relevant to the Court's ultimate decision. It is within the province of Congress, not the courts, to weigh the evidence and legislate on such issues, unless it can be established that the legislation is not rationally related to a legitimate governmental end. Thus, although this Court may not personally agree with the positions asserted by the [United States Trustee] in support of DOMA, applying the rational basis test as set forth by the Supreme Court, this Court cannot say that DOMA's limitation of marriage to one man and one woman is not wholly irrelevant to the achievement of the government's interest.[33]

The second of the three cases, *Wilson v. Ake*, involved a lesbian couple married in Massachusetts and living in Florida who presented their marriage license to the deputy clerk for Hillsborough County, Florida, asking for "acceptance of the valid and legal Massachusetts marriage license."[34] When the county clerk refused, the couple petitioned a federal district court to declare both DOMA and the Florida marriage statutes unconstitutional under the Full Faith and Credit Clause, the

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[33] *Id.* at 146 (citations and footnote omitted). In support of this conclusion, the bankruptcy court cited a litany of cases holding that the state has an interest in promoting childrearing in a setting that allows the child to know both its mother and its father. The series of cases relied upon by the court were as follows:

> *Bowen v. Gilliard*, 483 U.S. 587, 614, 107 S.Ct. 3008, 3024, 97 L.E.2d 485 (1987) (Brennan J., dissenting) (noting that "'[t]he optimal situation for the child is to have both an involved mother and an involved father'") (quoting H. Biller, *Paternal Deprivation* 10 (1974)); *Lofton v. Secretary of the Dep't of Children and Family Servs.*, 358 F.3d 804, 819 (11th Cir. 2004) (considering the state's argument that the presence of both male and female authority figures in the home is critical to optimal childhood development, the court held that "[i]t is hard to conceive an interest more legitimate and more paramount for the state than promoting an optimal social structure for educating, socializing, and preparing its future citizens to become productive participants in civil society"); *Adams*, 486 F. Supp. at 1124 (holding that it is beyond dispute that the state has a compelling interest in providing "status and stability to the environment in which children are raise [sic]"); *Standhardt*, 77 P.3d at 462–63 (holding that the state has an interest in promoting child-rearing by opposite-sex couples); *Singer*, 522 P.2d at 1197 (holding that "marriage is so clearly related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman").

Id.

[34] Wilson v. Ake, 354 F. Supp. 2d 1298, 1301 (M.D. Fla. 2005). The context of the request is not clear from the pleadings.

Privileges and Immunities Clause, the Commerce Clause, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[35]

Perhaps surprisingly, given the extent of academic debate over the Full Faith and Credit implications of DOMA, the court summarily dismissed the Full Faith and Credit argument, citing *Nevada v. Hall*,[36] and concluding,

> The Supreme Court has clearly established that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." Florida is not required to recognize or apply Massachusetts' same-sex marriage law because it clearly conflicts with Florida's legitimate public policy of opposing same-sex marriage.[37]

On the question of whether same-sex marriage constitutes a fundamental right, the Florida district court cited the analysis from *In re Kandu* with approval, also noting that the Eleventh Circuit Court of Appeals, its authority binding upon the lower court, had already held that *Lawrence v. Texas*[38] did not establish a new fundamental right to private sexual intimacy: "[T]he Supreme Court's decision in *Lawrence* cannot be interpreted as creating a fundamental right to same-sex marriage. First, the Eleventh Circuit disagrees with Plaintiffs' assertion that *Lawrence* created a fundamental right in private sexual intimacy and this Court must follow the holdings of the Eleventh Circuit."[39] On the equal protection claim also, the court deferred to Eleventh Circuit precedent, holding that sexual orientation classifications were subject only to rational basis review and adopting *Kandu*'s reasoning that "DOMA does not classify according to gender."[40]

For purposes of the rational basis analysis,[41] the *Wilson* court deferred once more, simply noting that "[a]lthough this Court does not express an opinion on the validity of the government's proffered legitimate interests, it is bound by the Eleventh Circuit's holding that

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[35] *Id.* at 1301–02.

[36] 440 U.S. 410 (1979).

[37] *Wilson*, 354 F. Supp. 2d at 1303–04 (citation omitted).

[38] 539 U.S. 558 (2003).

[39] *Wilson*, 354 F. Supp. 2d at 1306. On appeal, the court in *Wilson* looked to the Eleventh Circuit's binding precedent in *Lofton v. Secretary of Department of Children and Family Services*, 358 F.3d 804, 817 (11th Cir. 2004), which had concluded, "[I]t is a strained and ultimately incorrect reading of *Lawrence* to interpret it to announce a new fundamental right." *Wilson*, 354 F. Supp. 2d at 1306.

[40] *Id.* at 1308 (quoting *In re Kandu*, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004)).

[41] *Id.* (noting the government's two arguments in support of the rationality of DOMA that (1) "DOMA fosters the development of relationships that are optimal for procreation, thereby encouraging the 'stable generational continuity of the United States,'" and that (2) "DOMA 'encourage[s] the creation of stable relationships that facilitate the rearing of children by both of their biological parents.'").

encouraging the raising of children in homes consisting of a married mother and father is a legitimate state interest."[42]

Smelt v. County of Orange, the final of the three DOMA cases from 2003 to 2008, arose in Southern California when Arthur Smelt and Christopher Hammer sued Orange County, California in federal court for refusing to issue the couple a marriage license.[43] The couple argued that both the California marriage statutes and DOMA violated multiple provisions of the U.S. Constitution, including the First, Fifth, Ninth, and Fourteenth Amendments.[44]

Unlike the two earlier cases, the plaintiffs in *Smelt* were not married, but rather were domestic partners under California law.[45] The district court dismissed the couple's challenge to Section 2 of DOMA for lack of standing, holding that the plaintiffs did not have standing to challenge the interstate recognition section of DOMA because they were not married;[46] however, the couple was still allowed to proceed with a challenge to the marriage definition of Section 3.[47] The district court held DOMA's marriage definition to be constitutional because it did not

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[42] *Id.* at 1309.

[43] Smelt v. Cnty. of Orange, 374 F. Supp. 2d 861, 864 (C.D. Cal. 2005), *aff'd in part, vacated in part, remanded*, 447 F.3d 673 (9th Cir. 2006). Although the plaintiffs challenged both state and federal statutes, the court focused on the federal claims, abstaining from consideration of the state marriage laws given the challenge already pending in state court. *Id.* at 864–65, 868.

[44] *Id.* at 864–65.

[45] *Id.* at 870–71.

[46] *Id.* ("Plaintiffs have not shown they have standing to challenge section 2 of DOMA. . . . Because they lack a relationship treated as a marriage in any state, Plaintiffs are not injured by the fact section 2 permits states to choose not to give effect to other states' same-sex marriages. Plaintiffs also have not shown they will suffer an imminent injury as a result of section 2. They do not claim to have plans or a desire to get married in Massachusetts or elsewhere and attempt to have the marriage recognized in California. They do not claim to have plans to seek recognition of their eventual California marriage in another state. Without definite plans to engage in an act that will cause them to suffer an injury in fact, Plaintiffs have not established an imminent injury sufficient to confer standing to challenge section 2.").

[47] *Id.* at 871 ("Plaintiffs are registered domestic partners in California, which is a 'legal union' recognized by the state. For purposes of federal law, DOMA defines 'marriage' as a legal union between one man and one woman. Plaintiffs' legal union is excluded from the federal definition of marriage because it is not between a man and a woman. Because of DOMA's definition, Plaintiffs' legal union cannot receive the rights or responsibilities afforded to marriages under federal law. This is a concrete injury personally suffered by Plaintiffs, caused by DOMA's definition of marriage. The United States concedes, and the Court agrees, Plaintiffs have standing to challenge section 3.") This holding was later reversed by the Ninth Circuit. *Smelt*, 447 F.3d at 686 (vacating the district court's decision regarding the plaintiffs' challenge to Section 3 of DOMA).

involve sex discrimination or a fundamental right and because the law had a rational basis.[48] The Court offered the following analysis:

> The Court finds it is a legitimate interest to encourage the stability and legitimacy of what may reasonably be viewed as the optimal union for procreating and rearing children by both biological parents.
>
> Because procreation is necessary to perpetuate humankind, encouraging the optimal union for procreation is a legitimate government interest. Encouraging the optimal union for rearing children by both biological parents is also a legitimate purpose of government. The argument is not legally helpful that children raised by same-sex couples may also enjoy benefits, possibly different, but equal to those experienced by children raised by opposite-sex couples. It is for Congress, not the Court, to weigh the evidence.
>
> By excluding same-sex couples from the federal rights and responsibilities of marriage, and by providing those rights and responsibilities only to people in opposite-sex marriages, the government is communicating to citizens that opposite-sex relationships have special significance. Congress could plausibly have believed sending this message makes it more likely people will enter into opposite-sex unions, and encourages those relationships.[49]

The plaintiffs' appeal to the district court's ruling in *Smelt* was dismissed—again on standing grounds—by the U.S. Court of Appeals for the Ninth Circuit,[50] and the U.S. Supreme Court denied review.[51]

At the time these federal lawsuits were filed in 2004, state claims were already pending in California, New York, New Jersey, Maryland, and Washington,[52] and same-sex marriage advocates appeared optimistic that these cases would produce a wave of momentum in favor of same-sex marriage across the nation.[53] Yet, national strategists for recognition of same-sex marriages largely opposed these federal lawsuits, concerned that the federal litigation was premature, and that forcing a U.S. Supreme Court ruling too soon could produce a major strategic setback.[54]

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[48] *Smelt*, 374 F. Supp. 2d at 879 ("The Court concludes the fundamental due process right to marry does not include a fundamental right to same-sex marriage or Plaintiffs' right to marry each other. Plaintiffs' claimed interest is not part of a fundamental right. For due process purposes, the Court reviews DOMA's 'one man, one woman' restriction for rational basis.").

[49] *Id.* at 880.

[50] *Smelt*, 447 F.3d at 683–84.

[51] *Id.*, *cert. denied*, 549 U.S. 959 (2006).

[52] *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008); Conaway v. Deane, 932 A.2d 571 (Md. 2007); Lewis v. Harris, 908 A.2d 196 (N.J. 2006); Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006); Andersen v. King Cnty., 138 P.3d 963 (Wash. 2006).

[53] *See* Joan Biskupic, *Battles Escalate Over Gay Marriage*, USA TODAY, Mar. 24, 2006, at A1 ("The ACLU and others supporting same-sex marriages hope to turn public opinion by casting the ability to marry one's chosen partner as a basic right.").

[54] William C. Duncan, *Avoidance Strategy: Same-Sex Marriage Litigation and the Federal Courts*, 29 CAMPBELL L. REV. 29, 39 (2006) ("Whatever the exact concerns may be,

As Evan Wolfson with the national Freedom to Marry organization explained, "Bringing the wrong suit in the wrong way, even for the right objective, could do serious injury not only to our right to marry, but also to the broader range of lesbian and gay rights. The wrong case, wrong judge, or wrong forum could literally set us all back years, if not decades."[55] Ultimately, four of these state cases resulted in unfavorable holdings for same-sex marriage advocates (and the California ruling was effectively reversed by a state constitutional amendment[56]), thus prompting advocates to pursue new strategies.[57]

C. A Coordinated Assault

In the past three years alone, at least ten new challenges have been filed against DOMA.[58] Whereas earlier suits were largely uncoordinated,

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worry over federal precedent, fear of unsympathetic federal plaintiffs, or some other reason, the underlying motivation is strategic: keeping the marriage cases out of federal courts until a win there seems more likely.").

[55] Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 611 (1994).

[56] CAL. CONST. art. 1, § 7.5.

[57] *Conaway*, 932 A.2d at 635 (upholding Maryland's state marriage protection under rational basis review); *Lewis*, 908 A.2d at 224 ("The constitutional relief that we give to plaintiffs cannot be effectuated immediately or by this Court alone. The implementation of this constitutional mandate will require the cooperation of the Legislature."); *Hernandez*, 855 N.E.2d at 34 ("The Court ultimately concludes that the issue of same-sex marriage should be addressed by the Legislature."); *Andersen*, 138 P.3d at 990 (upholding Washington's state marriage protection under rational basis review).

A series of defeats at the state level prompted at least some same-sex marriage strategists to reconsider the state-by-state approach in favor of a more ambitious federal strategy. *See* David Crary, *Defeat in Maine a Harsh Blow to Gay-Marriage Drive*, LEWISTON SUN JOURNAL (Nov. 4, 2009, 1:01 PM), http://www.sunjournal.com/node/430550 ("Richard Socarides, who was an adviser on gay-rights issues in the Clinton administration, said the loss in Maine should prompt gay-rights leaders to reconsider their state-by-state strategy on marriage and shift instead to lobbying for changes on the federal level that expand recognition of same-sex couples.").

[58] Lui v. Holder, No. 2:11-cv-01267-SVW-JCG, slip op. at 1 (C.D. Cal. Sept. 28, 2011); Dragovich v. U.S. Dep't of the Treasury, 764 F. Supp. 2d 1178, 1179 (N.D. Cal. 2011); Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 235–36 (D. Mass. 2010) (complaint filed July 8, 2009), *appeal docketed*, No. 10-2207 (1st Cir. Nov. 24, 2010); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 376 (D. Mass. 2010) (complaint filed March 3, 2009), *appeal docketed sub nom.* Massachusetts v. Dep't of Health & Human Servs., No. 10-2207 (1st Cir. Nov. 24, 2010); Torres-Barragan v. Holder, No. 2:09-cv-08564-RGK-MLG (C.D. Cal. Apr. 30, 2010), *appeal docketed*, No. 10-55768 (9th Cir. May 13, 2010); *In re* Balas, 449 B.R. 567, 572 (Bankr. C.D. Cal. 2011); Hara v. Office of Pers. Mgmt., No. PH-0831-08-099-I-2, 2008 MSPB LEXIS 6601 (M.S.P.B. Dec. 17, 2008), *appeal docketed*, No. 2009-3134 (Fed. Cir. Mar. 17, 2009); Complaint for Declaratory and Injunctive Relief at 4, Pedersen v. Office of Pers. Mgmt., No. 3:10-cv-01750-VLB (D. Conn. Nov. 9, 2010); Complaint at 16, Windsor v. United States, No. 1:10-cv-8435 (S.D.N.Y. Nov. 9, 2010); Complaint at 3, Golinski v. Office of Pers. Mgmt., No. 3:10-cv-00257-JSW (N.D. Cal. Jan. 20, 2010). In addition to these cases, there is one additional DOMA challenge

individual efforts, the recent lawsuits suggest a strategic decision on the part of national same-sex marriage advocacy organizations, with two of the current DOMA challenges having been filed by Gay & Lesbian Advocates and Defenders ("GLAD"),[59] one by the American Civil Liberties Union ("ACLU"),[60] one by Lambda Legal Defense and Education Fund,[61] and a fifth suit filed by the State of Massachusetts.[62] In contrast, of the earlier DOMA lawsuits, several of the plaintiffs were represented by private counsel only.[63]

Whether this strategic decision is simply a reflection of the geographic realities of state-by-state strategies that have already exhausted the jurisdictions most likely to be sympathetic to same-sex marriage claims, an opportunistic response to a sympathetic Obama administration's defense of the litigation, some combination of the two, or perhaps other reasons altogether is not entirely clear.[64] What does

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pending in Oklahoma. *See* Bishop v. United States, No. 04-cv-848-TCK-TLW, slip op. at 1 (N.D. Okla. Nov. 24, 2009). An additional claim was decided by Judge Reinhardt through the Ninth Circuit's Employment Dispute Resolution Plan. *In re* Levenson, 560 F.3d 1145, 1145–46 (9th Cir. 2009).

[59] GLAD is representing the plaintiffs in separate challenges filed in Massachusetts and Connecticut. *Gill*, 699 F.Supp. 2d at 376; Complaint for Declaratory and Injunctive Relief at 46, *Pedersen*, No. 3:10-cv-01750-VLB; *see also DOMA Section 3 Challenge*, GAY & LESBIAN ADVOCATES & DEFENDERS, http://www.glad.org/doma/ (last visited Nov. 25, 2011). GLAD is the same organization that successfully challenged Massachusetts and Connecticut marriage laws in *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 946, 969–70 (Mass. 2003) and *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 410, 482 (Conn. 2008).

[60] ACLU is representing the plaintiffs in *Windsor v. United States*. Complaint at 23, *Windsor*, No. 1:10-cv-8435; *see also Windsor v. United States: Edie Windsor Challenges DOMA*, ACLU, http://www.aclu.org/lgbt-rights/windsor-v-united-states-thea-edie-doma (last visited Nov. 25, 2011).

[61] Lambda Legal is representing the plaintiffs in *Golinski v. Office of Personnel Management*. Complaint at 1, *Golinski*, No. 3:10-cv-00257-JSW. This case originated as a complaint under the Ninth Circuit's Employment Dispute Resolution Plan but was filed in federal district court in January 2010 after the Office of Personnel Management announced that it would ignore Judge Kozinski's order. *Id.*; *see also Golinski v. United States Office of Personnel Management*, LAMBDA LEGAL, http://www.lambdalegal.org/in-court/cases/golinski-v-us-office-personnel-management.html (last updated Apr. 14, 2011).

[62] Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 235–36 (D. Mass. 2010), *appeal docketed*, No. 10-2207 (1st Cir. Nov. 24, 2010).

[63] *See, e.g.*, Wilson v. Ake, 354 F. Supp. 2d 1298, 1300 (M.D. Fla. 2005); *In re* Marriage Cases, 183 P.3d 384, 390 (Cal. 2008); Lewis v. Harris, 908 A.2d 196, 198 (N.J. 2006).

[64] In the immediate aftermath of the Proposition 8 vote in California, former Solicitor General Ted Olson and David Boies, famous for their *Bush v. Gore* opposition, joined forces in litigation challenging Proposition 8 as a violation of federal equal protection guarantees. *See* Jesse McKinley, *Bush v. Gore Foes Join to Fight California Gay Marriage Ban*, N.Y. TIMES, May 28, 2009, at A1. Their effort immediately drew massive media attention, but at the same time received a less enthusiastic response from several national same-sex marriage advocates. *Id.* (reporting that the joint suit by Olson and Boies

seem to be increasingly evident, though, is that since the adoption of California's Proposition 8 reversing the California Supreme Court ruling in *In re Marriage Cases*,[65] same-sex marriage advocates have begun to focus their attentions and energies on a federal litigation strategy rather than a state-by-state approach.

In early 2009, shortly after the inauguration of a new president who publicly committed to the repeal of DOMA,[66] GLAD filed the first suit in Massachusetts federal court in what would become a new wave of DOMA litigation. *Gill v. Office of Personnel Management* was filed on behalf of seven same-sex couples married in Massachusetts and three individuals, all alleging that DOMA unconstitutionally denies them equal protection under the Fifth Amendment by denying them access to federal employee benefits, retirement benefits, spousal survivor benefits, and other federal privileges predicated upon marital status.[67] The second suit, *Massachusetts v. United States Department of Health & Human Services*, also filed in Massachusetts federal court, was brought by the Commonwealth of Massachusetts in July 2009, arguing that DOMA exceeds Congress's enumerated powers and infringes upon the states' "exclusive prerogative" to define marital status as guaranteed by the Tenth Amendment.[68]

In July 2010, a federal district judge, Joseph Tauro of Boston, ruled for the plaintiffs in both cases, holding that DOMA exceeded Congress's authority under the Spending Clause, that it infringed upon the rights of the Commonwealth of Massachusetts to regulate marital status, and

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against Proposition 8 "jolted many gay rights advocates—and irritated more than a few"). The filing of DOMA challenges by GLAD and other organizations in early 2009 may represent concern that the Proposition 8 litigation might reach the Supreme Court first and a belief that another context might present a more advantageous vehicle for raising the equal protection and due process issues at the Supreme Court.

[65] *In re* Marriage Cases, 183 P.3d 384.

[66] During his 2008 presidential campaign, President Obama released an open letter to the gay and lesbian community pledging to repeal DOMA, and through April 2009, listed the repeal of DOMA on the White House website as one of his top "civil rights" priorities. *See* Ali Frick, *White House Eliminated Pledge to Repeal Defense of Marriage Act from Website*, THINKPROGRESS.ORG (May 4, 2009, 6:33 PM), http://thinkprogress.org/politics/2009/05/04/38329/white-house-website-doma/; *see also* OBAMA PRIDE, http://obama.3cdn.net/36ddd2f5daac41cb21_rym6bxaax.pdf (last visited Nov. 25, 2011) ("I support the complete repeal of the Defense of Marriage Act.").

[67] Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 376–83 (D. Mass. 2010), *appeal docketed sub nom.* Massachusetts v. Dep't of Health & Human Servs., No. 10-2207 (1st Cir. Nov. 24, 2010).

[68] Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 235–36 (D. Mass 2010), *appeal docketed*, No. 10-2207 (1st Cir. Nov. 24, 2010); *see also* Complaint at 1–2, *Massachusetts*, 698 F. Supp. 2d 234 (No. 1:09-cv-11156-JLT) ("From its founding until DOMA was enacted in 1996, the federal government recognized that defining marital status was the exclusive prerogative of the states and an essential aspect of each state's sovereignty.").

that the law lacked a rational basis and so violated the Equal Protection Clause of the Fourteenth Amendment as incorporated in the Fifth Amendment.[69] While there is much to critique in the companion rulings, we will highlight in this Article just a few observations.

First, relying heavily upon an affidavit from Professor Nancy Cott, Judge Tauro recounted the history of anti-miscegenation laws and the fact that the federal government at no time adopted a uniform policy with respect to interracial marriage, but instead deferred to the individual policy of each state.[70] He also outlined the challenges faced by Massachusetts as a result of DOMA, including administrative challenges involved in accounting for individuals treated as married under state law but as single under federal law, lost federal funds under Medicaid, and additional taxation for state employees whose same-sex spousal health benefits are not deductible under federal law.[71]

Analyzing the Commonwealth's Tenth Amendment and enumerated powers claims, the Massachusetts district court held,

> This case requires a complex constitutional inquiry into whether the power to establish marital status determinations lies exclusively with the state, or whether Congress may siphon off a portion of that traditionally state-held authority for itself. . . .
>
> . . . .
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> Since, in essence, "the two inquiries are mirror images of each other," the Commonwealth challenges Congress' authority under Article I to promulgate a national definition of marriage, and, correspondingly, complains that, in doing so, Congress has intruded on the exclusive province of the state to regulate marriage.[72]

In *Gill*, handed down the same day, Judge Tauro turned to a rational basis analysis, discounting the justifications articulated by Congress at the time of DOMA's passage in stating, "This court can readily dispose of the notion that denying federal recognition to same-sex marriages might encourage responsible procreation, because the government concedes that this objective bears no rational relationship to the operation of DOMA."[73] Significantly, Judge Tauro supported his

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[69] *Gill*, 699 F. Supp. 2d at 376, 396–97; *Massachusetts*, 698 F. Supp. 2d at 235, 248–49, 251, 253.

[70] *Massachusetts*, 698 F. Supp. 2d at 238–39 (noting that at one time as many as forty-one states had adopted laws banning interracial marriage). However, in *Gill*, Judge Tauro noted that the number had dropped to sixteen states by the time the Supreme Court struck down such laws in *Loving v. Virginia*, 388 U.S. 1 (1967). *Gill*, 699 F. Supp. 2d at 392. While the *Loving* analogy is typically advanced by those favoring same-sex marriage, the analogy carries a message of restraint for the Supreme Court as well, as opposition to same-sex marriage currently stands at its high water mark with 41 states having adopted legislation opposing same-sex marriage. *See supra* note 4.

[71] *Massachusetts*, 698 F. Supp. 2d at 241–44.

[72] *Id.* at 245–46.

[73] *Gill*, 699 F. Supp. 2d at 388.

holding with the reasoning of *Lawrence v. Texas*, noting that "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."[74]

Professor David Cruz has appropriately criticized Judge Tauro's rulings in *Gill* and *Massachusetts* as being "somewhat circular" in their reasoning.[75] In *Massachusetts,* Judge Tauro held Congress's enactment of DOMA invalid because it allegedly establishes an unconstitutional condition upon state Medicaid and other funding—citing *Gill*'s holding that DOMA violates the equal protection guarantee of the Fifth Amendment.[76] Yet, in *Gill,* Judge Tauro explains that the government's asserted interests in protecting the status quo and taking an incremental response to a new social problem bear no rational relationship to DOMA—citing his opinion in *Massachusetts* for the proposition that Congress had no constitutional authority to regulate marriage in the first place.[77] So, according to Judge Tauro, DOMA is unconstitutional under the Fifth Amendment's equal protection guarantee because Congress had no authority to regulate marriage, and Congress's marriage regulation was invalid because it imposed an unconstitutional condition on the states, forcing them to violate constitutional guarantees of equal protection vis-à-vis their citizens. These decisions are, appropriately, now consolidated and pending on appeal in the U.S. Court of Appeals for the First Circuit.[78]

After the Massachusetts trial court decisions in the First Circuit were issued in July 2010, GLAD and the ACLU both filed similar

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[74] *Id.* at 389–90 (quoting Lawrence v. Texas, 539 U.S. 558, 577 (2003)).

[75] David B. Cruz, *The Defense of Marriage Act and Uncategorical Federalism*, 19 WM. & MARY BILL RTS. J. 805, 809–10 (2011). ("Judge Tauro's argument rejecting the Spending Clause as a basis for Section 3 of DOMA depended upon his conclusion in the companion case *Gill v. Office of Personnel Management* that DOMA violated equal protection in its discriminatory treatment of same-sex couples and that conditioning participation in federal programs on compliance with DOMA unconstitutionally induced states to violate equal protection. *Gill*, in turn, held that DOMA had no rational basis (as applied to the plaintiff same-sex couples and survivors in Massachusetts) because Judge Tauro concluded that the federal government has no 'interest in a uniform definition of marriage for purposes of determining federal rights, benefits, and privileges.' The authority Tauro gives for that conclusion, besides his related categorical conclusion that 'the subject of domestic relations is the exclusive province of the states[,]' is his opinion in *Massachusetts*. Thus, in a somewhat circular way, Judge Tauro's categorical federalism arguments are key to both his decisions holding the federal definition section of DOMA unconstitutional as applied to and in Massachusetts." (alteration in original) (footnotes omitted)).

[76] *Massachusetts*, 698 F. Supp. 2d at 248–49.

[77] *Gill*, 699 F. Supp. at 390–91.

[78] Order, Massachusetts v. U.S. Dep't of Health & Human Servs., No. 10–2207 (1st Cir. Nov. 24, 2010) (noting that *Gill* and *Massachusetts* have been consolidated into one case).

challenges to DOMA in the Second Circuit, one in Connecticut[79] and one in New York.[80] The Connecticut case was brought by GLAD and involves same-sex couples married in various northeastern states who seek to have their marriages recognized for federal law purposes.[81] The New York case, brought by the ACLU, involves a New York couple married in Canada who seek to have their marriage recognized for federal estate tax purposes to the surviving partner.[82]

Meanwhile, in California, federal constitutional challenges to DOMA have been filed in three cases. One involves a bankruptcy proceeding where the plaintiffs, represented by private attorneys, have challenged DOMA, seeking to be considered joint petitioners on their bankruptcy petition.[83] The bankruptcy court ruled in June 2011 that DOMA was unconstitutional, and the Department of Justice concluded it would not appeal that decision.[84] The next California case involves public employees in same-sex marriages, represented by the Legal Aid Society of San Francisco, who have sued to have their non-public employee spouses enrolled in a federally regulated insurance program.[85] Finally, the third case involves a federal court employee who has brought a claim to have her spouse added to a federal employee insurance program.[86] This latter case is pending at the trial court level.[87]

With at least ten DOMA challenges pending at various stages in federal litigation,[88] the issue is likely to come before the U.S. Supreme Court within the next two to three years.[89] Of the recent cases filed

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[79] Complaint for Declaratory and Injunctive Relief at 4, 46, Pedersen v. Office of Pers. Mgmt., No. 3:10-cv-1750-VLB (D. Conn. Nov. 9, 2010).

[80] Complaint at 21, 23, Windsor v. United States, No. 1:10-cv-8435 (S.D.N.Y. Nov. 9, 2010).

[81] Complaint for Declaratory and Injunctive Relief, *supra* note 79, at 44.

[82] Complaint, *supra* note 80, at 1, 21–23.

[83] *In re* Balas, 449 B.R. 567, 569–72 (Bankr. C.D. Cal. 2011).

[84] *Id.* at 579.

[85] Dragovich v. U.S. Dep't of the Treasury, 764 F. Supp. 2d 1178, 1179–80 (N.D. Cal. 2011). The district court in *Dragovich* rejected the federal government's motion to dismiss, finding that the court had subject-matter jurisdiction and that the plaintiffs had stated a cognizable claim. *Id.* at 1192.

[86] Complaint at 1–3, Golinski v. U.S. Office of Pers. Mgmt., No. 3:10-cv-00257-JSW (N.D. Cal. Jan. 20, 2010).

[87] Case Summary, Golinski v. U.S. Office of Pers. Mgmt., No. 3:10-cv-00257-JSW (N.D. Cal. Jan. 20, 2010), ECF Case Summary (showing date of last filing as October 12, 2011).

[88] *See supra* note 58.

[89] Michael A. Lindenberger, *Making a Supreme Court Case for Gay Marriage*, TIME (Aug. 9, 2010), http://www.time.com/time/politics/article/0,8599,2009335,00.html.

against DOMA, four have been decided by a trial court,[90] and two have already been appealed.[91]

D. The Politics of Defending DOMA

Overwhelmingly approved by bipartisan majorities in 1996,[92] DOMA has become increasingly controversial in recent years, at least among political elites. Emblematic of this shift—and perhaps contributing to it as well—has been the evolving position of the Obama administration on the issue of marriage. During the 2008 presidential campaign, President Obama published an open letter supporting "the complete repeal of the Defense of Marriage Act,"[93] while shortly thereafter explaining that he supported marriage as the union of a husband and wife, most notably during a candidate forum with Reverend Rick Warren on August 16, 2008: "I believe that marriage is the union between a man and a woman. Now, for me as a Christian . . . it is also a sacred union. God's in the mix."[94]

Shortly after President Obama's inauguration, the repeal of DOMA was listed as one of the new Obama administration's top "civil rights" priorities.[95] Yet at the same time, the Obama Department of Justice

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[90] Unlike the cases from 2003 to 2008, all four of the recently decided trial court cases have struck down DOMA or least recognized as cognizable the claim that DOMA is unconstitutional. *See Dragovich*, 764 F. Supp. 2d at 1192; Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 253 (D. Mass. 2010), *appeal docketed*, No. 10-2207 (1st Cir. Nov. 24, 2010); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 397 (D. Mass. 2010), *appeal docketed sub nom.* Massachusetts v. U.S. Dep't of Health & Human Servs., No. 10-2207 (1st Cir. Nov. 24, 2011); *In re Balas*, 449 B.R. 567, 579 (Bankr. C.D. Cal. 2011).

[91] *Gill* and *Massachusetts* were both appealed and have been consolidated on appeal to the First Circuit. Order, Massachusetts v. U.S. Dep't of Health & Human Servs., No. 10–2207 (1st Cir. Nov. 24, 2010).

As discussed in depth later, the House of Representatives Bipartisan Legal Advisory Group ("BLAG") has intervened to defend DOMA in the absence of any defense from the Obama administration. BLAG does not plan to appeal every case, as explained by a spokesman for House Speaker John Boehner:

> Bankruptcy cases are unlikely to provide the path to the Supreme Court, where we imagine the question of constitutionality will ultimately be decided . . . . Obviously, we believe the statute is constitutional in all its applications, including bankruptcy, but effectively defending it does not require the House to intervene in every case, especially when doing so would be prohibitively expensive.

John Schwartz, *A California Bankruptcy Court Rejects U.S. Law Barring Same-Sex Marriage*, N.Y. TIMES, June 15, 2011, at A18.

[92] *See supra* note 9.

[93] OBAMA PRIDE, *supra* note 66.

[94] *Saddleback Presidential Candidates Forum* (CNN television broadcast Aug. 16, 2008), http://transcripts.cnn.com/TRANSCRIPTS/0808/16/se.02.html (recording remarks by then-presidential candidate, Barack Obama).

[95] Frick, *supra* note 66.

continued to defend DOMA in briefs filed in the *Smelt* case.[96] Within a few months, however, under fire from gay marriage supporters,[97] the Department of Justice disclaimed any governmental interest in DOMA related to strengthening marriage, responsible procreation, or child well-being, failing to address these reasons but instead falling back on defenses such as maintaining the status quo or taking an incremental response to new social problems.[98]

On February 23, 2011, with *Gill* and *Massachusetts* pending in the First Circuit, Attorney General Eric Holder made the controversial announcement that the Department of Justice would no longer defend DOMA in litigation based on President Obama's new position that DOMA is unconstitutional.[99] In particular, Attorney General Holder

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[96] *See* Reply Memorandum in Support of Defendant United States of America's Motion to Dismiss at 2, 5–7, Smelt v. United States, No. 8:09-cv-00286-DOC-MLG (C.D. Cal. Aug. 17, 2009) (admitting the adminstration's lack of support of DOMA as a matter of policy but arguing that the plaintiffs' equal protection and due process claims in *Smelt* should be dismissed because DOMA survives rational basis review).

[97] *See* Jeremy W. Peters, *New Generation of Gay Rights Advocates March to Put Pressure on the President*, N.Y. TIMES, Oct. 12, 2009, at A12.

[98] Reply in Support of Defendants' Motion to Dismiss and Opposition to Plaintiffs' Motion for Summary Judgment at 14–16, *Gill*, 699 F. Supp. 2d 374 (No. 1:09-cv-10309-JLT).

[99] Letter from Eric H. Holder, Jr., Attorney General of the United States, to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011) [hereinafter Letter from Attorney General Holder]; Press Release, Dep't of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011) [hereinafter Press Release], http://www.justice.gov/opa/pr/2011/February/11-ag-222.html. ("After careful consideration, including a review of my recommendation, the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. Given that conclusion, the President has instructed the Department not to defend the statute in such cases. I fully concur with the President's determination. Consequently, the Department will not defend the constitutionality of Section 3 of DOMA as applied to same-sex married couples in the two cases filed in the Second Circuit. . . . The Department has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense. At the same time, the Department in the past has declined to defend statutes despite the availability of professionally responsible arguments, in part because—as here—the Department does not consider every such argument to be a 'reasonable' one. Moreover, the Department has declined to defend a statute in cases, like this one, where the President has concluded that the statute is unconstitutional."). Earlier debates over the constitutionality of DOMA had centered around Section 2 of the statute, which provides, "No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship." Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738C) (2006)). More

explained that, with new litigation pending in the Second Circuit Court of Appeals, where no binding authority exists on the standard of review for sexual orientation discrimination, the administration was taking the position that sexual orientation deserves heightened scrutiny, and that DOMA is unable to survive such heightened scrutiny.[100] Attorney General Holder noted that the Department of Justice, while no longer defending DOMA in litigation, would continue to enforce the law unless or until it was repealed or struck down.[101]

But three months later, Attorney General Holder vacated a Board of Immigration Appeals ruling based on DOMA, asking the Board to reconsider deportation proceedings initiated against a man who had entered into a New Jersey civil union with an American-born partner.[102] By July 2011, the Obama administration had come full circle in its legal position on DOMA, arguing in *Golinski v. United States Office of Personnel Management* that

> Section 3 of the Defense of Marriage Act, 1 U.S.C. § 7 ("DOMA"), unconstitutionally discriminates. It treats same-sex couples who are legally married under their states' laws differently than similarly situated opposite-sex couples, denying them the status, recognition, and significant federal benefits otherwise available to married persons. Under well-established factors set forth by the Supreme Court, discrimination based on sexual orientation is subject to heightened scrutiny. Under that standard of review, Section 3 of DOMA is unconstitutional.[103]

In response to the Obama administration's withdrawal, Congress has intervened through the Bipartisan Legal Advisory Group ("BLAG") in the lawsuits and other DOMA challenges to ensure the law receives a robust defense, both with respect to the standard of review and (especially) to the governmental interests in support of DOMA that would be advanced.

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recently, however, attention has been focused on the substantive definition of marriage contained in Section 3 of DOMA, which states, "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." *Id.*

[100] Letter from Attorney General Holder, *supra* note 99.

[101] *Id.*

[102] Dorman, 25 I. & N. Dec. 485, 485 (Dep't of Justice April 26, 2011).

[103] Defendants' Brief in Opposition to Motions to Dismiss at vi, Golinski v. U.S. Office of Pers. Mgmt., 781 F. Supp. 2d 967 (N.D. Cal. 2011) (No. 3:10-cv-00257-JSW).

II. STANDARD OF REVIEW

A. What Is the Appropriate Classification?

In all of the pending challenges to DOMA, plaintiffs have asserted that the law discriminates on the basis of sexual orientation. As Judge Taylor wrote in *Smelt*, however,

> On its face, DOMA does not classify based on sexual orientation. . . . It does not mention sexual orientation or make heterosexuality a requirement for obtaining federal marriage benefits. However, equal protection analysis is not invoked only by a facial classification. A facially neutral law may be subjected to equal protection scrutiny if its disproportionate effect on a certain class reveals a classification.[104]

As a facial matter, Judge Taylor is undoubtedly correct. Although many analyses overlook this reality, DOMA, in common with the marriage laws of all states, contains no mention of the "orientation" of the parties. And while gays and lesbians are clearly impacted disproportionately by the law, it is also true that at least some people who experience same-sex attraction can and do marry persons of the opposite sex. This is in keeping with the procreative purpose of marriage since such couples can and do have children as a result of their union, and these children benefit from a relationship with their own mother and father.

Additionally, the category of orientation itself can be analytically problematic,[105] in that, as will be explained further, there is no universally accepted definition of homosexuality, there is no consensus that sexual orientation is primarily genetic in origin like race or sex, and there is broad scientific agreement that individual orientation can and does change over time. In an amici curiae brief to the California Supreme Court for *In re Marriage Cases*, attorney John Stewart addressed the fact that there is no universally accepted definition of homosexuality.[106] Stewart pointed out that not only are there three different "basic definitions of sexual orientation," but also that there are "significant variations" within each definition.[107] Stewart also presented

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[104] Smelt v. Cnty. of Orange, 374 F. Supp. 2d 861, 874 (C.D. Cal. 2005), *aff'd in part, vacated in part, remanded*, 447 F.3d 673 (9th Cir. 2006).

[105] *See* William C. Duncan, *Problems of Classification*, 4 LIBERTY U. L. REV. 465, 466 (2010).

[106] Brief of Amici Curiae Jews Offering New Alternatives to Homosexuality ("JONAH"), Parents and Friends of Ex-Gays & Gays ("PFOX"), and Evergreen International, in Support of Proposition 22 Legal Defense and Education Fund at 3, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (S147999).

[107] *Id.* at 4–5 (citing EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY 290–97 (1994)). The different definitions of sexual orientation are based upon "sexual behavior," "sexual attraction," or "self-ascribed social identity." Variations among

a compelling argument that there is no consensus that sexual orientation is primarily genetic in origin like race or sex, citing multiple sociological and psychological studies published in various academic journals to support his claim.[108] Drawing from the results of a recent twin study by two sociologists at Columbia University and Yale University, Stewart wrote, "[T]he efforts to establish genetic or hormonal

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these three definitions raise important questions, such as if one uses a "sexual behavior" definition of sexual orientation, should any man who has had sexual relations with another man be considered gay? Based upon information from a psychological study by Edward Laumann, Stewart also asks if one should consider a certain time frame when asking this question. For example, is a man only gay if he has had sexual relations with another man in the last year? What about the past five years? Stewart highlights similar problems with the other definitions of sexual orientation. For instance, he asks whether physical or romantic attraction should be the gauge for defining sexual orientation under the "sexual attraction" definition since "attraction typically exists on a continuum with many individuals recognizing some degree of attraction to both sexes." *Id.*

[108] *Id.* at 7–10. "As two scholars recently put it, '. . . [T]he assertion that homosexuality is genetic is so reductionistic that it must be dismissed out of hand as a general principle of psychology.'" *Id.* at 8 (alteration in original) (quoting RICHARD C. FRIEDMAN & JENNIFER I. DOWNEY, SEXUAL ORIENTATION AND PSYCHOANALYSIS: SEXUAL SCIENCE AND CLINICAL PRACTICE 39 (2002)). Stewart supported this argument by compiling various studies. In particular, Stewart pointed out that psychologists and sociologists have recognized these shortcomings in a recent study focusing on patterns of behaviors observed in identical twins:

> Identical twin studies, used to tease out genetic influence, suffer from some of the same recruitment problems that other "convenience" samples face. Identical twins who are more alike are more likely to volunteer for identical twin registries, for example, and several early studies rely on one twin's estimates of their other twin's orientation, reports which have been shown to be unreliable. [P]rofessors Bearman and Bruckner note that "[a]s samples become more representative, concordance on sexual behavior, attraction, and orientation, as expected, declines." . . .
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> Concordance rates in orientation among identical twins have varied considerably from one study to the next, ranging from 13 percent to 100 percent in the eight small-scale studies (ranging in size from 5 to 71 identical twin pairs in which at least one twin was homosexual) in one recent review of the literature. . . .
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> For example 1991 and 1993 studies, involving twin pairs recruited through gay publications, reported a concordance rate (similarity across the twins) of approximately 50 percent, which would suggest some heritable influence. . . . However, even a 50 percent concordance rate among identical twins suggests that genetic influences cannot be primary (or if one twin were gay 100 percent of other identical twins are gay, just as 100 percent of identical twins in which one twin is black or female, the other twin is black or female). Moreover, as sociologists Bearman and Bruckner note, using common heritability estimates suggests that many voluntary social actions show signs of genetic influence. They note a study that suggests "substantial heritability for caring for tropical fish (28%), and frequency of various behaviors such as purchasing folk music in the past year (46%), chewing gum (58%), and riding a taxi (38%)."

Id. at 8–10 (citations omitted).

effects on sexual orientation have been 'inconclusive at best.'"[109] Finally, there is also broad scientific agreement that an individual's sexual orientation may change and often does change over time,[110] particularly in cases involving women who have identified themselves as lesbians.[111]

In Maryland's same-sex marriage case, the state's highest court noted that given "the scientific and sociological evidence currently available to the public, we are unable to take judicial notice that gay, lesbian, and bisexual persons display readily-recognizable, immutable characteristics that define the group such that they may be deemed a suspect class for purposes of determining the appropriate level of scrutiny [in this case]."[112] Further, the court noted that the plaintiffs "point neither to scientific nor sociological studies, which have withstood analysis for evidentiary admissibility, in support of an argument that sexual orientation is an immutable characteristic."[113]

Orientation can be a vague category, encompassing sexual behavior, romantic attractions, and self-identification, among other things.

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[109] *Id.* at 7–8 (quoting Peter S. Bearman & Hannah Brückner, *Opposite-Sex Twins and Adolescent Same-Sex Attraction*, 107 AM. J. SOC. 1179, 1180 (2002)).

[110] To support this argument regarding changes in sexual orientation over time, Stewart again cited multiple scientific studies. *See id.* at 12–14. Stewart quotes the following in his brief:

> [R]esearch that asks individuals to rate themselves on the homosexuality continuum finds considerable flux in self-identification, with some individuals reporting they are more "gay" and some becoming less "gay" in their own estimation over time. "[W]e realize that homosexuality is not some monolithic construct one moves toward or from in a linear way; . . . We also acknowledge that changes in sexual feelings and orientation over time occur in all possible directions."

Id. at 12 (quoting Joseph P. Stokes et al., *Predictors of Movement Toward Homosexuality: A Longitudinal Study of Bisexual Men*, 43 J. SEX RES. 304, 305 (1997)).

[111] *Id.* at 12–13. Based upon sociological and psychological studies, Stewart maintains that lesbian women increasingly describe their sexual orientation as a "personal choice" instead of an "innate constraint." *Id.* at 12 (citing Lisa M. Diamond & Ritch C. Savin-Williams, *Explaining Diversity in the Development of Same-Sex Sexuality Among Young Women*, 56 J. SOC. ISSUES 297, 298 (2000)). On this point, Stewart quoted a recent study regarding sexual identity:

> As found by Diamond and Savin-Williams, "'[Fifty percent] of the respondents had changed their identity label more than once since first relinquishing their heterosexual identity.' Charbonneau and Lander interviewed 30 women who had spent half their lives as heterosexuals, married and had children and then in midlife became lesbian. Some of these women explained their lesbianism as a process of self-discovery. But a 'second group of women . . . regarded their change more as a choice among several options of being lesbian, bisexual, celibate or heterosexual.'"

Id. at 12–13 (citations omitted) (quoting Karen L. Bridges & James M. Croteau, *Once-Married Lesbians: Facilitating Changing Life Patterns*, 73 J. COUNSELING & DEV. 134, 135 (1994)).

[112] Conaway v. Deane, 932 A.2d 571, 614 (Md. 2007).

[113] *Id.* at 615.

Notwithstanding, courts have been willing to analyze marriage statutes in terms of orientation discrimination by avoiding the difficult definitional questions. In the pending DOMA challenges, moreover, neither the Department of Justice nor the BLAG representing Congress has contested the assertion that an orientation classification is inherent in DOMA.[114]

In at least two of the cases, petitioners have alleged that DOMA discriminates on the basis of sex (as opposed to sexual orientation), treating men and women differently insofar as a man can marry a woman, but another woman cannot.[115] To date, BLAG has not responded to this claim, which has been advanced among scholars,[116] but has yet to gain much acceptance in the state and federal courts.[117] The failure of the sex discrimination claim to gain traction is probably related to its counterintuitive premises. Marriage laws plainly treat men and women the same way, and when we speak of sex discrimination, we refer to laws or practices that disadvantage either men or women.[118] Additionally, the legislative history of laws prohibiting sex discrimination, such as the equal rights amendments, does not disclose any intent to interfere with existing marriage definitions.[119] It therefore seems unlikely that the sex

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[114] Letter from Attorney General Holder, *supra* note 99; Memorandum of Law of Intervenor-Defendant the Bipartisan Legal Advisory Group of the United States House of Representatives in Support of its Motion to Dismiss at 22–25, Windsor v. United States, (No. 1:10-cv-8435) (S.D.N.Y. Aug. 1, 2011).

[115] *In re* Kandu, 315 B.R. 123, 143 (Bankr. W.D. Wash. 2004) ("The Debtor argues that because DOMA does not allow one woman to marry another woman, the legislation is a sex-based classification warranting strict scrutiny."); Plaintiff's Notice of Motion and Motion for Summary Judmgent [sic]; Memorandum of Points and Authorities at 10, Golinski v. U.S. Office of Pers. Mgmt., 781 F. Supp. 2d 967 (N.D. Cal. 2011) (No. 3:10-cv-00257-JSW) ("DOMA is subject to heightened scrutiny not only because it discriminates based on sexual orientation, but also because it discriminates based on sex. The undisputed facts show that Ms. Golinski has been denied spousal coverage based on her sex in relation to the sex of her spouse." (citation omitted)).

[116] *See* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 199 (1994) (making the argument for sex discrimination).

[117] *Compare* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) (accepting the argument), *and* Baehr v. Lewin, 852 P.2d 44, 62–63 (Haw. 1993) (accepting the argument), *with In re* Marriage Cases, 183 P.3d 384, 433–34 (Cal. 2008) (rejecting the argument), *and* Conaway v. Deane, 932 A.2d 571, 635 (Md. 2007) (rejecting the argument), Andersen v. King Cnty., 138 P.3d 963, 988 (Wash. 2006) (rejecting the argument).

[118] *See* Hernandez v. Robles, 855 N.E.2d 1, 10–11 (N.Y. 2006) ("By limiting marriage to opposite-sex couples, New York is not engaging in sex discrimination. The limitation does not put men and women in different classes, and give one class a benefit not given to the other. Women and men are treated alike—they are permitted to marry people of the opposite sex, but not people of their own sex.").

[119] *See* Paul Benjamin Linton, *Same-Sex "Marriage" Under State Equal Rights Amendments*, 46 ST. LOUIS U. L.J. 909, 961 (2002) ("Nothing in the text, history or interpretation of state equal rights provisions even remotely suggests that those provisions

discrimination line of argument will play a substantial role in the DOMA litigation.

B. Heightened Scrutiny?

Despite its difficulties, the argument that DOMA constitutes sexual orientation discrimination will clearly be an important part of the DOMA litigation. The district court in *Gill v. Office of Personnel Management* held that under DOMA "it is only *sexual orientation* that differentiates a married couple entitled to federal marriage-based benefits from one not so entitled."[120] The next analytical step, then, is to determine what level of scrutiny applies to this type of classification. Plaintiffs in the DOMA challenges have argued that courts assessing the constitutionality of the law should apply some form of heightened scrutiny, either "intermediate" (used for classifications on the basis of sex) or "strict" (used for classifications on the basis of race).[121]

In his letter offering a justification for the Department of Justice's decision to cease defending DOMA, Attorney General Holder seized on this precise legal question to explain the administration's constructive withdrawal from the defense. The letter states, "[T]he President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny."[122]

Contrary to the administration's suggestion, however, the great—nearly overwhelming—weight of precedent supports application of the deferential rational basis standard to classifications involving sexual orientation rather than any form of heightened scrutiny.[123] Most importantly, the U.S. Supreme Court has had at least two opportunities to apply heightened scrutiny to sexual orientation classifications and has declined to do so in both instances. In 1996, the Court applied rational

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should invalidate state policies against same-sex marriages. The unmistakable purpose of these provisions was to eradicate discrimination in the law in favor of men and against women, as well as discrimination in favor of women and against men.").

[120] 699 F. Supp. 2d 374, 396 (D. Mass. 2010) (emphasis added), *appeal docketed sub nom.* Massachusetts v. Dep't of Health & Human Servs., No. 10-2207 (1st Cir. Nov. 24, 2010).

[121] *See, e.g., id.* at 387 (arguing in favor of the strict scrutiny standard); Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 13, Windsor v. United States, No. 1:10-cv-8435 (S.D.N.Y. June 24, 2011) (arguing in favor of intermediate scrutiny standard).

[122] Letter from Attorney General Holder, *supra* note 99.

[123] For a detailed response to the Attorney General's letter, see Paul Benjamin Linton, *A Response to the Administration's Decision Not to Defend Section 3 of the Defense of Marriage Act*, ALLIANCEALERT.ORG, http://www.alliancealert.org/2011/20110301.pdf (last visited Nov. 25, 2011). Linton concludes that "the unanimous opinions of the courts of appeals that classifications based upon sexual orientation are subject only to rational basis review" is one of the strongest arguments that can be used in support of DOMA's constitutionality. *Id.* at 20.

basis analysis in assessing the constitutionality of Colorado's Amendment Two.[124] Again, in 2003, the Court applied rational basis review to Texas's sodomy statute.[125]

Like the Supreme Court, the majority of the federal appeals courts have applied rational basis scrutiny in sexual orientation cases, including the First,[126] Second,[127] Fourth,[128] Fifth,[129] Sixth,[130] Seventh,[131] Eighth,[132] Ninth,[133] Tenth,[134] and Eleventh[135] Circuit Courts of Appeals, as well as the Circuit Court of Appeals for the District of Columbia.[136]

Tellingly, one of these cases involved a challenge to a state marriage definition like DOMA's. The Eighth Circuit in 2006 rejected this federal constitutional challenge to Nebraska's marriage amendment.[137] The court, relying on U.S. Supreme Court precedent, applied rational basis

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[124] Romer v. Evans, 517 U.S. 620, 631–32 (1996).

[125] Lawrence v. Texas, 539 U.S. 558, 574 (2003).

[126] Cook v. Gates, 528 F.3d 42, 60–62 (1st Cir. 2008).

[127] Able v. United States, 155 F.3d 628, 632 (2d Cir. 1998) (applying rational basis review without deciding whether a higher standard would be warranted).

[128] Veney v. Wyche, 293 F.3d 726, 731–32 (4th Cir. 2002); Thomasson v. Perry, 80 F.3d 915, 927–28 (4th Cir. 1996) (en banc).

[129] Johnson v. Johnson, 385 F.3d 503, 532 (5th Cir. 2004); Baker v. Wade, 769 F.2d 289, 292 (5th Cir. 1985) (en banc).

[130] Scarbrough v. Morgan Cnty. Bd. of Educ., 470 F.3d 250, 261 (6th Cir. 2006); Equal. Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 54 F.3d 261, 265–68 (6th Cir. 1995), *cert. granted, vacated, remanded*, 518 U.S. 1001 (1996).

[131] Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 954 (7th Cir. 2002); Ben-Shalom v. Marsh, 881 F.2d 454, 464–65 (7th Cir. 1989).

[132] Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 866–67 (8th Cir. 2006); Richenberg v. Perry, 97 F.3d 256, 260 n.5 (8th Cir. 1996).

[133] Witt v. Dep't of the Air Force, 527 F.3d 806, 821 (9th Cir. 2008); Flores v. Morgan Hill Unified Sch. Dist., 324 F.3d 1130, 1137–38 (9th Cir. 2003); Holmes v. California Army Nat'l Guard, 124 F.3d 1126, 1132–33 (9th Cir. 1997); Philips v. Perry, 106 F.3d 1420, 1425 (9th Cir. 1997); Meinhold v. U.S. Dep't of Def., 34 F.3d 1469, 1478 (9th Cir. 1994); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990). A panel decision of the Ninth Circuit held otherwise. *See* Watkins v. U.S. Army, 847 F.2d 1329, 1352 (9th Cir. 1988). This opinion was later withdrawn on rehearing without addressing the constitutional challenge addressed below. *See* Watkins v. U.S. Army, 875 F.2d 699, 705, 711 (9th Cir. 1989) (en banc).

[134] Price-Cornelison v. Brooks, 524 F.3d 1103, 1113–14 (10th Cir. 2008); Walmer v. U.S. Dep't of Def., 52 F.3d 851, 854–55 (10th Cir. 1995); Jantz v. Muci, 976 F.2d 623, 628, 630 n.3 (10th Cir. 1992); Rich v. Sec'y of the Army, 735 F.2d 1220, 1229 (10th Cir. 1984); Nat'l Gay Task Force v. Bd. of Educ., 729 F.2d 1270, 1273 (10th Cir. 1984), *aff'd by an equally divided court*, 470 U.S. 903 (1985).

[135] Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 818 (11th Cir. 2004).

[136] Steffan v. Perry, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989); Padula v. Webster, 822 F.2d 97, 104 (D.C. Cir. 1987); Dronenburg v. Zech, 741 F.2d 1388, 1397–98 (D.C. Cir. 1984).

[137] *Bruning*, 455 F.3d at 871.

scrutiny to the amendment's challenge.[138] Specifically, the Eighth Circuit noted, "[T]he Supreme Court has *never* ruled that sexual orientation is a suspect classification for equal protection purposes."[139]

When the Eighth Circuit—as the other circuits and the U.S. Supreme Court have already done[140]—applied rational basis scrutiny rather than a heightened scrutiny to the Nebraska marriage law, the federal appeals court acted consistently with the vast majority of state court decisions on same-sex marriage as well. In fact, only three state high courts (California, Connecticut, and Iowa) have applied any form of heightened scrutiny in analyzing their state marriage laws.[141]

III. IS DOMA RATIONAL?

A. A New Rationale for DOMA: Preserving the Status Quo?

Whatever level of scrutiny that courts apply to DOMA, the analytical process next involves examining the justifications that can be offered for the law. The push for heightened scrutiny by the Obama administration and plaintiffs challenging DOMA's constitutionality is important for just this reason. If courts determine that some form of more searching scrutiny is required in analyzing DOMA, they will be less deferential to the interests offered by Congress in support of the law. Yet, even if, as is appropriate given precedent, courts employ rational basis scrutiny, they will still examine the state interests promoted by DOMA.

Indeed, the district court in *Gill* purported to apply rational basis scrutiny to DOMA and still ruled the law unconstitutional, finding it lacked any rational justification.[142] In doing so, the court noted that the Department of Justice had disavowed the interests identified by Congress as supporting DOMA when the law was enacted.[143] Instead, the Department of Justice argued essentially that DOMA had a rational basis in preserving the status quo. At least one state court had accepted a similar argument as satisfying the rational basis standard. In its opinion on the constitutionality of the state's marriage law, the California Court of Appeals concluded,

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[138] *Id.* at 866–67.

[139] *Id.* at 866 (emphasis added).

[140] *See supra* notes 126–139 and accompanying text.

[141] *In re* Marriage Cases, 183 P.3d 384, 401 (Cal. 2008); Kerrigan v. Dep't of Pub. Health, 957 A.2d 407, 427, 432 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 896 (Iowa 2009).

[142] Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 387 (D. Mass. 2010), *appeal docketed sub nom.* Massachusetts v. Dep't of Health & Human Servs., No. 10-2207 (1st Cir. Nov. 24, 2010).

[143] *Id.* at 388; *see supra* note 99 and accompanying text.

> Under the highly deferential standard of review that applies, we believe it is rational for the Legislature to preserve the opposite-sex definition of marriage, which has existed throughout history and which continues to represent the common understanding of marriage in most other countries and states of our union, while at the same time providing equal rights and benefits to same-sex partners through a comprehensive domestic partnership system.[144]

B. DOMA's Rational Basis Under Congress's Original Intent

Now that BLAG has intervened in defending DOMA, however, it has offered much more robust justifications for the law—those that Congress itself identified when it first enacted DOMA.[145] Thus, a court cannot justifiably take the route the Massachusetts District Court did and rely on the disavowal of Congress's statements by the Department of Justice.[146]

How then would the proffered interests supporting DOMA fare in the courts? In other words, does DOMA promote state interests that are rational and valid? The manifest weight of evidence from state and federal caselaw suggests that DOMA's definition of marriage is not only very defensible but has, in fact, been upheld by the great majority of American courts to have considered the question.

As a formal matter, the exact question of the constitutionality of laws defining marriage as the union of a husband and wife has already been decided by the U.S. Supreme Court. In 1972, the U.S. Supreme Court dismissed a federal constitutional challenge to Minnesota's definition of marriage as the union of a man and a woman.[147] Such a dismissal by the Court is a decision on the merits binding in future cases.[148] Whether a summary opinion handed down nearly forty years ago would be considered dispositive, however, is not essential to this

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[144] *In re* Marriage Cases, 49 Cal. Rptr. 3d 675, 720–21 (Cal. Ct. App. 2006).

[145] *See* Letter from Jean Lin, Senior Trial Counsel, U.S. Dep't of Justice, to Judges Jones and Francis, United States District Court for the Southern District of New York (Aug. 5, 2011) (referencing a motion to dismiss filed by Intervenor-Defendant Bipartisan Legal Advisory Group of the United States House of Representatives for *Windsor v. United States*), *available at* http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2010cv08435/370870/64/; H.R. REP. NO. 104-664, at 12 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2916 (describing the governmental interests in enacting DOMA); Memorandum of Law of Intervenor-Defendant the Bipartisan Legal Advisory Group of the United States House of Representatives in Support of its Motion to Dismiss at 28–31, Windsor v. United States, (No. 1:10-cv-8435) (S.D.N.Y. June 24, 2011) (arguing the myriad rational bases in support of DOMA).

[146] *See Gill*, 699 F. Supp. 2d at 388.

[147] Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

[148] *See* Hicks v. Miranda, 422 U.S. 332, 344–45 (1975).

discussion as there have been a number of subsequent decisions that have to examine the issues raised by the DOMA litigation in more detail.

For example, in the mid-1980s the U.S. Court of Appeals for the Ninth Circuit heard a case very similar to the DOMA challenges now pending. The case arose from a Colorado same-sex marriage between a citizen and non-citizen who were denied spousal immigration status because federal immigration law defined marriage as the union of a man and a woman.[149] The district court explained that

> [f]or immigration purposes, whether one is married to another, or is the spouse of another, is governed by congressional intent. It is the congressional intent that one look to the law of the jurisdiction where the marriage was contracted to determine its validity. But that is not an absolute and totally governing criterion. If the state law (or in certain instances the foreign law) is one which offends federal public policy, Congress is deemed to have intended federal public policy to prevail.[150]

Thus, the two men could not be considered spouses for federal purposes. The district court then rejected the men's claim that failure to recognize their purported marriage violated the Equal Protection Clause: "In traditional equal protection terminology, it seems beyond dispute that the state has a compelling interest in encouraging and fostering procreation of the race and providing status and stability to the environment in which children are raised. This has always been one of society's paramount goals."[151]

On appeal, the Ninth Circuit also upheld the law.[152] The court reasoned that Congress's decision to recognize only opposite-sex couples as spouses for immigration law purposes

> has a rational basis and therefore comports with the due process clause and its equal protection requirements. . . . In effect, Congress has determined that preferential status is not warranted for the spouses of homosexual marriages. Perhaps this is because homosexual marriages never produce offspring, because they are not recognized in most, if in any, of the states, or because they violate traditional and often prevailing societal mores.[153]

As already noted, the U.S. Court of Appeals for the Eighth Circuit also applied rational basis scrutiny to uphold a Nebraska law with a marriage definition similar to DOMA. The court noted the following:

> The State argues that the many laws defining marriage as the union of one man and one woman and extending a variety of benefits to

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[149] Adams v. Howerton, 486 F. Supp. 1119, 1120–21 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982).

[150] *Id.* at 1122.

[151] *Id.* at 1124.

[152] Adams v. Howerton, 673 F.2d 1036, 1042 (9th Cir. 1982).

[153] *Id.* at 1042–43.

> married couples are rationally related to the government interest in "steering procreation into marriage." By affording legal recognition and a basket of rights and benefits to married heterosexual couples, such laws "encourage procreation to take place within the socially recognized unit that is best situated for raising children." The State and its supporting amici cite a host of judicial decisions and secondary authorities recognizing and upholding this rationale. The argument is based in part on the traditional notion that two committed heterosexuals are the optimal partnership for raising children, which modern-day homosexual parents understandably decry. But it is also based on a "responsible procreation" theory that justifies conferring the inducements of marital recognition and benefits on opposite-sex couples, who can otherwise produce children by accident, but not on same-sex couples, who cannot. . . . Whatever our personal views regarding this political and sociological debate, we cannot conclude that the State's justification "lacks a rational relationship to legitimate state interests."[154]

Significantly, in its conclusion the Eighth Circuit opined, "We hold that [Nebraska's marriage amendment] *and other laws limiting the state-recognized institution of marriage to heterosexual couples* are rationally related to legitimate state interests and therefore do not violate the Constitution of the United States."[155] The reasoning of this recent circuit court ruling is echoed by state courts.

C. Evaluating DOMA's Rational Basis in Light of Successful Defenses to Similar State Marriage Measures

In addition to the direct challenges to DOMA and other federal cases outlined previously, a body of state caselaw has been developed over two decades on the constitutionality of marriage laws that recognizes marriage as only a union between a man and woman.[156] These cases have consistently ruled that the challenged marriage laws advance a valid interest, linking marriage and procreation.

This, of course, is one of the interests specified by Congress in passing DOMA.[157] In the district court decision in *Adams v. Howerton*, the court described this interest not only as rational, but as "compelling"[158]—the type of interest that would overcome even the highest level of scrutiny.

Within just the past ten years, at least thirteen federal and state appellate courts have considered constitutional challenges to state

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[154] Citizens for Equal Prot. v. Bruning, 455 F.3d 859, 867–68 (8th Cir. 2006) (citations omitted).

[155] *Id.* at 871 (emphasis added).

[156] *See infra* note 159.

[157] *See supra* note 14 and accompanying text.

[158] 486 F. Supp. 1119, 1124 (C.D. Cal. 1980), *aff'd*, 673 F.2d 1036 (9th Cir. 1982).

marriage laws, with nine of the thirteen courts affirming the marriage laws and ruling that there is a rational relation between the state or federal government's definition of marriage and procreation.[159] The Eighth Circuit's decision has already been noted, as have the three federal district court decisions.

Perhaps the clearest judicial articulation to date comes from the New York Court of Appeals. There, the state's highest court considered the New York legislature's reasons for adopting laws protecting and promoting marriage:

> [T]he Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex than in same-sex relationships. Heterosexual intercourse has a natural tendency to lead to the birth of children; homosexual intercourse does not. Despite the advances of science, it remains true that the vast majority of children are born as a result of a sexual relationship between a man and a woman, and the Legislature could find that this will continue to be true. The Legislature could also find that such relationships are all too often casual or temporary. It could find that an important function of marriage is to create more stability and permanence in the relationships that cause children to be born. It thus could choose to offer an inducement—in the form of marriage and its attendant benefits—to opposite-sex couples who make a solemn, long-term commitment to each other.[160]

The New York court noted further,

> The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like. It is obvious that there are exceptions to this general rule—some children who never know their fathers, or their mothers, do far better than some who grow up with parents of both

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[159] *See, e.g.*, *Bruning*, 455 F.3d at 871 (8th Cir. 2006); Smelt v. Orange Cnty., 374 F. Supp. 2d 861, 880 (C.D. Cal. 2005), *aff'd in part, vacated in part, remanded*, 447 F.3d 673 (9th Cir. 2006); Wilson v. Ake, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005); Standhardt v. Superior Court, 77 P.3d 451, 465 (Ariz. Ct. App. 2003); Morrison v. Sadler, 821 N.E.2d 15, 27 (Ind. Ct. App. 2005); Conaway v. Deane, 932 A.2d 571, 630 (Md. 2007); Hernandez v. Robles, 855 N.E.2d 1, 10 (N.Y. 2006); Andersen v. King Cnty., 138 P.3d 963, 983 (Wash. 2006). Some courts reached the opposite result. *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384, 432–34 (Cal. 2008); Kerrigan v. Dep't of Pub. Health, 957 A.2d 407, 476–78 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa 2009); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003); Lewis v. Harris, 908 A.2d 196, 217–18 (N.J. 2006) (taking the position that the exclusion of same-sex couples from the legal incidents of marriage was constitutionally problematic but stopping short of striking down the marriage law so long as the legislature created a parallel structure of benefits for same-sex couples).

[160] *Hernandez*, 855 N.E.2d at 7.

> sexes—but the Legislature could find that the general rule will usually hold.[161]

In another case involving the constitutionality of a state law favoring the union of man and woman in marriage, the Maryland Court of Appeals reached a similar conclusion as the New York court:

> [S]afeguarding an environment most conducive to the stable propagation and continuance of the human race is a legitimate government interest.
>
> The question remains whether there exists a sufficient link between an interest in fostering a stable environment for procreation and the means at hand used to further that goal, i.e., an implicit restriction on those who wish to avail themselves of State-sanctioned marriage. We conclude that there does exist a sufficient link. . . . This "inextricable link" between marriage and procreation reasonably could support the definition of marriage as between a man and a woman only, because it is that relationship that is capable of producing biological offspring of both members (advances in reproductive technologies notwithstanding).[162]

Likewise, the Washington Supreme Court also upheld the state's marriage law.[163] In concurrence, one justice aptly explained,

> A society mindful of the biologically unique nature of the marital relationship and its special capacity for procreation has ample justification for safeguarding this institution to promote procreation and a stable environment for raising children. Less stable homes equate to higher welfare and other burdens on the State.
>
> Only opposite-sex couples are capable of intentional, unassisted procreation, unlike same-sex couples. Unlike same-sex couples, only opposite-sex couples may experience unintentional or unplanned procreation. State sanctioned marriage as a union of one man and one woman encourages couples to enter into a stable relationship prior to having children and to remain committed to one another in the relationship for the raising of children, planned or otherwise.[164]

In an earlier appellate case, an Indiana court similarly concluded the state's marriage law had a rational basis: "The State, first of all, may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from 'casual' intercourse."[165] Likewise, an Arizona appellate decision held that "the State has a legitimate interest in encouraging procreation and child-rearing within the marital relationship, and that

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[161] *Id.*

[162] *Conaway*, 932 A.2d at 630–31.

[163] *Andersen*, 138 P.3d at 990.

[164] *Id.* at 1002 (J.M. Johnson, J., concurring).

[165] Morrison v. Sadler, 821 N.E.2d 15, 24 (Ind. Ct. App. 2005).

limiting marriage to opposite-sex couples is rationally related to that interest."[166]

This nearly overwhelming consensus on the linkage of marriage and procreation is in keeping with earlier federal and state jurisprudence. In articulating the human right to marry, the U.S. Supreme Court has repeatedly pointed to the link between marriage and procreation. In *Skinner v. Oklahoma*, the Court noted that "[m]arriage and procreation are fundamental to the very existence and survival of the race."[167] Even earlier in *Maynard v. Hill*, in speaking generally of marriage, the Court linked marriage to the very existence of civilization: "[Marriage] is the foundation of the family and of society, without which there would be neither civilization nor progress."[168] The Court echoed this view in *Loving v. Virginia*, writing, "Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[169]

It is difficult to see how marriage could be considered fundamental to our very existence and survival if it were not understood to be related to making and caring for the next generation. Historically, American courts have declared procreation to be the primary *public* purpose—as opposed to varying and diverse individual, private purposes—of marriage.[170] In the words of the California Supreme Court, "[T]he first purpose of matrimony, by the laws of nature and society, is procreation."[171]

In his amici curiae brief with the Legal and Family Scholars for *In re Marriage Cases*, James Q. Wilson aptly characterized as "difficult to credit" the plaintiffs' claim that "this link between marriage as a male-female sexual bond and procreation is today so irrational that no sane or well-intentioned legislator could ever entertain it and that procreation is *merely a pretext* for other, more invidious and undeclared motives."[172] Along the same lines, the New York Court of Appeals once remarked, regarding the "accepted truth" that marriages could only be between

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[166] Standhardt v. Superior Court, 77 P.3d 451, 463–64 (Ariz. Ct. App. 2003).

[167] 316 U.S. 535, 541 (1942).

[168] 125 U.S. 190, 211 (1888).

[169] 388 U.S. 1, 12 (1967) (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) and Maynard v. Hill, 125 U.S. 190 (1888)).

[170] Gard v. Gard, 169 N.W. 908, 909 (1918) ("As has been already stated, one of the leading and most important objects of the institution of marriage under our laws is the procreation of children." (quoting Reynolds v. Reynolds, 85 Mass. 605, 610 (1862))); *see also Skinner*, 316 U.S. at 541 ("Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects.").

[171] Baker v. Baker, 13 Cal. 87, 103 (1859).

[172] Brief Amici Curiae of James Q. Wilson et al., Legal and Family Scholars in Support of the Appellees at 33, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (No. S147999).

participants of opposite sex, "A court should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted."[173]

IV. STATE SOVEREIGNTY

In addition to the key arguments related to equal protection described in the previous Section, opponents of DOMA have focused on the alleged novelty of Congress's decision to decline using state same-sex marriage laws when applying federal laws. In other words, those who have challenged DOMA have alleged that the federal law violates states' sovereignty.

A. Judge Tauro's "Novel" Tenth Amendment Analysis

The plaintiffs in *Gill* made such an argument: "Because it represents such a dramatic departure from federalist tradition, and implicates the core State power to govern domestic relations, DOMA should be subjected to more searching constitutional scrutiny than that applicable to conventional social or economic legislation."[174] The plaintiffs went on to claim the following: "Under the basic structure of our constitutional scheme, the power to establish criteria for marriage, and to issue determinations of marital status, lies at the very core of the States' sovereign authority."[175]

Judge Tauro accepted this argument in both *Gill* and *Massachusetts*, concluding that the Tenth Amendment created an obligation for the national government to employ state law definitions in administering programs.[176] In Judge Tauro's opinion, "DOMA plainly intrudes on a core area of state sovereignty—*the ability to define the marital status of its citizens*," and thus "the statute violates the Tenth Amendment."[177]

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[173] Hernandez v. Robles, 855 N.E.2d 1, 8 (N.Y. 2006) (speaking of the belief that marriage could only be between a man and woman).

[174] Memorandum of Law in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Motion for Summary Judgment at 12, Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010) (No. 1:09-cv-10309 JLT).

[175] *Id.* at 13.

[176] Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 253 (D. Mass. 2010) ("The federal government, by enacting and enforcing DOMA, plainly encroaches upon the firmly entrenched province of the state, and, in doing so, offends the Tenth Amendment."), *appeal docketed*, No. 10-2207 (1st Cir. Nov. 24, 2011); *Gill*, 699 F. Supp. 2d at 377 n.4 ("In the companion case of *Commonwealth of Mass. v. Dep't of Health and Human Servs., et al.*, No. 09-cv-11156-JLT, 698 F. Supp. 2d 234 (D. Mass. July 8, 2010) (Tauro, J.) this court holds that the Defense of Marriage Act is additionally rendered unconstitutional by operation of the Tenth Amendment and the Spending Clause."), *appeal docketed sub nom.* Massachusetts v. U.S. Dep't of Health & Human Servs., No. 10-2207 (1st Cir. Nov. 24, 2011).

[177] *Massachusetts*, 698 F. Supp. 2d at 249 (emphasis added). Thus far, however, Judge Tauro is the only judge to have accepted this argument. Similar claims were made in

As Professor Richard Epstein has noted, this is a "novel" understanding of the Tenth Amendment.[178] Some same-sex marriage advocates have been even less kind. Professor Andrew Koppelman has described Judge Tauro's Tenth Amendment analysis as "silly and potentially mischievous,"[179] stating that the ruling "does not make much sense."[180] David Cruz, another proponent of same-sex marriage, writes that Judge Tauro's federalism argument is "somewhat circular" and "deeply problematic."[181]

As this Section describes, the plaintiffs' novel Tenth Amendment argument and the Massachusetts District Court's acceptance of it is only possible if large swaths of legal history are ignored. Columnist Charles Lane charitably suggested a possible reason for the court's conclusion: "In fairness to the judge, the Justice Department seems not to have presented these facts to the court, and they aren't mentioned in the only historical document in the record before him, an affidavit from Harvard historian Nancy Cott from which [Judge] Tauro quotes frequently."[182]

Whatever the origin of the fundamental misunderstanding of the scope of the Tenth Amendment, Judge Tauro's ruling turned the Tenth

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In re Kandu, where the court reached the opposite conclusion, reasoning simply: "The Tenth Amendment is not implicated because the definition of marriage in DOMA is not binding on states and, therefore, there is no federal infringement on state sovereignty. States retain the power to decide for themselves the proper definition of the term marriage." 315 B.R. 123, 132 (Bankr. W.D. Wash. 2004).

178 Richard A. Epstein, *Judicial Offensive Against Defense of Marriage Act*, FORBES.COM (July 12, 2010, 1:28 PM), http://www.forbes.com/2010/07/12/gay-marriage-massachusetts-supreme-court-opinions-columnists-richard-a-epstein.html.

179 Koppelman, *supra* note 19, at 926.

180 *Id.* at 923.

181 David B. Cruz, *The Defense of Marriage Act and Uncategorical Federalism*, 19 WM. & MARY BILL RTS. J. 805, 810 (2011). Cruz continues,

> Even on its own terms, however, Judge Tauro's legal reasoning on this point is unpersuasive. Admitting that 'Tenth Amendment caselaw does not provide much guidance,' the opinion in Massachusetts turned to *United States v. Bongiorno*, a 1997 decision from the First Circuit not cited by Massachusetts in its motion for summary judgment, to extract a doctrinal test to govern Massachusetts's challenge to DOMA. The reliance on *Bongiorno* is surprising, for that case involved an *unsuccessful* Tenth Amendment challenge to the federal Child Support Recovery Act (CSRA). In particular, the defendant there argued 'that the CSRA [fell] beyond Congress' competence because it concerns domestic relations (an area traditionally within the states' domain).' But the Court of Appeals 'reject[ed] the claim out of hand.' Bongiorno thus is an inauspicious basis for a decision arguing that an act passed by Congress (DOMA) is unconstitutional (again under the Tenth Amendment) because it regulates in the area of domestic relations (specifically, marriage).

Id. (alteration in original) (footnotes omitted).

182 Charles Lane, *Judge Tauro's Questionable Past*, WASHINGTON POST (July 9, 2010, 3:57 PM), http://voices.washingtonpost.com/postpartisan/2010/07/judge_tauros_questionable_past.html.

Amendment on its head. Rather than protecting against federal usurpation of powers reserved to the states, Judge Tauro would allow each state to impose its own definition of marriage on the federal government in a sort of reverse Supremacy Clause. While Congress may adopt state classifications for purposes of federal law, it is under no compulsion to do so. Indeed, when it comes to matters of immigration, Congress has long applied its own definition of marriage for purposes of identifying fraudulent marriages, neither imposing its definition on the states nor deferring to state law to determine whether immigrant status predicated upon a marriage is valid or fraudulent.[183] Though immigration is but one example, as will be explained further, it is no different with respect to DOMA. Congress is not infringing upon the powers of any state to define or regulate matters of family law.

Similarly, the challenges to DOMA do not suggest that Congress lacks authority to legislate in the subject matter areas for which marriage is used to classify (e.g., taxation, immigration, etc.), but only that Congress must defer to each state in defining classifications and eligibility.[184] Thus, under such reasoning, Congress may unquestionably legislate in the area of taxation, but must defer to each state in determining who is permitted to file a joint return.[185] This same argument would suggest that Congress may regulate immigration status, but must defer to individual state marriage laws in determining whether to grant certain visa or citizenship applications.[186] If implemented, such reasoning would create a patchwork effect in which federal statutes are applied differently to residents of different states and thus creating additional potential conflict in matters involving more than one state.

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[183] *E.g.*, Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 2(g), 100 Stat. 3537, 3541 (codified at 8 U.S.C. 1186a(g) (2006)) (defining a "qualifying marriage" for immigration purposes).

[184] *See, e.g.*, Memorandum of Law in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Motion for Summary Judgment at 15–16, Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010) (No. 1:09-cv-10309-JLT) ("[F]ederal reliance on State determinations of marital status is a longstanding tradition—implemented in federal common law, countless federal statutes, and federal regulations. . . . Indeed, even in the absence of such express incorporation, the well-established rule has been that *federal law affords recognition to familial status determinations* as governed by the law of the relevant State." (emphasis added)).

[185] *See id.* (quoting Dunn v. Comm'r of Internal Revenue, 70 T.C. 361, 366 (1978) ("[W]hether an individual is 'married' is, for purposes of the tax laws, to be determined by the law of the State of the marital domicile."), *aff'd*, 601 F.2d 599 (7th Cir. 1979)).

[186] *See id.* at 17 ("[E]ven in the area of immigration, where the federal government's power is arguably at its most extensive, immigration law 'does not directly regulate who may marry.'" (citing Kerry Abrams, *Immigration Law and The Regulation of Marriage*, 91 MINN. L. REV. 1625, 1668 (2007))).

B. Past and Present Federal Regulation of Marriage and Family

Contrary to Judge Tauro's suggestion, Congress regularly defines terms for purposes of federal law, including definitions which may differ from the definitions given by one or more states to those same terms. Specifically relevant in this context, there is abundant precedent for congressional regulation of family and of marriage for purposes of federal law, including some which the U.S. Supreme Court itself has explicitly upheld. Like DOMA, the congressional ban on polygamy was challenged in federal court.[187] That issue was eventually resolved by the Court in a landmark decision, *Reynolds v. United States*.[188] As to marriage, the Court wrote,

> Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. . . .
>
> In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control.[189]

The Poland Act considered by the Court in *Reynolds* facilitated prosecutions under the Morrill Act by giving jurisdiction over all cases arising in Utah to the federal courts.[190] The reason for making cohabitation a crime was to aid prosecutions since the government could more easily show cohabitation occurred than prove that a marriage existed because at that time religious marriage records were not made available to the government.[191]

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[187] Perhaps the most obvious historic DOMA analogy is to Congress's extensive regulation of polygamy in the Nineteenth Century. Between 1862 and 1894, Congress passed five separate statutes intended to repress the development of polygamy as a recognized marriage system in the United States, including the Morrill Anti-Bigamy Act of 1862, ch. 126, 12 Stat. 501 (amended 1874, 1983); the Poland Act of 1874, ch. 3, 18 Stat. 1039; the Edmunds Anti-Polygamy Act of 1882, ch. 47, 22 Stat. 30 (partially repealed 1983); the Edmunds-Tucker Act of 1887, ch. 397, 24 Stat. 635 (partially repealed 1978); and the Utah Enabling Act of 1894, ch. 138, 28 Stat. 107 (amended 1929).

The Morrill Anti-Bigamy Act criminalized polygamy, and it also established in federal law the common law standard that a spouse who has been missing for a prescribed number of years is "judicially dead" for the purpose of remarriage. Morrill Anti-Bigamy Act of 1862, ch. 126, § 1, 12 Stat. 501, 501. Both standards are clear examples of regulating marriage for the purpose of federal law.

[188] 98 U.S. 145, 166 (1878).

[189] *Id.* at 165–66.

[190] Poland Act of 1874, ch. 3, § 5352, 18 Stat. 1039, 1039.

[191] *See* United States v. Snow, 9 P. 501, 501, 504 (Utah 1886), *aff'd*, 9 P. 686 (Utah 1886), *and aff'd*, 9 P. 697 (Utah 1886). *Snow* involved an indictment against prominent Mormon leader Lorenzo Snow, a known polygamist who admitted at the commencement of

In *Murphy v. Ramsey*, the U.S. Supreme Court upheld the Edmunds Act, a federal law which made bigamy a felony and created a misdemeanor of "unlawful cohabitation,"[192] against a challenge arguing that the law criminalized behavior *ex post facto*.[193] The U.S. Supreme Court reasoned instead that the law criminalized continuing cohabitation rather than past marriages.[194] When Congress allowed Utah to be admitted as a state, the Enabling Act specified that while religious liberty would be protected "polygamous or plural marriages are forever prohibited."[195]

Presumably, some will object to this analogy because Congress has plenary authority over the law of territories while DOMA allows Congress to apply federal law rather than *state* law. This objection, however, draws the wrong parallel. Both federal actions—control over territories and defining terms in the United States Code—are areas of federal jurisdiction.[196] In both polygamy regulation and DOMA contexts, Congress has adopted and promulgated a substantive definition of marriage. In the case of DOMA, Congress has enacted a substantive definition of marriage in an area of federal jurisdiction—the definition of terms used in federal law.[197] In the case of its historic precedent regarding polygamy, Congress also enacted a substantive definition of marriage in an area of federal jurisdiction—plenary authority over federal territories.[198]

At any rate, Congress's use of definitions of marriage for federal law purposes is not confined to this one instance. In fact, as Professor Lynn D. Wardle has documented, the argument that the exercise of Congress's

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the trial that "he had married each of the seven women named in the indictment." *Id.* at 501, 505–06. Despite Snow's reputation as a polygamist, the prosecution apparently found it more advantageous to indict and convict him of cohabitation. *See id.*

[192] Edmunds Anti-Polygamy Act of 1882, ch. 47, 22 Stat. 30 (partially repealed 1983).

[193] Murphy v. Ramsey, 114 U.S. 15, 42–43 (1885).

[194] *Id.* at 43. The Edmunds Act was also addressed by the Supreme Court in *In re Snow*, 120 U.S. 274, 283 (1887), which said a defendant could only be charged once with unlawful cohabitation and in *Cannon v. United States*, 116 U.S. 55, 72 (1885), which said a defendant's promise not to engage in sexual intercourse does not preclude prosecution. The Court in *Cannon* stated, "Compacts for sexual non-intercourse, easily made and as easily broken, when the prior marriage relations continue to exist, with the occupation of the same house and table and the keeping up of the same family unity, is not a lawful substitute for the monogamous family which alone the statute tolerates." *Cannon*, 116 U.S. at 72.

[195] Utah Enabling Act of 1894, ch. 138, § 3, 28 Stat. 107, 108 (amended 1929).

[196] U.S. CONST. amend. XVI; 1 U.S.C. § 1 (2006).

[197] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2006)) (defining marriage as "only a legal union between one man and one woman as husband and wife").

[198] Poland Act of 1874, ch. 3, § 5352, 18 Stat. 1039.

power to define marriage for federal law purposes is unprecedented and *ultra vires* is inconsistent with hundreds of years of precedent and practice in our nation's history.[199] Professors Linda Elrod and Robert Spector have also noted,

> Probably one of the most significant changes over the past fifty years [in American family law] has been the explosion of federal laws . . . and cases interpreting them. As families have become more mobile, the federal government has been asked to enact laws in numerous areas that traditionally were left to the states, such as . . . domestic violence, and division of pension plans.[200]

In a recent article, Professor Wardle provided a number of examples of current and historical congressional enactments of laws relating to domestic relations.[201] For instance, the Naturalization Act of 1802, which gave automatic citizenship to children of naturalized parents.[202] An 1855 immigration law allowed citizenship to women who married citizens and to children of citizens.[203] In 1803, Congress provided that homestead land south of Tennessee would be given only to heads of families or individuals over twenty-one.[204] An 1804 law protected the land interest of "an actual settler on the lands so granted, for himself, and for his wife and family."[205] The Homestead Act of 1862 specified grants would be limited to "any person who is the head of a family, or who has arrived at the age of twenty-one years."[206]

Professor Wardle notes that U.S. Supreme Court precedent from this era upheld the application of federal law definitions and terms to family disputes that were brought under these laws, rather than deferring to state law.[207] For example, in a 1905 case, *McCune v. Essig*, the Court resolved a dispute between a daughter and her mother and stepfather over a land grant.[208] The daughter argued that state inheritance law should be applied to provide her an interest in the property, but the Court concluded that "[t]he words of the [Federal

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[199] *See* Wardle, *supra* note 20, at 974–82.

[200] Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law 2007–2008: Federalization and Nationalization Continue*, 42 FAM. L.Q. 713, 713 (2009).

[201] Wardle, *supra* note 20, at 976–82. The research that follows, until the conclusion, is adapted from Professor Wardle's article, though that article is much more comprehensive and detailed.

[202] Naturalization Act of 1802, ch. 28, § 4, 2 Stat. 153, 155.

[203] Act of Feb. 10, 1855, ch. 71, § 2, 10 Stat. 604, 604.

[204] Act of Mar. 3, 1803, ch. 27, § 2, 2 Stat. 229, 229.

[205] Land Act of 1804, ch. 38, § 14, 2 Stat. 283, 288–89.

[206] Homestead Act of 1862, ch. 75, § 1, 12 Stat. 392, 392.

[207] Wardle, *supra* note 20, at 977–78.

[208] 199 U.S. 382, 386 (1905).

Homestead Act] statute are clear" and rejected the daughter's claim that state law, rather than federal, should apply.[209]

Furthermore, in 1836, Congress enacted legislation bolstering pensions awarded to widows of Revolutionary War soldiers.[210] The 1890 Dependent and Disability Pension Act also provided for widows and other family members of veterans.[211] Federal courts interpreting military benefits laws have used federal interpretations of "family," even at times where the definitions did not accord with state law.[212] The federal Employment Retirement and Income Security Act ("ERISA") and other federal pension laws have consistently been held to control the marital incidents of pensions.[213] For purposes of the 1850 Census, Congress included the following definition of "family":

> By the term family is meant, either one person living separately in a house, or a part of a house, and providing for him or herself, or several persons living together in a house, or in part of a house, upon one common means of support, and separately from others in similar circumstances. A widow living alone and separately providing for herself, or 200 individuals living together and provided for by a common head, should each be numbered as one family.
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> The resident inmates of a hotel, jail, garrison, hospital, an asylum, or other similar institution, should be reckoned as one family.[214]

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[209] *Id.* at 389, 390.

[210] Act of July 4, 1836, ch. 362, §§ 1–3, 5 Stat. 127, 127–28.

[211] Act of June 27, 1890, § 1, ch. 634, 26 Stat. 182, 182.

[212] *See* United States v. Jordan, 30 C.M.R. 424, 430 (1960) (finding that the military could limit the defendant's right to marry abroad because of special military concerns), *aff'd*, 30 C.M.R. 424 (1960); United States v. Richardson, 4 C.M.R. 150, 158–59 (1952) (holding a marriage valid for purposes of military discipline, although it would have been invalid in the state where the marriage began); United States v. Rohrbaugh, 2 C.M.R. 756, 758 (1952) (noting, inter alia, that common law marriages are specifically recognized for federal purposes "in relation to a variety of matters").

[213] *See, e.g.*, Boggs v. Boggs, 520 U.S. 833, 835–36 (1997) (holding that pensions are governed by ERISA, which preempts community property law); Mansell v. Mansell, 490 U.S. 581, 584, 594–95 (1989) (holding that military retirement pay waived in order to collect veterans' disability benefits is governed by Uniformed Services Former Spouses' Protection Act (USFSPA) not community property law); McCarty v. McCarty, 453 U.S. 210, 232, 233, 236 (1981) (citing Hisquierdo v. Hisquierdo, 439 U.S. 572, 590 (1979)) (holding that military retirement pay is governed by federal law not community property law) *superseded by statute*, Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, § 1002(a), 96 Stat. 718, 730 (1982) (codified as amended at 10 U.S.C. § 1408(c)(1) (2006)); *Hisquierdo*, 439 U.S. at 590 (holding that railroad retirement assets are governed by federal law not community property law); Yiatchos v. Yiatchos, 376 U.S. 306, 309 (1964) (noting that United States Savings Bonds are governed by federal law, not community property law, unless fraud is involved); Wissner v. Wissner, 338 U.S. 655, 658 (1950) (noting that the National Service Life Insurance Act governs the beneficiary of the policy not community property laws).

[214] U.S. CENSUS BUREAU, POL/02-MA, MEASURING AMERICA: THE DECENNIAL CENSUSES FROM 1790 TO 2000, at 9 (2002), *available at* http://www.census.gov/prod/2002pubs/pol02-ma.pdf.

Professor Wardle's research confirms the same to be true in relation to federal regulation of marriage and the family in the context of copyright and bankruptcy laws.[215] In 1831, Congress enacted a law allowing a child or widow to inherit a copyright.[216] In 1956, the U.S. Supreme Court held in *De Sylva v. Ballentine* that, in the *absence* of a federal definition, state law controlled the question of who counted as a child for copyright law.[217] In 1978, Congress effectively reversed this decision by enacting a definition of "child" to include a "person's immediate offspring, whether legitimate or not, and any children legally adopted by that person" so as to ensure that—regardless of state law—copyright law would not exclude illegitimate children.[218] Furthermore, bankruptcy law determines the meaning of alimony, support, and spousal maintenance using federal law rather than state law.[219] This has often been recognized in federal court decisions.[220]

In addition to these examples of more general domestic relations matters, there is also ample precedent for specifically employing federal definitions of marriage. The Immigration and Naturalization Act provides that marriages contracted for the purpose of gaining preferential immigration status are not valid for federal law purposes.[221] Some states, to the contrary, recognize immigration marriages as valid or voidable.[222] To defer to state law on marriage for immigration purposes would allow one state to circumvent the entire federal policy. Federal tax law considers a couple who is married under state law but

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[215] Wardle, *supra* note 20, at 975, 980.

[216] Act of Feb. 3, 1831, ch. 16, § 2, 4 Stat. 436, 436.

[217] 351 U.S. 570, 581 (1956).

[218] 17 U.S.C. § 101 (2006); *see also* KENNETH R. REDDEN, FEDERAL REGULATION OF FAMILY LAW § 6.4 (1982).

[219] H.R. REP. NO. 95-595, at 364 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6320.

[220] *In re* Swate, 99 F.3d 1282, 1286 (5th Cir. 1996) ("'Whether a particular obligation constitutes alimony, maintenance, or support within the meaning of this section is a matter of federal bankruptcy law, not state law.'" (quoting *In re* Joseph, 16 F.3d 86, 87 (5th Cir. 1994))); *In re* Strickland, 90 F.3d 444, 446 (11th Cir. 1996) ("The issue of whether the attorney fees award in this case constituted 'support' within the meaning of § 523(a)(5) is a matter of federal law." (citing *In re* Harrell, 754 F.2d 902, 904–05 (11th Cir.1985))).

[221] *See* 8 U.S.C. § 1154(a)(2)(A) (2006); 8 U.S.C. § 1255(e) (2006).

[222] *See* Lutwak v. United States, 344 U.S. 604, 612 (1953); *In re* Appeal of O'Rourke, 246 N.W.2d 461, 462 (Minn. 1976); Kleinfield v. Veruki, 372 S.E.2d 407, 410 (Va. Ct. App. 1988); *see also* Adams v. Howerton, 673 F.2d 1036, 1040 (9th Cir. 1982) (stating that even if same-sex marriage was valid under state law, it did not count as a marriage for federal immigration law purposes); Garcia-Jaramillo v. INS, 604 F.2d 1236, 1238 (9th Cir. 1979) (deeming "frivolous" petitioner's argument based upon the validity of his marriage under New Mexico law because of INS's authority to independently inquire into marriage for immigration purposes); United States v. Sacco, 428 F.2d 264, 269–70 (9th Cir. 1970) (holding that a marriage conducted for immigration purposes may be valid under Massachusetts law but nevertheless invalid under federal law's added requirements).

living separately as unmarried for tax purposes.[223] Along those same lines, a couple who consistently obtains a divorce at the end of each year to obtain single status for tax filing could be considered unmarried for state purposes but married for purposes of federal tax law.[224]

The 2010 Census included same-sex marriages in its statistical report of marriages in the United States.[225] Thus, the same-sex couples from states defining marriage as the union of a man and a woman who get married in a state that allows same-sex couples to marry will be counted as "married" for Census purposes, even though the state in which they live considers them unmarried.

Moreover, Professor Wardle keenly observes that actions taken by DOMA opponents in recent years clearly contradict their arguments regarding DOMA's alleged violation of federalism principles.[226] Indeed, pending federal legislation makes clear that members of Congress continue to recognize a role for the national government in marriage and domestic relations. A bill proposed in 2009 would have allowed same and opposite-sex domestic partners of federal government employees to access the employment benefits currently given to married spouses.[227] The proposed repeal of DOMA, H.R. 3567, would consider same-sex marriages as valid for federal law purposes, even if they are not so recognized in a same-sex couple's home state.[228] Ironically, the sponsor of this latter bill hailed Judge Tauro's decision on DOMA, though its import would invalidate his own legislation aiming to repeal DOMA.[229]

To reiterate, the argument that Congress lacks authority to define marriage for purposes of federal statutes is clearly contrary to long precedent and practice. If the central holding of the Massachusetts district court (that federal law cannot define marriage or family independent of state definitions) were applied consistently, then the holding would likely require the invalidation of current immigration,

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[223] I.R.C. § 7703(a)(2), (b) (promulgating rules for determining marital status).

[224] Rev. Rul. 76-255, 1976-2 C.B. 40, 40–41. For additional examples of federal law defining aspects of marriage and divorce for tax purposes, see Elrod & Spector, *supra* note 200 (summarizing IRS regulations and tax court decisions affecting child custody, alimony, and spousal relief as these issues relate to tax deductions).

[225] U.S. CENSUS BUREAU & THE WILLIAMS INSTITUTE, 2010 CENSUS FACT SHEET FOR LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PERSONS (2010), *available at* http://2010.census.gov/partners/pdf/factSheet_General_LGBT.pdf.

[226] Wardle, *supra* note 20, at 982–85.

[227] Domestic Partnership Benefits and Obligations Act of 2009, H.R. 2517, 111th Cong. § 2(a) (2009).

[228] Respect for Marriage Act of 2009, H.R. 3567, 111th Cong. §§ 2–3 (2009).

[229] Press Release, Congressman Jerrold Nadler, Chair of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, Nadler Hails Federal Court Ruling Against the Defense of Marriage Act (July 8, 2010), *available at* http://nadler.house.gov/index2.php?option=com_content&do_pdf=1&id=1517.

tax, bankruptcy, census, copyright, and taxation laws and would be clearly contrary to federal precedent, including judgments by the Supreme Court, upholding federal laws even when they conflict with state laws.

CONCLUSION

When a presidential administration formally opposed to DOMA took office, proponents of same-sex marriage apparently believed the time was right to launch a concerted attack through litigation on the law's constitutionality. It must have appeared, particularly at first, that they chose their timing well—that they could count on the Department of Justice not to put forward a strong defense of the law. Such a weak policy by the branch of government tasked with defending DOMA would seem to have made a court victory against the law much easier.

But with the entrance of BLAG into the DOMA litigation, that scenario is no longer the reality. While the executive branch has refused to do so, the House of Representatives is making strong and substantive arguments in favor of DOMA. There are compelling reasons to conclude that BLAG's position is far better supported in logic and precedent than the arguments by DOMA's challengers and prior efforts by the Department of Justice. Perhaps DOMA's attackers will find more sympathetic judicial listeners, but with the weight of the law on the other side, that should be unlikely.

Should, because the duty of the courts is to faithfully apply the law. As we have laid out in this Article, such a faithful application by the courts will result in a decision favorable to the constitutionality of DOMA.

THOMAS V. SCALIA ON THE CONSTITUTIONAL RIGHTS OF PARENTS: PRIVILEGES AND IMMUNITIES, OR JUST "SPINACH"?

David M. Wagner[*]

INTRODUCTION

"It's spinach." So said Justice Antonin Scalia about the constitutional law doctrine known as "substantive due process" in a talk he gave at Regent University School of Law in September of 1998.[1] The vegetable reference ultimately traces back through multiple permutations in American comedy to a cartoon in *The New Yorker*,[2] drawn by Carl Rose and famously captioned by E.B. White.[3] The full text is clearly not meant to be flattering to spinach, and Justice Scalia certainly did not mean to praise substantive due process by this reference.

Furthermore, for Justice Scalia, the penumbras of spinach—I should say of substantive due process—emanate[4] not only over the more familiar targets such as *Allgeyer v. Louisiana*[5] and *Lochner v. New York*,[6] but also over *Meyer v. Nebraska*[7] and *Pierce v. Society of Sisters*[8]—two decisions that came, methodologically, right out of the playbook typified by *Allgeyer* and *Lochner*. Ironically, the term "substantive due process"

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1 Since Justice Scalia has several core messages that he wants listeners to hear in his speeches, this phrase has perhaps been used in other venues as well.

2 THE NEW YORKER: TWENTY-FIFTH ANNIVERSARY ALBUM 1925–1950 (Harper Colophon Books 1977) (1951).

3 JUDITH YAROSS LEE, DEFINING *NEW YORKER* HUMOR 207 (2000).

4 The phrase "emanations from penumbras" comes, of course, from *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."). In the opinion for the Court, Justice Douglas strove to avoid using substantive due process openly, while attaining results characteristic of substantive due process: protection of a right not enumerated in the Constitution but deemed to be fundamental nonetheless. *Id.* at 481–82, 485–86. Curiously, *Griswold* has remained an unassailable precedent since it was handed down, yet the expression "emanations from penumbras" has become something of a constitutional-law punchline, usually good for a knowing smirk or even a laugh when con-law types get together. Yet the phrase cannot be dismissed as dictum, because it was crucial to the Court's holding, given its determination to avoid outright reliance on substantive due process. The significance of this bifurcated legacy of *Griswold* is beyond the scope of this Article.

5 165 U.S. 578 (1897).

6 198 U.S. 45 (1905).

7 262 U.S. 390 (1923).

8 268 U.S. 510 (1925).

was not used by the Supreme Court at that time; as far as the Court majorities of those days were concerned, they were implementing Fourteenth Amendment Due Process.[9] These decisions managed to survive the Court's general rejection of substantive due process during the New Deal Era,[10] and later Courts were able to see in them some value other than the "mere" economic freedom that had been central to the "*Lochner*-era" precedents—an idea that fell most into disfavor during and after the New Deal.[11] *Meyer* and *Pierce* were seen as protecting values that were and are distinguishable from the economic and business values that drove most of the other substantive due process decisions of the pre-1937 era.[12]

What did *Meyer* and *Pierce* hold, and what do they mean today? Surprisingly, given the brevity of the decisions themselves,[13] one very quickly exhausts the non-controversial responses that can be made in answer to this question. In the early 1920s, the Court struck down state legislation that virtually abolished private education altogether in

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[9] *See, e.g.*, *Lochner*, 198 U.S. at 53 ("The statute necessarily interferes with the right of contract between the employer and employes [sic], concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. . . . Under that provision no State can deprive any person of life, liberty or property without due process of law." (citation omitted)); *Allgeyer*, 165 U.S. at 589 ("As so construed we think the statute [that requires state citizens to abstain from doing business with out-of-state insurance companies] is a violation of the Fourteenth Amendment of the Federal Constitution, in that it deprives the defendants of their liberty without due process of law.").

[10] *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937) (overruling Adkins v. Children's Hosp., 261 U.S. 525, 539, 562 (1923), a case that invalidated a District of Columbia minimum wage law on substantive due process grounds, without overruling or even citing *Meyer* and *Pierce*); Nebbia v. New York, 291 U.S. 502, 515, 539 (1934) (holding, without citing *Meyer* or *Pierce*, that a New York statute that allowed a regulatory board to fix the price of milk did not violate the Due Process Clause of the Fourteenth Amendment). I here avoid reliance on the notion of a "revolution of 1937" or a "switch in time" keyed to President Roosevelt's Court-packing plan because the iconic status of these events has come under well-deserved criticism. *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 3–7 (1998) (arguing that these notions are "long overdue for some serious scrutiny").

[11] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 152–53 (1973) (citing *Meyer* for the principle that elements of the right of privacy have long been protected by Section 1 of the Fourteenth Amendment and further citing *Meyer* and *Pierce* for the principle that the right to privacy protects education and child rearing); Griswold v. Connecticut, 381 U.S. 479, 482–83 (1965) (affirming the principle of the *Pierce* and *Meyer* cases).

[12] *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 165–66 (1944) (avoiding giving controlling weight to *Meyer* and *Pierce* but acknowledging that their teaching on parental rights is "cardinal with us").

[13] *Meyer* takes up only fourteen pages in the *United States Reports*, 262 U.S. at 390–403, and *Pierce* takes up only twenty-seven pages, 268 U.S. at 510–36.

Pierce[14] or over-regulated it at the level of content in *Meyer*,[15] and thus laid down certain dicta about "the liberty of parents and guardians to direct the upbringing and education of children under their control."[16]

Nearly everything else one can say about these cases *is* controversial.[17] Were *Meyer* and *Pierce* pure or mere substantive due process? Were First Amendment values involved?[18] Did the Court intend

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[14] The Oregon state constitutional amendment struck down in *Pierce* required almost all school-age children to attend a public school during school hours. *Pierce*, 268 U.S. at 530 n.*. Private schools, including those of a religious nature, were not declared illegal per se, but under the circumstances, they could have functioned only as supplemental learning centers, not as "schools" in the full sense. Given that present-day business models of for-profit institutions such as Huntington Learning Center and Sylvan Learning Center have such high economic value, perhaps plaintiffs such as the Sisters' school and the Independent Hill Military Academy could have survived economically, but not as schools. *See* Siobhan Gorman, *The Invisible Hand of NCLB*, *in* LEAVING NO CHILD BEHIND?: OPTIONS FOR KIDS IN FAILING SCHOOLS 37, 41 (Frederick M. Hess & Chester E. Finn, Jr. eds., 2004) (estimating the value of the retail-tutoring market at approximately two billion dollars). Also, no one can deny that the law made public school mandatory in almost all cases. Both assaults—on the economic freedom of the educators, and the educational freedom/parental rights of the parents—were noted by the Court. *Pierce*, 268 U.S. at 534–35.

[15] The statute in *Meyer* interfered with the teaching of foreign languages other than classical languages in all schools, including private ones. *Meyer*, 262 U.S. at 403. Again, note the Court's analysis of the two-pronged constitutional violation: the right of the teacher to pursue a lawful calling (an economic liberty, though hardly a novel one), and the right of parents to select a particular program of learning for their children. *Id.* at 401 ("[T]he legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.").

[16] *Pierce*, 268 U.S. at 534–35.

[17] Except for one historical fact: Oregon's Compulsory Education Act struck down in *Pierce* was the result of campaigning by the Ku Klux Klan as part of its effort to put an end to Catholic schooling. Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1017–18 (1992). The Klan had tried to enact similar measures in several other states during the early 1920s but was successful only in Oregon. *Id.* at 1016. This success caused high-level Catholic legal talent to be enlisted from New York to argue against the state amendment's reconcilability with the U.S. Constitution. *Id.* at 1070. I disagree sharply with Professor Woodhouse's conclusions and philosophical framework, but, since she opposes *Pierce* and supports Oregon's Compulsory Education Act, the historical section of her article deserves praise for being forthright in confronting the Act's ugly origins. *Id.* at 997. For my sharper comments regarding Professor Woodhouse's normative views, see David Wagner, *The Family and the Constitution*, FIRST THINGS, Aug./Sept. 1994, at 23, 26–27.

[18] Justice Douglas tried to transform *Meyer* and *Pierce* entirely into First Amendment cases in his opinion for the Court in *Griswold*. Griswold v. Connecticut, 381 U.S. 479, 482 (1965). Such a complete transformation cannot be reconciled with what *Meyer* and *Pierce* actually held because neither case made reference to freedom of speech or of religion nor to the First Amendment itself. Justice Douglas had a point when he remarked that *Meyer* and *Pierce* can be read to stand for the principle that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Id.* at 482. But this formulation is problematic because it is not easily

to give parents a Dworkinian trump-type right[19] good against a wide range of state action? Should the Court have given this right if it did not do so?

The thin consensus about *Meyer* and *Pierce*—a veneer of left-right accord that these were good decisions, barely concealing profound differences over why they were good—was rocked when a difference emerged between Justices Scalia and Thomas over the constitutional underpinnings and possible futures of these precedents. The case was *Troxel v. Granville*.[20] It pitted the rights of a parent against a statute that enabled courts to order visitation rights for a child's grandparents over the objections of a parent, even though a court had never judged the parent unfit in any legal or administrative proceeding.[21] In a plurality opinion, the Court agreed that the *Meyer-Pierce* principle controlled this situation[22]—admittedly going beyond the familiar fact patterns from *Meyer* and *Pierce*, although arguably staying within their rule.

Interestingly for our purposes, Justice Scalia dissented. He affirmed the existence of natural law but denied the jurisdiction of the Supreme Court to apply it.[23] He noted that to apply *Meyer* and *Pierce* in the *Troxel* case was to extend them, and he expressly declined to do so.[24] Most

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generalized. Consider the import of this formulation: Must a public school library have every book ever published? Where, if at all, do costs, copyright, and age-appropriateness yield to a hypothetical First Amendment-based prohibition on "state restriction on the range of available knowledge"? Must public schools teach, literally, every subject or all subjects that a student demands? This formulation is also problematic because both *Meyer* and *Pierce* speak much more specifically of the right to earn a living at the respectable calling of teaching and of the right of parents to direct the upbringing of their children. *See Meyer*, 262 U.S. at 401.

[19] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 364 (1978).

[20] 530 U.S. 57 (2000).

[21] The statute at issue in *Troxel*, Washington Revised Code Section 26.10.160(3), permitted "'[a]ny person' to petition a superior court for visitation rights 'at any time,' and authorize[d] that court to grant such visitation rights whenever 'visitation . . . serve[d] the best interest of the child.'" *Troxel*, 530 U.S. at 60.

[22] The Court discussed *Meyer* and *Pierce* to support their assertion in *Troxel* that "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.* at 65 (plurality opinion).

[23] *Id.* at 91 (Scalia, J., dissenting) ("In my view, a right of parents to direct the upbringing of their children is among the 'unalienable Rights' with which the Declaration of Independence proclaims 'all men . . . are endowed by their Creator.' And in my view that right is also among the 'othe[r] [rights] retained by the people' which the Ninth Amendment says the Constitution's enumeration of rights 'shall not be construed to deny or disparage.' The Declaration of Independence, however, is not a legal prescription conferring powers upon the courts; and the Constitution's refusal to 'deny or disparage' other rights is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be, and to enforce the judges' list against laws duly enacted by the people.").

[24] *Id.* at 92.

notably, he asserted that *Meyer* and *Pierce* date "from an era rich in substantive due process holdings that have since been repudiated"[25] and further stated that they have "not . . . induced substantial reliance."[26] Shockingly to some, Justice Scalia seemed to be teeing *Meyers* and *Pierce* up for eventual overruling.

Meanwhile, Justice Thomas went in quite a different direction. Concurring separately in *Troxel*, he chided the majority for failing to accord parental rights the normal courtesy due to fundamental rights, namely, a clear statement that violations of such rights receive strict scrutiny.[27] In fact, Justice Thomas suggested in a footnote that perhaps the Privileges or Immunities Clause of the Fourteenth Amendment might have been, and might be, a better constitutional home for parental rights.[28]

More recently, a similar disagreement flickered between these two titans of conservative jurisprudence in *McDonald v. City of Chicago*, the case which held the Second Amendment applies to the states.[29] Justice Thomas once again advocated the Privileges or Immunities Clause as the vehicle of incorporation, this time agreeing with the petitioners.[30] Justice Scalia, by contrast, both during oral argument[31] and in a concurring opinion in *McDonald*,[32] scoffed at this idea yet accepted the incorporation of the Second Amendment under the substantive due process rubric.[33]

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[25] *Id.*

[26] *Id.*

[27] *Id.* at 80 (Thomas, J., concurring) ("The opinions of the plurality, Justice Kennedy, and Justice Souter recognize [a parent's fundamental right to direct the upbringing of his or her children], but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights.").

[28] *Id.* n.* ("This case also does not involve a challenge based upon the Privileges and Immunities Clause and thus does not present an opportunity to reevaluate the meaning of that Clause.").

[29] 130 S. Ct. 3020, 3026 (2010) ("We have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States. Applying the standard that is well established in our case law, we hold that the Second Amendment right is fully applicable to the States.").

[30] *Id.* at 3058–59 (Thomas, J., concurring) ("I cannot agree that [the Second Amendment] is enforceable against the States through a clause that speaks only to 'process.' Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause.").

[31] Transcript of Oral Argument at 6–7, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521) ("I'm saying, assuming we give . . . the Privileges and Immunities Clause your definition, does that make it any easier to get the Second Amendment adopted with respect to the States? . . . Why do you want to undertake that burden instead of just arguing substantive due process? Which, as much as I think it's wrong, I have -- even I have acquiesced in it.").

[32] *McDonald*, 130 S. Ct. at 3050 (Scalia, J., concurring) (citing Albright v. Oliver, 510 U.S. 266, 275 (1994) (Scalia, J., concurring)) ("I join the Court's opinion. Despite my

This Article proceeds by first examining *Troxel* more closely, especially the diverging Scalia and Thomas opinions. It then takes the reader back to an earlier (albeit plurality) opinion by Justice Scalia in *Michael H. v. Gerald D.*, which suggests a less hostile approach to substantive due process, and most notably a method for cabining the doctrine and for keeping it from turning into the mere imposition of judicial value preferences.[34]

Next, this Article turns to *Saenz v. Roe*, decided in 1999, a year before *Troxel*, in which the majority of the Court, with Justice Scalia silently concurring, decided that the Fourteenth Amendment Privileges or Immunities Clause could accommodate the Court's previously announced, but not constitutionally tethered, "right to travel" without harming the Constitution or the Republic.[35] Justice Thomas, despite his well-known advocacy of greater use of Fourteenth Amendment Privileges or Immunities,[36] dissented in such a way as to accomplish what Justice Scalia had accomplished in *Michael H.*: to describe how the doctrine at issue, rightly understood, protects traditional understandings and how it is not a vehicle for social transformation through the unbridled creativity of law professors, cause litigators, and Supreme Court Justices.[37]

Finally, this Article concludes by arguing that substantive due process is indeed "spinach," that Privileges or Immunities are the better constitutional home for "fundamental rights," that either doctrine in the interest of republican legitimacy must be cabined in the ways suggested by Justice Scalia in *Michael H.* and by Justice Thomas in *Saenz*, and finally that *Meyer* and *Pierce*, perhaps reconceived as Privileges or Immunities cases as Justice Thomas suggested in *Troxel*, meet this test.

I. EXAMINING *TROXEL*

Troxel v. Granville concerned the limits, if any, on a state's power to confer on parties outside the nuclear family the right to petition a family court for visitation rights.[38] In other words, if you are a parent, does the Constitution protect you against outsiders, even if they are grandparents

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misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights 'because it is both long established and narrowly limited.'").

[33] *Id.*

[34] Michael H. v. Gerald D., 491 U.S. 110, 121–23 (1989).

[35] Saenz v. Roe, 526 U.S. 489, 503 (1999).

[36] Justice Thomas is very vocal about his position on the Privileges or Immunities Clause, as evidenced by the law review article he wrote on the subject in 1989. *See generally* Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL'Y (1989).

[37] *Saenz*, 526 U.S. at 527–28 (Thomas, J., dissenting).

[38] Troxel v. Granville, 530 U.S. 57, 62–65 (2000).

who may want to visit your children, despite the fact that (a) you think such visits are not in your children's best interests and (b) you have neither been adjudicated neglectful or abusive nor submitted your family's internal arrangements to the jurisdiction of a court in any way, such as in a divorce proceeding?[39]

A. Introduction to Troxel

Tommie Granville had two children with her boyfriend Brad Troxel.[40] When she and Brad ended their relationship, Brad's parents continued to visit the children.[41] Then, tragically, Brad committed suicide.[42] After his death, it was in Tommie's judgment, as the sole surviving parent, that her children's contacts with Brad's parents should be limited.[43] As outsiders to the full impact of the facts, we can probably imagine reasons why she might have so decided. We might also imagine (making generous but non-record assumptions about Brad's parents) that Tommie had made a mistake.

Family law tends to make this a question of jurisdiction: The parent(s) decide(s) visitation rights, except in cases—not present here—where the parent has been adjudicated abusive or neglectful or where visitation rights pursuant to a divorce are at issue. Does the U.S. Constitution, applying the *Meyer-Pierce* rule, require this allocation of power, or may states reallocate custodial and visitational decision-making to courts, even in the absence of neglect, abuse, or divorce?

Brad's parents, Jenifer and Gary Troxel, sued to displace Tommie's (the mother's) decision and to obtain increased visitation as they were allowed to do under Section 26.10.160(3) of the Revised Code of Washington, which permitted "'[a]ny person' to petition a superior court for visitation rights 'at any time,' and authorized that court to grant such visitation rights whenever 'visitation may serve the best interests of the child.'"[44]

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[39] Family courts make visitation determinations all the time, often over the objections of one or both parents. *See, e.g.*, VA. CODE ANN. § 20-124.2(B) (2008 & Supp. 2011) (allowing Virginia courts to grant visitation rights to any person with a legitimate interest if doing so is within the "best interests of the child" when determining custody). But for this to occur, something has to have happened to bring the family's affairs into the jurisdiction of that court. A filing for divorce will have that effect as well as a finding that a parent has committed abuse or neglect toward one or more children. As will be seen, none of these factors were present in *Troxel*, and this was critical to the case's outcome.

[40] *Troxel*, 530 U.S. at 60.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 60–61.

[44] *Id.* at 61.

During the litigation, Tommie got married, and her new husband adopted the children.[45] Presumably, this gave Tommie additional reasons to want to insulate her children—now her husband's children as well—from contact with the parents of a past, deceased boyfriend. But the Washington statute, as we have just seen, gave absolutely anyone the right to petition for the right to visit absolutely anyone's children, and the only issue for the family court to decide was whether such visitation "*may* serve the best interests of the child."[46]

As recited by Justice O'Connor, the facts show that Tommie lost pretty steadily in the court system until the Washington appellate courts began to notice that the statute, as written, intruded sharply into her parental rights, thereby raising constitutional issues.[47] The Washington Court of Appeals in effect tried to blue-pencil the statute: The appeals court held that the statute must have conferred visitation-petition rights only on parents because any other reading would raise grave federal constitutional issues. The appeals court therefore held that the Troxels did not have standing to bring suit.[48] The Washington Supreme Court agreed with the appeals court regarding the constitutional issues, but it could not ignore the plain words of the statute. It therefore held the statute unconstitutional.[49]

The U.S. Supreme Court affirmed the Washington Supreme Court's ruling in a plurality opinion written by Justice O'Connor and joined by Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer (the joining of the latter two Justices in the opinion thus demonstrating the existence of a pro-*Meyer-Pierce* liberal tradition).[50] Justices Souter and Thomas each concurred separately in the judgment,[51] while separate dissenting opinions came from Justices Stevens, Scalia, and Kennedy.[52]

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[45] *Id.* at 61–62.

[46] *Id.* at 61 (emphasis added).

[47] *Id.* at 61–62.

[48] *Id.* (citing *In re* Troxel, 940 P.2d 698, 700 (Wash. Ct. App. 1997)).

[49] *Id.* at 62–63 (citing *In re* Custody of Smith, 969 P.2d 21, 26–27 (Wash. 1998)).

[50] *Id.* at 75 (plurality opinion). In support of its ruling, the plurality offered the following reasoning:

> In light of [cases like *Meyer* and *Pierce*], it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children. Section 26.10.160(3), as applied to Granville and her family in this case, unconstitutionally infringes on that fundamental parental right. The Washington nonparental visitation statute is breathtakingly broad.

Id. at 66–67.

[51] *Id.* at 75 (Souter, J., concurring); *id.* at 80 (Thomas, J., concurring).

[52] *Id.* at 80 (Stevens, J., dissenting); *id.* at 91 (Scalia, J., dissenting); *id.* at 93 (Kennedy, J., dissenting).

Our concern here will be with the contrast between the Thomas concurrence and the Scalia dissent in *Troxel*, as these two opinions illustrate a bifurcation within the conservative judicial philosophy that is 100% outcome-determinative for the fate of the *Meyer-Pierce* doctrine.

B. Justice Scalia's Opinion in Troxel

Justice Scalia began his dissent in *Troxel* by answering a question that had long been asked of him at conferences and other off-bench appearances: Does his concept of judicial restraint proceed from a disbelief in natural law?[53] No, says Justice Scalia, it is jurisdictional. Abstractions, such as the Declaration of Independence's "unalienable rights"[54] or the other rights referred to in the Ninth Amendment,[55] have real content. But, to affirm these rights is one thing, and to make the leap to judicial enforceability of those rights is quite another. Among these real, but not judicially-enforceable rights, are parental rights.[56]

What about *Meyer* and *Pierce* themselves? According to Justice Scalia, they are two out of only "three holdings of this Court [that] rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children."[57] Furthermore, they are tainted because they come "from an era rich in substantive due process holdings that have since been repudiated."[58]

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[53] *See id.* at 91–92 (Scalia, J., dissenting). Justice Scalia generally expresses not disbelief, but skepticism, as to whether there is sufficient consensus on the meaning of natural law to make it a reference point for judges. *See, e.g.*, *Constitutional Interpretation the Old Fashioned Way*, CFIF.ORG, http://www.cfif.org/htdocs/freedomline/current/guest_commentary/scalia-constitutional-speech.htm (last visited Nov. 26, 2011).

[54] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[55] U.S. CONST. amend. IX.

[56] *Troxel*, 530 U.S. at 91–92 (Scalia, J., dissenting).

[57] *Id.* at 92. The third case is the hapless *Wisconsin v. Yoder*, 406 U.S. 205 (1972), truly a "distinguished" opinion, but not in the good sense. It held that the Old Order Amish have a constitutional right to withhold their children from school above the eighth grade, based on both the Free Exercise Clause and the *Meyer-Pierce* doctrine. *Id.* at 234. But the Court used language so specific to the plaintiffs that it is doubtful whether it represents anything but a special privilege for isolated, non-socially-engaged religious communities, or perhaps just for the Amish. *Id.* at 236 ("Nothing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes or to limit the power of the State to promulgate reasonable standards that, while not impairing the free exercise of religion, provide for continuing agricultural vocational education under parental and church guidance *by the Old Order Amish or others similarly situated.* The States have had a long history of amicable and effective relationships with church-sponsored schools, and there is no basis for assuming that, in this related context, reasonable standards cannot be established concerning the content of the continuing vocational education of Amish children under parental guidance, provided always that state regulations are not inconsistent with what we have said in this opinion.") (emphasis added).

[58] *Troxel*, 530 U.S. at 92 (Scalia, J., dissenting).

In this context, the expression "rich in" is difficult to contest, but it is also vaguer than Justice Scalia's treatment. Were *Allgeyer* and *Lochner* considered good law at the time *Meyer* and *Pierce* were decided? It would seem so. Did *Meyer* and *Pierce* resemble *Allgeyer* and *Lochner* methodologically, in that by them the Court measured an asserted state exercise of its police power against an unenumerated right said to be in the Fourteenth Amendment Due Process Clause? Yes.[59] Was *Meyer*, decided in 1923, the same year as *Adkins v. Children's Hospital*,[60] a substantive due process decision that was overruled in 1937, just as Scalia points out? Yes.[61]

Does that end the discussion about how to characterize *Meyer* and *Pierce*? I would say no. The dominance of substantive due process in its supposed prime is easily exaggerated. *Lochner* did not overrule[62] *Holden v. Hardy* (decided seven years earlier but a year after *Allgeyer*), which had upheld workplace regulations not vastly different from those struck down on substantive due process grounds in *Lochner* (such as violating freedom of contract).[63] *West Coast Hotel Company v. Parrish* overruled

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[59] In *Meyer*, the Court held, over the state's claim of using its police powers to promote education and national unity,

> Without doubt, ["liberty" in the Fourteenth Amendment's Due Process Clause] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1922). The Court explained,

> The calling [of a teacher] always has been regarded as useful and honorable, essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.

Id. at 400. In *Pierce*, the Court cited *Meyer* and added, "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

[60] 261 U.S. 525 (1923).

[61] *See Troxel*, 530 U.S. at 92 (Scalia, J., dissenting) (citing W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overruling *Adkins*, 261 U.S. 525)).

[62] *Lochner* factually distinguished its holding from the decision in *Holden* rather than overruling it. Lochner v. New York, 198 U.S. 45, 55 (1905).

[63] The statute at issue in *Holden* prohibited underground mine workers from working shifts longer than eight hours. Holden v. Hardy, 169 U.S. 366, 380 (1898). The statute at issue in *Lochner* prohibited bakery workers from working more than sixty hours in a single week. *Lochner*, 198 U.S. at 46.

Adkins,[64] but no other decisions of its era. If Justice Scalia is suggesting that the overruling of *Meyer* and *Pierce* is made inevitable by the wholesale repudiation of the rights-jurisprudence of the opinion's era, he has somewhat overstated his case.

In closing out his brief section on the precedential status of *Meyer* and *Pierce*, Justice Scalia writes, "While I would not now overrule those earlier cases [presumably this includes *Wisconsin v. Yoder*[65]] (that has not been urged), neither would I extend the theory upon which they rested to this new context."[66] So, we are still confused. Is Justice Scalia willing, even eager, to overrule *Meyer* and *Pierce* if parties before the Court ever do, in fact, urge this? Or are *Meyer* and *Pierce* secure in Justice Scalia's eyes as long as no attempt is made, as here, to apply them to "new context[s]," meaning, presumably, contexts outside of education?[67]

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[64] *W. Coast Hotel Co.*, 300 U.S. at 400.

[65] Frankly, if *Yoder* survived *Employment Division v. Smith*, 494 U.S. 872, 881 (1990), it will survive anything. But, since *Yoder* does not mean very much, neither does its survival. *Employment Division v. Smith* severely restricted judicial use of the compelling-state-interest balancing test in Free Exercise cases. *Id.* at 884 ("Even if we were inclined to breathe into [the compelling-state-interest-test] some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The [compelling-state-interest] test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct."). This same test had been part of the *ratio decidendi* of *Yoder*. *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) ("[I]n order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."). *Yoder*, the *Smith* Court explained, involved not Free Exercise alone but Free Exercise combined with the (judicially-created) parental right of *Meyer* and *Pierce*. *Smith*, 494 U.S. at 881. This basis for *yet again* distinguishing *Yoder* is, I must say, not *Smith*'s analytic high point, though I have defended *Smith* in other contexts.

[66] *Troxel*, 530 U.S. at 92 (Scalia, J., dissenting).

[67] Justice Scalia's overriding concern here seems to be, as he states a few lines further, to avoid "ushering in a new regime of judicially prescribed, and federally prescribed, family law." *Id.* at 93. Nothing but applause should greet the impulse to curb the project of constitutionalized family law. It could be argued, however, that *Meyer* and *Pierce* are themselves curbs on this project, reining in experiments by future judicial activists. In *Troxel*, it is true, the experiment of subjecting all parents to visitation claims by sundry individuals came from a legislative source, not a judicial one, but many of our experimenters today are interested in going the more familiar route, from scholarship to legal activism. *See, e.g.*, James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CALIF. L. REV. 1371, 1446–47 (1994); Woodhouse, *supra* note 17, at 1122. According to Professor Dwyer, his envisioned constitutional requirement that all children attend secular public schools is out of his hands: He implies it is simply a requirement of the Equal Protection Clause. *See* JAMES G. DWYER, RELIGIOUS SCHOOLS V. CHILDREN'S RIGHTS 121–22, 147 (1998).

C. Justice Thomas's Opinion in Troxel

Quite similar in one way and radically different in another is the approach taken by Justice Thomas in his separate concurring opinion in *Troxel*.[68] Justice Thomas has a way of introducing issues by *not* introducing them. Thus, he alludes directly to the possibility "that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision."[69] Rather than endorse this thesis, he notes that "neither party has argued that our substantive due process cases were wrongly decided"[70] and that therefore "I express no view on the merits of this matter, and I understand the plurality as well to leave the resolution of that issue for another day."[71] Of course, the plurality had not mentioned the issue (that is one form that leaving it for another day can take!), and given the Court's deep institutional investment in modern substantive due process,[72] that would have to be quite a day.

Then, Justice Thomas introduces another issue into his opinion, again, by *not* introducing it. Just as neither party had asked for a revolution in the Court's substantive due process doctrine, neither did either party ask the Court to perform the scarcely less revolutionary feat of re-grounding some portion of its substantive due process jurisprudence elsewhere in the Constitution, namely, on the Privileges or Immunities Clause of the Fourteenth Amendment. Justice Thomas

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[68] *Troxel*, 530 U.S. at 80 (Thomas, J., concurring).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] The recent acme of this investment is surely *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *Casey* stands unreversed, although notably its approach to substantive due process was not followed in *Washington v. Glucksberg*, 521 U.S. 702, 727–28 (1997) ("That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected . . . and *Casey* did not suggest otherwise.") (citation omitted). *Lawrence v. Texas*, 539 U.S. 558 (2003), may represent a return to the *Casey* methodology, but it declined to be specific about the constitutional clause or particular legal doctrine on which the case based its holding. *See id.* at 578; *see also* Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1614 (2004) ("Many Supreme Court decisions have had worse immediate consequences than *Lawrence*. But few decisions in its entire history are so poorly reasoned, and almost none seeks so overtly to maximize future judicial discretion. Because *Lawrence* represents the final dissolution of meaningful legal constraints on substantive due process, it is likely to generate bad policy results in the future and it will certainly undermine the Court's role as an institution that is more than a reservoir of political discretion for whatever forces can control it. The one possibly happy consequence is that the transparent emptiness of *Lawrence*'s analysis may cause a rethinking of the trends in substantive due process that have estranged the Court from anything that resembles the rule of law in such cases. Unfortunately, the better prediction may well be that *Lawrence*'s judicial hubris will prove contagious, and that other doctrinal areas will succumb to its virulent lawlessness.").

discretely introduces this issue in a footnote, which consists solely of noting that the present case "does *not* involve a challenge based upon the Privileges and Immunities Clause, and thus does *not* present an opportunity to reevaluate the meaning of that Clause."[73] Thus, by calling attention to an important issue that the present case did not raise, Justice Thomas invites us to think about that issue.

As a further guide to thought, Justice Thomas cites his own dissent in *Saenz v. Roe*.[74] This dissent is important because it sets forth principles for cabining Privileges or Immunities jurisprudence and preventing it from becoming merely another fountainhead of unrestrained judicial creativity.[75] But before we turn to that, let us first look at how Justice Scalia tried to achieve exactly the same goal for substantive due process in his opinion for a plurality of the Court in *Michael H. v. Gerald D.*[76]

II. EXAMINING JUSTICE SCALIA'S OPINION IN *MICHAEL H.*

A. Substantive Due Process: Friend or Enemy of "Tradition"?

A rather different take on substantive due process, again in the context of family law, was offered by Justice Scalia in his plurality opinion in *Michael H. v. Gerald D.*[77] Here, and as a dissenter in *Troxel*, Justice Scalia was interpreting the substantive due process parental-rights doctrine so as to argue against its extension to the circumstances at hand. In both cases, Justice Scalia came out in defense of legislative

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[73] *Troxel*, 530 U.S. at 80 n.* (Thomas, J., concurring) (emphasis added).

[74] *Id.* (citing Saenz v. Roe, 526 U.S. 489, 527–28 (1999) (Thomas, J., dissenting)).

[75] *See Saenz*, 526 U.S. at 526–28 (Thomas, J., dissenting). In his *Saenz* dissent, Justice Thomas contends that the term "privileges or immunities" as used by the framers of the Fourteenth Amendment meant what today we call "fundamental rights" and that the Court has misinterpreted the Privileges or Immunities Clause since the *Slaughter-House Cases*. *Id.* at 527–28. He contends that this misunderstanding has resulted in great confusion surrounding Fourteenth Amendment jurisprudence and that the Court should reevaluate its equal protection and substantive due process jurisprudence based on the Privileges or Immunities Clause's correct, historical meaning. *Id.* at 528.

[76] 491 U.S. 110 (1989).

[77] Unlike Justice Thomas, who argued for a re-grounding of fundamental rights in the Privileges or Immunities Clause, Justice Scalia argued for judicial restraint in the application of substantive due process. *Id.* at 121 ("It is an established part of our constitutional jurisprudence that the term 'liberty' in the Due Process Clause extends beyond freedom from physical restraint. . . . Without that core textual meaning as a limitation, defining the scope of the Due Process Clause 'has at times been a treacherous field for this Court,' giving 'reason for concern lest the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of this Court.'") (citations omitted) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977)).

authority and against judicial expansion of rights.[78] A key difference, though, is that in *Troxel* the state had legislated against parental rights,[79] while in *Michael H.* the state had legislated through a rule lodged in its evidence code in favor of *legally recognized* parents, which as the case showed, may be different from the biological parents.[80]

Justice Scalia's opinions in *Troxel* and *Michael H.* differ in that he effectively rejected substantive process in *Troxel*[81] but sketched a method for disciplining it in *Michael H.*, rendering it more legal and less political and also more traditionalist and less experimental. Justice Scalia showed that all of this can be done without overruling or even calling into question any substantive due process precedents not already overruled by the Court.[82]

When the complicated facts of *Michael H.* are boiled down, we are left with the following story: Carole and Gerald, a couple who had experienced marital trouble that included infidelity and the birth of a daughter to Carole by another man, reconciled and wished to settle down, including Gerald adopting child, Victoria. Michael, whom blood tests showed to be almost certainly the biological father of Victoria, wanted a hearing to assert his claims to parental rights over Victoria.[83] Though at one time Carole was willing to work with Michael to prove his

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[78] *See Troxel*, 530 U.S. at 93 (Scalia, J., dissenting) ("If we embrace this unenumerated right, I think it obvious—whether we affirm or reverse the judgment here, or remand as Justice Stevens or Justice Kennedy would do—that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people."); *Michael H.*, 491 U.S. at 122 ("'That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The Judiciary, including this Court, is the 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 even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers . . . , the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority.'" (quoting *Moore*, 431 U.S. at 544 (White, J., dissenting)).

[79] The statute in *Troxel* allowed the Court to overrule parents' wishes about the visitation rights of others if it was in "the best interests of the child." *Troxel*, 530 U.S. at 60.

[80] The evidence rule at issue in *Michael H.* created an irrebutable presumption that the husband of a child's mother is the child's father if he was living with the mother at the time of conception and is not sterile or impotent. *Michael H.*, 491 U.S. at 115. In *Michael H.*, the biological father of the child was not the father listed on the birth certificate; therefore, he was not the legal father of the child. *Id.* at 113–14.

[81] *Troxel*, 530 U.S. at 91–93 (Scalia, J., dissenting).

[82] *Michael H.*, 491 U.S. at 121–23.

[83] *Id.* at 113–15.

paternity through blood tests, she now wanted no more to do with him. Thus, as the facts get freeze-framed for purposes of resolving the constitutional issue, we have an intact legal family—Carole, Gerald, and Victoria—fighting off a challenge from an outsider, Michael.

State law may help the person in Michael's position by widening the range of persons legally entitled to contest parental rights within a legally-intact family, or it can protect that family by restricting such challenges to the legal father himself (Gerald, in this case) or the mother (Carole). At the time of the *Michael H.* litigation, California law protected the legal family, and Michael argued that by making this choice, California had violated his rights, which were grounded in substantive due process, to a parental relationship with his biological daughter.[84]

Quite a few scholars saw the Court's approval of this choice as a setback for "parents' rights."[85] Michael is a parent of Victoria, is he not? It is more accurate to see this case as pitting a father's rights against the rights of the family as defined by marital law and adoption law. Such a conflict will rarely arise, but when it does, it takes a strong commitment to social innovation via the judiciary to maintain that the Fourteenth Amendment *requires* that the state favor Michael, though the state surely may if it chooses.

In his dissent, Justice Brennan was under no illusions on this point, and he was fully equipped with just such a commitment.[86] Objecting that

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[84] *Id.* at 116 ("On appeal, Michael asserted, *inter alia*, that the Superior Court's application of [Cal. Evid. Code Section 621] had violated his procedural and substantive due process rights.").

[85] *See, e.g.*, Scott Fruehwald, *Behavioral Biology and Constitutional Analysis*, 32 OKLA. CITY U. L. REV. 375, 405 (2007) ("In sum, Justice Scalia came to the wrong outcome in *Michael H.* because he favored tradition over evolution, a choice that ignored human nature. He should have seen that technology eliminated the foundation for the rule that paternity of a child born in a marriage should be challenged only in limited circumstances. Moreover, he wrongly favored marriage over protecting paternity and the paternal bond because paternity and the paternal bond are essential to human nature, while marriage is only a way to protect those attributes. Justice Scalia had it right that there is no dual fatherhood in nature. However, in nature Michael was Victoria's father. If California law interferes with Michael's relationship with his natural daughter, it has violated his due process rights under the Fourteenth Amendment."); Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 26–27 (2010) ("Along the way, of course, there were some Supreme Court cases that may have gotten it flat wrong on love—*Michael H. v. Gerald D.*, for example.").

[86] *Michael H.*, 491 U.S. at 148 (Brennan, J., dissenting) ("It is obvious, however, that the effect of [the law] is to terminate the relationship between Michael and Victoria before affording any hearing whatsoever on the issue whether Michael is Victoria's father. This refusal to hold a hearing is properly analyzed under our procedural due process cases, which instruct us to consider the State's interest in curtailing the procedures accompanying the termination of a constitutionally protected interest. California's interest,

the plurality's rule would deprive the judiciary of the power to keep everybody up to date,[87] he declared the purpose of "those who, with care and purpose, wrote the Fourteenth Amendment"[88] to be both *anti-majoritarian* (clearly a defensible view in light of practices in the newly-readmitted ex-Confederate states, supported by majorities of the enfranchised in those states, that the Fourteenth aimed to give Congress the power to counteract) and *anti-traditional* (much less defensible). This latter purpose is hard to defend as slavery was already banned by the Thirteenth Amendment, so animus against tradition was not needed in the Fourteenth in order to get rid of it. Other forms of racial injustice were banned by the inherent meaning of the other clauses of Section 1 of the Fourteenth, and broader interpretations of that section near-contemporary with its enactment read these as broad bans on state action against traditional rights and privileges,[89] not as mandates to despise tradition and go in search of innovative rights-claims.

To *allow* California to protect Gerald and Carole's marital family against Michael's no-longer-desired intrusion would be, as Justice Brennan maintains, to ignore "the kind of society in which our Constitution exists."[90] In his *Michael H.* dissent, Justice Brennan remarked,

> We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellent practice because the same tolerant impulse protects our own idiosyncrasies. Even if we can agree, therefore, that "family" and "parenthood" are part of the good life, it is absurd to assume that we can agree on the content of those terms and destructive to pretend that we do. In a community such as ours, "liberty" must include the freedom not to conform.
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> . . . [The Constitution according to the plurality] is not the living charter that I have taken to be our Constitution; it is instead a

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minute in comparison with a father's interest in his relationship with his child, cannot justify its refusal to hear Michael out on his claim that he is Victoria's father.").

[87] *Id.* at 140.

[88] *Id.* at 141.

[89] *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 93 (1872) (Field, J., dissenting) ("The [Fourteenth Amendment] was adopted to obviate objections which had been raised and pressed with great force to the validity of the Civil Rights Act, and to place the common rights of American citizens under the protection of the National government."); *id.* at 118 (Bradley, J., dissenting) ("But we are not bound to resort to implication, or to the constitutional history of England, to find an authoritative declaration of some of the most important privileges and immunities of citizens of the United States. It is in the Constitution itself."); *id.* at 129 (Swayne, J., dissenting) ("It is necessary to enable the government of the nation to secure to every one within its jurisdiction the rights and privileges enumerated, which, according to the plainest considerations of reason and justice and the fundamental principles of the social compact, all are entitled to enjoy.").

[90] *Michael H.*, 491 U.S. at 141 (Brennan, J., dissenting).

> stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past.[91]

This is quite an indictment. Jet-setting model Carole and international businessman Gerald, who only wanted to get on with their married life free from the threat of Michael's paternal-rights claim over Victoria, would probably not recognize themselves in that part about "stagnant, archaic, [and] hidebound,"[92] and Gerald might well object that Michael should be a little more "facilitative" toward Carole's final decision in this regard, even if that decision is "unfamiliar or even repellent" to him. But no, for Justice Brennan, it is precisely the "traditional" (or legal) family, and rules of law protecting it, that are "stagnant, archaic, [and] hidebound,"[93] and it is precisely rules that advance the life-projects of the adulterous that are "facilitative [and] pluralistic."[94]

Justice Scalia took this challenge by Justice Brennan seriously enough to respond to it in the final version of his plurality opinion and, in doing so, captured the irony:

> Here, to *provide* protection to an adulterous natural father is to *deny* protection to a marital father, and vice versa. If Michael has a "freedom not to conform" (whatever that means), Gerald must equivalently have a "freedom to conform." One of them will pay a price for asserting that "freedom"—Michael by being unable to act as father of the child he has adulterously begotten, or Gerald by being unable to preserve the integrity of the family unit he and Victoria[95] have established. Our disposition does not choose between these two "freedoms," but leaves that to the people of California. Justice Brennan's approach chooses one of them as the constitutional imperative, on no apparent basis except that the unconventional is to be preferred.[96]

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91 *Id.*

92 *Id.*

93 *Id.*

94 *Id.*

95 That is, the child. Her own personal views are unknown. She was represented in this litigation by a court-appointed guardian ad litem whose filings and arguments mirrored Michael's at all times. Of the twenty-one cases Victoria D. cites, Michael H. cites ten. Brief for Appellant Victoria D. at iii, *Michael H.*, 491 U.S. 110 (No. 87-746), 1987 WL 880074; Brief for Appellant Michael H. at iv–v, *Michael H.*, 491 U.S. 110 (No. 87-746), 1987 WL 880072. The briefs also advance similar equal protection and due process theories based on their relationship as biological parent and child. Brief for Appellant Victoria D., *supra*, at 13–14. Brief for Appellant Michael H., *supra*, at 6–10.

96 *Michael H.*, 491 U.S. at 130.

B. Justice Scalia's Teaching on Substantive Due Process in Michael H.

In both *Troxel* and *Michael H.*, a plaintiff sought to deploy the parental-rights prong of substantive due process.[97] The cases are otherwise quite different because *Michael H.*, as discussed previously, sought to set aside the privileges of a traditional family as recognized by law in favor of a right whose principle champion on the Court, Justice Brennan, recognized as a novelty.[98] In *Troxel*, by contrast, Tommie Granville sought only the traditional *Meyer-Pierce* judicially-enforced state deference to parental decision-making, albeit in a factual environment unlike *Meyer* and *Pierce* themselves. In both cases, Justice Scalia was unwilling to go along. In *Troxel*, where a more "traditional" application of *Meyer-Pierce* was sought, he was openly critical of *Meyer* and *Pierce*,[99] while in *Michael H.*, where an innovative use of substantive due process was sought (albeit with the *Meyer-Pierce* doctrine relegated to the background), he also said no—but not to family-oriented substantive due process and all its works.[100]

Rather, Justice Scalia urged a restrained use of due process in cases where unenumerated rights are claimed. Most of this discussion is found in the footnotes of the *Michael H.* case. But before turning to the famous "Footnote Six,"[101] we must not ignore "Footnote Two," which announces in relevant part: "Nor do we understand why our practice of limiting the Due Process Clause to traditionally protected interests turns the Clause 'into a redundancy.' Its purpose is to prevent future generations from

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[97] Troxel v. Granville, 530 U.S. 57, 65 (2000) ("The Fourteenth Amendment provides that no State shall 'deprive any person of life, liberty, or property, without due process of law.' We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, 'guarantees more than fair process.' . . . The Clause also includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.' . . . The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." (citations omitted)); *Michael H.*, 491 U.S. at 121 ("Michael contends as a matter of substantive due process that, because he has established a parental relationship with Victoria, protection of Gerald's and Carole's marital union is an insufficient state interest to support termination of that relationship.").

[98] *See Michael H.*, 491 U.S. at 136–37 (Brennan, J., dissenting).

[99] In *Troxel*, Justice Scalia referred to *Meyer* and *Pierce* as "from an era rich in substantive due process holdings that have since been repudiated." *Troxel*, 530 U.S. at 92 (Scalia, J., dissenting).

[100] In his opinion in *Michael H.*, Justice Scalia only cites *Meyer* and *Pierce* for the proposition that "[i]t is an established part of our constitutional jurisprudence that the term 'liberty' in the Due Process Clause extends beyond freedom from physical restraint." *Michael H.*, 491 U.S. at 121.

[101] In Footnote Six, Justice Scalia defends his use of tradition against Justice Brennan's dissent. *Id.* at 127 n.6.

lightly casting aside important traditional values—not to enable this Court to invent new ones."[102]

"Its purpose." What is the referent of "it"? There are seemingly two possibilities. The referent is either the Due Process Clause itself or "our practice of limiting [it] to traditionally protected interests."[103] Either way, the purport of the remark seems clear enough: The Due Process Clause is not a fountainhead of social transformation waiting to be tapped by the Court. What, then, is this part about "prevent[ing] future generations from lightly casting aside important traditional values"?[104] The least activist interpretation that can be placed on this assertion is that "our practice of limiting the Due Process Clause to traditionally protected interests" has the effect of preventing future generations *of Supreme Court Justices* from "lightly casting aside traditional values."

But nothing in Footnote Two limits its application to the Justices themselves. It clearly says "future generations."[105] This designation would seem to affirm the notion (not ordinarily associated with Justice Scalia, but perhaps winning his reluctant approval in this case) that the Due Process Clause stands as an outer barrier against overly-innovative state experimentation, which notion, in turn, is at the heart of the *Meyer-Pierce* doctrine of substantive due process.

The better-known Footnote Six is even more important than Footnote Two since it suggests nothing less than a system for reconciling substantive due process with judicial restraint and perhaps even with Fourteenth Amendment originalism.[106] This footnote explains that when a substantive due process claim is placed before the Court, the Court must test the claim to see whether the right that is claimed is "implicit in the concept of ordered liberty"[107] or "so rooted in the traditions and conscience of our people as to be ranked as fundamental"[108] as the Court has been known to put it. Too often this inquiry has been carried out in terms of the moral hunches of the Justices; this argument is the standard one for discarding substantive due process altogether. But Footnote Six suggests a different method. Use historical sources, especially legal history sources such as the old hornbooks cited in *Michael H.*, and answer the question that Footnote Six famously

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[102] *Id.* at 122 n.2 (citation omitted).

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *See* Steven G. Calabresi & Sarah Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 11 (2008).

[107] *Michael H.*, 491 U.S. at 128 n.6 (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[108] *Id.* (citing Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

articulates, which is "What is 'the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified'?"[109]

Misreading this analytic method is easy to do by focusing solely on the words "most specific" as Justice Scalia himself is forced to do later in the footnote for reasons of verbal economy, but not in the passage quoted above where he states the proposed rule fully. One example of the most notorious of all such misreadings occurs in the joint opinion of *Planned Parenthood v. Casey*,[110] where the Court called it "tempting . . . to suppose that the Due Process Clause protects only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified."[111] In his dissent, which was joined by Chief Justice Rehnquist, Justice White, and Justice Thomas, Justice Scalia describes this passage as "evidently meant to represent my position."[112] Of course, it fails to represent Justice Scalia's position because it fails to

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[109] Footnote Six reads, in relevant part,

> Justice Brennan criticizes our methodology in using historical traditions specifically relating to the rights of an adulterous natural father, rather than inquiring more generally "whether parenthood is an interest that historically has received our attention and protection." . . .
>
> We do not understand why, having rejected our focus upon the societal tradition regarding the natural father's rights vis-à-vis a child whose mother is married to another man, Justice Brennan would choose to focus instead upon "parenthood." Why should the relevant category not be even more general–perhaps "family relationships"; or "personal relationships"; or even "emotional attachments in general"? Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified. If, for example, there were no societal tradition, either way, regarding the rights of the natural father of a child adulterously conceived, we would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general. But there is such a more specific tradition, and it unqualifiedly denies protection to such a parent.
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> . . . The need, if arbitrary decisionmaking is to be avoided, to adopt the most specific tradition as the point of reference—or at least to announce, as Justice Brennan declines to do, some other criterion for selecting among the innumerable relevant traditions that could be consulted—is well enough exemplified by the fact that in the present case Justice Brennan's opinion and Justice O'Connor's opinion . . . , which disapproves this footnote, *both* appeal to tradition, but on the basis of the tradition they select reach opposite results. Although assuredly having the virtue (if it be that) of leaving judges free to decide as they think best when the unanticipated occurs, a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all.

Id. at 127–28 n.6 (citations omitted).

[110] 505 U.S. 833 (1992).

[111] *Id.* at 847 (1992) (citing *Michael H.*, 491 U.S. at 127–28 n.6).

[112] *Id.* at 981 (Scalia, J., concurring in the judgment in part and dissenting in part).

note the work done in the Footnote Six analysis by the word "relevant," as in, "a relevant tradition protecting, or denying protection to, the asserted right."[113]

Michael's marital status vis-à-vis Carol, or lack thereof, and also Carol's marital status vis-à-vis Gerald are both of considerable relevance to Michael's claim to be entitled to have a paternal relationship with Carol's daughter. These relationships are relevant, at least in a legal system that believes as ours did and evidently still does, that the marital unit is the preferred venue for raising children and that legally-intact families have an interest in resisting outside assaults on their legal status.[114]

C. Putting the Pieces Together

Once we have identified the correct level of generality by the historical research sketched in Footnote Six of *Michael H.*, the next question to address is the following: Has American legal culture traditionally protected or traditionally denied protection to the asserted right? The answer to this question will determine the outcome of the substantive due process claim. One may concede to critics of *Michael H.* that there is room for the influence of ideology or policy preferences in the delicate business of unearthing the most specific relevant tradition, but there is much *less* room for it than there is when substantive due process is nakedly a matter of life-tenured Justices who conceive the "duties of [their] office"[115] as including relieving the nation of "the prejudices and superstitions of a time long past."[116]

Thus, we have from Justice Scalia in *Michael H.* a teaching on substantive due process where the rights of the family unit are concerned, which is all one needs to bring us within the universe of not only *Meyer* and *Pierce* but also *Troxel* that cabins substantive due process by harnessing it to both tradition and historical scholarship.[117]

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[113] *Michael H.*, 491 U.S. at 128 n.6.

[114] Notably, several American jurisdictions have some form of a presumption in favor of the husband of the child's mother at the time of conception. For instance, the Uniform Parentage Act of 2002, which has been adopted by nine states in addition to being endorsed by several American Bar Association Committees, provides for such a presumption. UNIF. PARENTAGE ACT § 204 (2002); *Legislative Fact Sheet - Parentage Act*, UNIF. LAW COMM'N, http://www.nccusl.org/LegislativeFactSheet.aspx?title=Parentage%20Act (last visited Nov. 26, 2011).

[115] *Casey*, 505 U.S. at 849.

[116] *Michael H.*, 491 U.S. at 141 (Brennan, J., dissenting).

[117] *Id.* at 121 (majority opinion) ("It is an established part of our constitutional jurisprudence that the term 'liberty' in the Due Process Clause extends beyond freedom from physical restraint. . . . Without that core textual meaning as a limitation, defining the scope of the Due Process Clause 'has at times been a treacherous field for this Court,' giving 'reason for concern lest the only limits to . . . judicial intervention become the

Textual rights do not need a jurisprudence of tradition to back them up, but non-textual rights seeking recognition under the rubric of substantive due process need to be able to show historical roots at a level of specificity not so low as to be absurd (we are not concerned, for example, with Michael's hair color), but also not so high either as to leave the Justices free to pick their personal favorite policies.

III. EXAMINING JUSTICE THOMAS'S OPINION IN *SAENZ*

A. What Justice Thomas Said in Saenz*: Cabining Privileges or Immunities*

Saenz v. Roe represents what seems to be a momentary revival of interest by the Court in identifying the Privileges or Immunities Clause of the Fourteenth Amendment as a source of a substantive right.[118] Justice Thomas dissented in the case.[119] But the gravamen of this dissent was not that this clause should not be revisited as a source of substantive rights protection, but rather that this revisiting must be done in light of the Privileges or Immunities Clause's historical background.[120]

The *Saenz* majority, with Justice Stevens writing, had held that the plaintiffs' right to travel was unconstitutionally burdened by a California statute limiting the maximum welfare benefits available to otherwise-eligible persons moving into the state.[121] The right to travel is itself a non-textual, unenumerated right, granted protection in *Shapiro v. Thompson*,[122] but that decision did not specify from which clause of the Constitution this right came or on what clause it was based.[123] The

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predilections of those who happen at the time to be Members of this Court.'" (citations omitted)).

[118] Saenz v. Roe, 526 U.S. 489, 502–03 (1999).

[119] *Id.* at 521 (Thomas, J., dissenting).

[120] *Id.* at 527–28 ("Because I believe that the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case. Before invoking the Clause, however, we should endeavor to understand what the Framers of the Fourteenth Amendment thought that it meant. We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence.").

[121] *Id.* at 500–07 (majority opinion).

[122] 394 U.S. 618, 629 (1969). The right to travel was also discussed by the Court in *Crandall v. Nevada*, 73 U.S. 35, 49 (1867) (striking down a state tax on persons leaving the state).

[123] The Court majority in *Saenz* noted,

> In Shapiro . . . [w]ithout pausing to identify the specific source of the right, we began by noting that that the Court had long "recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."

Saenz majority held that the constitutional right to travel needed a proper constitutional home, and the best home for it was the Fourteenth Amendment Privileges or Immunities Clause.[124]

In his dissenting opinion, Justice Thomas clarified that he is and remains open to a revival of the Privileges or Immunities Clause subject to original-intent conditions that, in his judgment, the majority (including Justice Scalia) did not observe.[125] Citing Justice Bushrod in Washington's classic ante-bellum decision *Corfield v. Coryell*,[126] which was based on the Article IV Privileges and Immunities Clause and later became a reference point for the drafters of the Fourteenth Amendment's Privileges or Immunities Clause,[127] Justice Thomas remarked,

> [Justice] Washington rejected the proposition that the Privileges and Immunities Clause guaranteed equal access to all public benefits (such as the right to harvest oysters in public waters) that a State chooses to make available. Instead, he endorsed the colonial-era conception of the terms "privileges" and "immunities," concluding that Article IV encompassed only *fundamental* rights that belonged to all citizens of the United States.[128]

Harvesting oysters in public waters was, of course, what *Corfield* was actually *about*. Justice Washington's oft-cited dicta in *Corfield* listing examples of fundamental rights[129] sometimes obscures this fact.

Saenz, 526 U.S. at 499 (citing *Shapiro*, 394 U.S. at 629). The *Shapiro* Court also held that, the right to travel being assumed to exist on no particular textual basis, the Equal Protection Clause is violated by "any classification which serves to penalize the exercise of that right." *Shapiro*, 394 U.S at 629, 633–34.

[124] *Saenz*, 526 U.S. at 502–03 ("What is at issue in this case, then, is this third aspect of the right to travel—the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State. That right is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States. That additional source of protection is plainly identified in the opening words of the Fourteenth Amendment.").

[125] *Id.* at 521–22 (Thomas, J., dissenting) ("Unlike the majority, I would look to history to ascertain the original meaning of the Clause.").

[126] 6 F.Cas. 546, 551–52 (C.C.E.D. Pa. 1825) (No. 3,230).

[127] *Saenz*, 526 U.S. at 526 (Thomas, J., dissenting) (citing John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1418 (1992)). Thomas also cites numerous colonial-era charters that contain language closely paralleling "privileges and immunities." *Id.* at 523.

[128] *Id.* at 525–26.

[129] In *Corfield*, Justice Washington wrote,

> We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right

Here, Justice Thomas is analogizing between fundamental rights, on one hand, and on the other hand, benefits that the state may create but is not obliged to create, which the state may therefore restrict to its own citizens. To the latter category, Justice Thomas would allocate the right to harvest oysters in the state's territorial waters (following the holding of *Corfield*). He would also allocate welfare benefits to the same category (therefore disagreeing with the majority in *Saenz*).

Thus, according to Justice Thomas, the Privileges or Immunities Clause[130] should not be invoked where, as here, only discretionary public benefits are at stake. Rather, as in *Corfield* and the other authorities he cites, the Privileges or Immunities Clause should be reserved for "fundamental rights."[131] But, once properly invoked, if properly invoked, the clause could be powerful indeed:

> to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject_ nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental: to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, privileges and immunities . . . .

Corfield, 6 F.Cas. at 551–52.

[130] A point of clarification for readers who are not privileges/immunities nerds: The term in Article IV is "privileges *and* immunities." U.S. CONST. art. IV, § 2 (emphasis added). In the Fourteenth Amendment, it is "privileges *or* immunities." U.S. CONST. amend. XIV, § 1 (emphasis added). The difference is of no substance: It is purely a syntactical result of the negative phrasing used in the Fourteenth Amendment ("No state shall . . . ."). But it does provide a handy signaling device for letting readers or listeners know about which clause one is talking.

[131] *Saenz*, 526 U.S. at 527 (Thomas, J., dissenting) ("That Members of the 39th Congress appear to have endorsed the wisdom of Justice Washington's opinion does not, standing alone, provide dispositive insight into their understanding of the Fourteenth Amendment's Privileges or Immunities Clause. Nevertheless, their repeated references to the *Corfield* decision, combined with what appears to be the historical understanding of the Clause's operative terms, supports the inference that, at the time the Fourteenth Amendment was adopted, people understood that 'privileges or immunities of citizens' were fundamental rights, rather than every public benefit established by positive law. Accordingly, the majority's conclusion—that a State violates the Privileges or Immunities Clause when it 'discriminates' against citizens who have been domiciled in the State for less than a year in the distribution of welfare benefits—appears contrary to the original understanding and is dubious at best.").

> Because I believe that the demise of the Privileges or Immunities Clause [referring to the *Slaughter-House Cases*[132]] has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence, I would be open to reevaluating its meaning in an appropriate case. Before invoking the Clause, however, we should endeavor to understand what the Framers of the Fourteenth Amendment thought that it meant. We should also consider whether the Clause should displace, rather than augment, portions of our equal protection and substantive due process jurisprudence.[133]

Though it is Justice Scalia, not Justice Thomas, who is apt to denounce substantive due process from the lecture podium as "spinach," it would appear from this passage in Justice Thomas's *Saenz* dissent that he too is critical of the effects of over-reliance on the Due Process Clause. Justice Thomas seems even open to the possibility of re-grounding some subset of the Court's existing substantive due process corpus on Privileges or Immunities.

The radical nature of Justice Thomas's proposal should not go unnoticed. It is the same proposal he repeated in his *Troxel* footnote,[134] but here he made the proposal more clearly. Presumably, given Justice Thomas's restriction of Privileges and/or Immunities to "fundamental rights" as opposed to state-created benefits, this would give a traditionalist cast to the resulting muster of protected rights. Parenthood, with its attendant rights and duties (*Pierce*, of course, spoke of both[135]), is not state-created.[136]

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[132] Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 74 (1873) (adopting a very narrow reading of the Fourteenth Amendment Privileges or Immunities Clause, an interpretation that has remained criticized yet authoritative within the Court).

[133] *Saenz*, 526 U.S. at 527–28 (Thomas, J., dissenting).

[134] *See supra* note 73 and accompanying text.

[135] The *Pierce* Court's now-famous characterization of these rights and duties proceeds as follows: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

[136] The case is closer with regard to adoption, which normally involves a process that a court oversees. But adoption is ancient and accepted at Common Law and in other legal traditions, even including the relationship of Jesus to the good man Joseph widely taken to have been His father. *Matthew* 1:16; *Luke* 2:4, 48; 3:23. A more risky proposition would be the case of more recently recognized forms of parenthood, such as the "psychological" or "de facto" variety, which lack *Michael H.*-type roots in the history and traditions of our people or *Saenz*-dissent-type fundamentality. *See* Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL F. 353, 353–54; David M. Wagner, *Balancing "Parents Are" and "Parents Do" in the Supreme Court's Constitutionalized Family Law: Some Implications for the ALI Proposals on De Facto Parenthood*, 2001 BYU L. REV. 1175, 1175–76.

B. Linking Justice Thomas in Troxel *and* Saenz *to Justice Scalia in* Michael H.

Reserving a potentially open-ended constitutional clause to "fundamental rights," and, moreover, to rights that can vindicate their "fundamental" status by appeal to age, deep roots, and long practice—does that not sound familiar? Is that not the preferable way of analyzing substantive due process claims, according to the teaching of the *Michael H.* plurality[137]—a teaching that while scorned by the Court in *Casey*,[138] was nonetheless partly adopted by it later in *Glucksberg*?[139]

As we have seen, the purpose of restricting substantive due process, Justice Scalia's more-or-less spelled-out goal, was to permit the Court's well-settled practice of protecting unenumerated rights under the Fourteenth Amendment to survive while at the same time not allowing it to spin into outright government by the judiciary. Also, restricting substantive due process allows that practice to act in line with "the traditions of our people" rather than as a counter-majoritarian dynamo.[140] These same concerns drove Justice Thomas to write the following passage in his *Saenz* dissent:

> The majority's failure to consider these important questions [of the original meaning of privileges and/or immunities] raises the specter that the Privileges or Immunities Clause will become yet another convenient tool for inventing new rights, limited solely by the "predilections of those who happen at the time to be Members of this Court."[141]

Does the *Meyer-Pierce* doctrine of parental rights, grounded in substantive due process, have a chance of surviving in a world of originalist constitutional law?[142] First, would it survive in an originalist

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[137] *See supra* note 109 and accompanying text.

[138] *See supra* note 111 and accompanying text.

[139] Notably, the Court in *Glucksberg* began its analysis as follows: "We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices." Washington v. Glucksberg, 521 U.S. 702, 710 (1997). Though citing *Casey*, *inter alia*, for authority, this statement reflects more the general approach of *Michael H.*, though not the particular analytic mode of that opinion's Footnote Six. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) ("Justice Brennan criticizes our methodology in using historical traditions specifically relating to the rights of an adulterous natural father, rather than inquiring more generally 'whether parenthood is an interest that historically has received our attention and protection.'").

[140] *See supra* note 89 and accompanying text.

[141] Saenz v. Roe, 526 U.S. 489, 528 (1999) (Thomas, J., dissenting) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977)).

[142] This is not the place even to describe, much less defend, originalism. I mean by it, briefly, constitutional decision-making cabined by fidelity to the actual meaning of the text as it would have been understood by reasonably well-educated persons at the time it was adopted, as that meaning can be recovered through historical research, and combined with a willingness to understand past drafters and ratifiers as they understood themselves,

world in which substantive due process had been admitted and approved, subject to the restraints of *Michael H.*? I believe so. In the face of a statute, such as the ones found in *Pierce* and *Troxel*, that derogates from the rights and responsibilities of parents to direct the upbringing of their children, it should not be difficult for a plaintiff, even articulating this right at a level of generality or specificity suitable to the case, as *Michael H.* would require, to show that the right is deeply rooted in our history and tradition, sufficient to shift the burden of proof to the government.[143]

On the other hand, Justice Scalia's most recent statement on the *Meyer-Pierce* doctrine remains his dissent in *Troxel*,[144] grudging acceptance, potential willingness to overrule given an appropriate case with a demand by parties to do so, and unwillingness to extend the doctrine beyond the fact patterns in which it arose. Justice Scalia's policy

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rather than as stock-figures in a morality play to which our era has all the answers. *See* United States v. Virginia, 518 U.S. 515, 566–67 (1996) (Scalia, J., dissenting); Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 248–55 (1991).

[143] The issue of the exact standard of review in such a case may be left to another day. The plurality in *Troxel* did not address it (drawing a rebuke for that from Justice Thomas). Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring). I am myself not sufficiently an enthusiast for the "compelling state interest" test to defend it against other forms of "heightened scrutiny" that may do the job, or even categorical rules to the effect that given a parent who has not been adjudicated unfit and no intra-parental dispute submitted to a court, a specified and not-too-grudging list of parental decisions simply may not be second-guessed by government. Obviously, such a proposal merely kicks the hard cases down the road, including borderline definitions of abuse and neglect, the vaccination issue, etc.

[144] *Troxel*, 530 U.S. at 91 (Scalia, J., dissenting). Actually he addresses *Meyer* again, very briefly, in his concurrence in *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3051 (2010) (Scalia, J., concurring); *see infra* notes 159–160 and accompanying text. The thrust of that concurrence is to critique Justice Stevens's dissent in the same case for advocating non-historically-tethered substantive due process. On Justice Scalia's list of substantive due process precedents that in his view are *not* well grounded in history and tradition, one finds *Meyer*! *McDonald*, 130 S. Ct. at 3051 (Scalia, J., concurring). This may seem remarkable until one notices that he sums up *Meyer* as having invented a "right to teach one's children foreign languages." *Id.* In this phrasing, he is perhaps merely repeating Stevens's own phrasing of the *Meyer* holding. *Id.* at 3091 (Stevens, J., dissenting). It could also be, if one were to try the experiment, the result of a rigorous but defensible application of Justice Scalia's own *Michael H.* Footnote Six methodology. *See supra* note 101. Note that articulation of the claim in *Meyer* here does not add "the *German* language": That would have added a level of specificity that is legally irrelevant. It is definitely arguable, however, that to take *Meyer* to any higher level of generality than "the right to teach one's children foreign languages"—certainly to take it to as high a level as "parental rights," or even the level the *Meyer* Court in fact chose, which was Mr. Meyer's right to exercise the "helpful and desirable" profession of teaching "and the right of parents to engage him so to instruct their children"—is to generalize so highly that any right could become protected. This is a valid critique of *Meyer*. Meyer v. Nebraska, 262 U.S. 390, 400 (1923). Whether the same critique can be made of *Pierce* is a separate question, and Justice Scalia does not attempt it here.

concern appears to be the same in both *Michael H.* and *Troxel.* Constitutionalized family law, in practice, has done net harm to the family by entrenching liberal morality (*Meyer* and *Pierce*, to the extent they are counter-examples, are the exceptions and not the rule). It has done so in ways that entrench rules into constitutional law, whereas mistakes by legislators can be undone through elections and lobbying.[145] Therefore, the argument goes, let us either constrain constitutionalized family law through a rigorous level-of-generality/history-and-tradition requirement (*Michael H.*)[146] or by denying it any opportunity to expand, even if hypothetically a history-and-tradition basis for such an expansion could be shown (*Troxel* dissent).[147] The fact remains, though, that under the teachings of Justice Scalia's *Troxel* dissent, *Meyer-Pierce* is going nowhere.

IV. WHAT THEN ABOUT PRIVILEGES AND IMMUNITIES?

As we have seen, vindicating parental rights through the *Michael H.* version of substantive due process would entail historical research showing that such rights are deeply rooted in our history and tradition. Vindicating them under the *Saenz* dissent's version of the Privileges or Immunities Clause would mean showing that they are fundamental as opposed to state-created and discretionary. In all likelihood, the body of research necessary to carry either of these two burdens of proof would be the same, and that burden could, in fact, be carried.[148] This would put all

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[145] *Troxel*, 530 U.S. at 93 (Scalia, J., dissenting). In proclaiming that state legislators can "correct their mistakes in a flash," Scalia may be underestimating the torpor and logrolling of state capitals. But their work surely *does* take place "in a flash" compared to the process of undoing a mistaken Supreme Court decision.

[146] Michael H. v. Gerald D., 491 U.S. 110, 121 (1989) ("It is an established part of our constitutional jurisprudence that the term 'liberty' in the Due Process Clause extends beyond freedom from physical restraint. Without that core textual meaning as a limitation, defining the scope of the Due Process Clause 'has at times been a treacherous field for this Court,' giving 'reason for concern lest the only limits to . . . judicial intervention become the predilections of those who happen at the time to be Members of this Court.'" (citations omitted)).

[147] *Troxel*, 530 U.S. at 91–92 (Scalia, J., dissenting).

[148] There are dicta in both *Meyer* and *Pierce* to this effect, but one need not rely circularly on these. In Aristotle's *The Politics*, though, "[t]he city is thus prior by nature to the household . . . . For the whole must of necessity be prior to the part . . . ." ARISTOTLE, THE POLITICS 37 (Carnes Lord trans., Univ. of Chicago Press 1984) (c. 350 B.C.). Nonetheless, the family (union of man and woman and household activities) is formed first, then the village, and only then the city. *Id.* at 35–37. The "priority" of the city, therefore, is like the priority of a goal to its means: a priority of *telos* (end), not of *timē* (honor). *Id.* at 37, 275–76. (It should be noted, however, that Aristotle was not averse to extensive government regulation of family-life and procreation. *Id.* at 224–26. In the Bible, we see the same order of foundational events. The book of *Genesis* shows the earliest families (Adam and Eve plus Cain, Abel, and later Seth) forming before what are possibly the earliest states. *Genesis* 4:1–2, 25. At the very earliest, we perhaps see primitive state

but the most extravagant parental rights claims on the "fundamental" side, rather than the "state-created" side, of the bright line Justice Thomas drew for the Privileges or Immunities Clause analysis that he sketched in his dissent in *Saenz*.[149] Furthermore, Justice Thomas has virtually invited, both in *Saenz* and *Troxel*, reconsideration of at least some substantive due process claims as Privileges or Immunities Claims.[150]

Of course, the obstacle is that no one on the Court except Justice Thomas shows signs of interest in such a doctrinal development. When the Court recently considered the question of incorporating against the states an individual right to bear arms that was grounded in the text of the Bill of Rights, the Court recognized it as an individual right rather than exclusively a group or "militia" right in *D.C. v. Heller*,[151] and the Court subsequently applied that right against the states in *McDonald v. City of Chicago*.[152] The plaintiffs in *McDonald* argued the Privileges or Immunities Clause as their principle vehicle of incorporation.[153] Their alternative theory was, of course, substantive due process.[154] At oral argument, Justice Scalia dismissed the Privileges or Immunities theory as "the darling of the professoriate."[155] When the decision came down,

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formation when people first "play the lyre and pipe," when there first appears among mankind a "forger of instruments of bronze and iron," or possibly when organized worship first appears. *See Genesis* 4:21–26. Popular culture, industrial artisanship, and organized worship all suggest that some form of political organization, even if minimal and small-scale, has come about by this point—but not before the family.

149 *See supra* note 75.

150 *See supra* notes 28, 75.

151 128 S. Ct. 2783, 2797 (2008).

152 130 S. Ct. 3020, 3026 (2010).

153 Petitioners' Brief at 9, 42, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521) (arguing that the Privileges or Immunities Clause incorporates the Second Amendment and that the *Slaughter-House Cases* and its progeny must be overruled); Respondent's Brief at 5, D.C. v. Heller, 128 S. Ct. 2783 (2008) (No. 07-290).

154 Petitioners' Brief, *supra* note 153, at 66 (arguing that the Second Amendment is incorporated by the Fourteenth Amendment's Due Process Clause).

155 The following exchange comes from the *McDonald* oral argument:

> Justice Scalia: Mr. Gura, do you think it's at all easier to bring the Second Amendment under the Privileges and Immunities Clause than it is to bring it under our established law of substantive due process?
>
> Mr. Gura [attorney for petitioners]: It's—
>
> Justice Scalia: Is it easier to do it under privileges and immunities than it is under substantive due process?
>
> Mr. Gura: It's easier in terms, perhaps, of—of the text and history, the original public understanding of—
>
> Justice Scalia: No, no. I'm not talking about whether—whether the Slaughter-House Cases were right or wrong. I'm saying, assuming we give, you know, the Privileges and Immunities Clause your definition, does that make it any easier to get the Second Amendment adopted with respect to the States?

Justice Alito announced for a majority of the Court (Part II.B) that many legal scholars—including Justice Thomas—continue to disapprove of the *Slaughter-House* majority decision.[156] But, in the plurality (Part II.C, not joined by Justice Thomas), Justice Alito did not see any reason to overturn it.[157] Justice Scalia concurred, devoting to the substantive due process issue a single sentence that encapsulated both his *Troxel* grumpiness about substantive due process and his *Michael H.* agenda of saving it by limiting it: "Despite my misgivings about Substantive Due Process as an original matter, I have acquiesced in the Court's incorporation of certain guarantees in the Bill of Rights because it is both long established and narrowly limited."[158]

Justice Scalia specifically references the Bill of Rights in his *McDonald* concurrence,[159] so that, most likely, the "acquiescence" to substantive due process that he acknowledges is to incorporation of the Bill of Rights through the Due Process Clause, *rather than* to judicial recognition of substantive rights (under *any* clause) that are not specified in the Bill of Rights. Therefore, this concurrence signals no change on Justice Scalia's part concerning such rights (including those recognized in the *Meyer-Pierce* doctrine).[160]

Justice Thomas, on the other hand, gave *McDonald* a crucial fifth vote with a concurring opinion, arguing at length for grounding

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> Mr. Gura: Justice Scalia, I suppose the answer to that would be no, because—
>
> Justice Scalia: And if the answer is no, why are you asking us to overrule 150, 140 years of prior law, when—when you can reach your result under substantive due—I mean, you know, unless you're bucking for a—a place on some law school faculty—
>
> (Laughter.)
>
> Mr. Gura: No. No. I have left law school some time ago, and this is not an attempt to—to return.
>
> Justice Scalia: Well, I mean, what you argue is the darling of the professoriate, for sure, but it's also contrary to 140 years of our jurisprudence. Why do you want to undertake that burden instead of just arguing substantive due process? Which, as much as I think it's wrong, I have—even I have acquiesced in it.
>
> (Laughter.)
>
> Mr. Gura: Justice Scalia, we would be extremely happy if the Court reverses the lower court based on the substantive due process theory that we argued in the Seventh Circuit.

Transcript of Oral Argument at 6–7, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010) (No. 08-1521).

[156] *McDonald*, 130 S. Ct. at 3029–30.

[157] *Id.* at 3030–31.

[158] *Id.* at 3050 (Scalia, J., concurring).

[159] *Id.*

[160] *See* Troxel v. Granville, 530 U.S. 57, 92–93 (2000) (Scalia, J., dissenting) (reflecting Justice Scalia's narrow reading of the right actually protected by *Meyer*).

incorporation of the Second Amendment solely on the Privileges or Immunities Clause.[161] His concurrence was itself a substantial treatise on the history of the concepts of "privileges" and "immunities," tailored so as to focus on the original public meaning of that clause in the Fourteenth Amendment.[162] Justice Thomas completely rejected substantive due process: "The notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words."[163]

But as to the applicability of the Privileges or Immunities Clause to the *Meyer-Pierce* right, Justice Thomas's concurrence in *McDonald* takes us no further than he did in his *Troxel* concurrence.[164] The project of upending the Court's substantive due process corpus and re-grounding some of it on the Privileges or Immunities Clause, possibly leaving some of it permanently upended along the way, is daunting. Yet, Justice Thomas insists that *McDonald* is about one rights-claim only: personal arms-ownership. According to Justice Thomas, "The question presented in this case is not whether our entire Fourteenth Amendment jurisprudence must be preserved or revised, but only whether, and to what extent, a particular clause in the Constitution protects the particular right at issue here."[165]

Furthermore, the rights-claim in *McDonald* is grounded in the text of the Bill of Rights. This alone makes *McDonald* a vastly easier case than those cases that have arisen when the rights-claim involves non-textual rights, such as teachers' rights to exercise their profession and

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[161] *McDonald*, 130 S. Ct. at 3059 (Thomas, J., concurring in part and concurring in the judgment) ("But I cannot agree that it is enforceable against the States through a clause that speaks only to 'process.' Instead, the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause.").

[162] Thus, for instance, when he goes over the floor debates in Congress on the Fourteenth Amendment, he is careful to stress the evidence that crucial portions of these debates were printed, distributed, and widely discussed by the news-consuming public of the day. Justice Thomas's opinion is very much a jurisprudence of original public meaning, not a jurisprudence of original legislators' subjective intent. *Id.* at 3071–72.

[163] *Id.* at 3062. Or, as he might say to Justice Scalia if he were a U.S. Marine: Acquiesce? "We just got here!" Saying attributed to Capt. Lloyd W. Williams, USMC, at the Battle of Belleau Wood, June 1, 1918, at which Capt. Williams died. *See* MARTIN MARIX EVANS, RETREAT, HELL! WE JUST GOT HERE!: THE AMERICAN EXPEDITIONARY FORCE IN FRANCE 1917–1918, at 44 (1998).

[164] *See McDonald*, 130 S. Ct. at 3062–63 (Thomas, J., concurring in part and concurring in the judgment); *Troxel*, 530 U.S. at 80 (Thomas, J., concurring).

[165] *McDonald*, 130 S. Ct. at 3063 (Thomas, J., concurring in part and concurring in the judgment).

parents' rights to have languages taught (*Meyer*),[166] or the right to travel (*Saenz*)[167]—never mind the rights grounded in "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"[168] or the "liberty of the person both in its spatial and in its more transcendent dimensions."[169] Textual anchoring of the right at issue so that the only problem is finding the correct vehicle within the Fourteenth Amendment for incorporating it against the states greatly lessens the burden of proof that Justice Thomas had to carry in his *McDonald* concurrence. But that does not advance the ball in terms of the issue under discussion here. In fact, it deliberately avoids advancing it.

CONCLUSION

So, could the *Meyer-Pierce* doctrine of parental rights—though never mentioned in the Constitution, but only in Court precedent, and protected from some forms of government intrusion due to their status as fundamental rights deeply rooted in our history and tradition—ever be protected by the Court as privileges and/or immunities of citizenship? Justice Thomas's call for proof of fundamentality under the Privileges or Immunities Clause is no less rigorous (nor, to anticipate critics, more so) than the one called for by Justice Scalia in Footnote Six of *Michael H.* with regard to the Due Process Clause.[170] Both Justices recognize the danger of either the Due Process Clause or Privileges or Immunities Clause becoming (or, in the case of the Due Process Clause, remaining) a "Bertie Bott's Every-Flavour Beans"[171] jar of rights-claims. It may be fairly said, though, that substantive due process has in fact been the bean jar since 1887[172] with some time off between 1937[173] and 1965.[174]

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[166] Meyer v. Nebraska, 262 U.S. 390, 399–401 (1923) ("The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment. . . . The challenged statute forbids the teaching in school of any subject except in English.").

[167] Saenz v. Roe, 526 U.S. 489, 502 (1999) ("What is at issue in this case, then, is this third aspect of the right to travel—the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same State. That right is protected not only by the new arrival's status as a state citizen, but also by her status as a citizen of the United States." (citing the Privileges or Immunities Clause of the United States Constitution, U.S. CONST. amend. XIV, § 1, cl. 2)).

[168] Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992).

[169] Lawrence v. Texas, 539 U.S. 558, 562 (2003).

[170] To be precise, the inquiry in *Michael H.* is rooted in American legal history and tradition rather than the status of being "fundamental," though this is really a difference of words and not of meaning. *See* Michael H. v. Gerald D., 491 U.S. 110, 127–28 n.6 (1989).

[171] J. K. ROWLING, HARRY POTTER AND THE PHILOSOPHER'S STONE 76 (1997).

[172] Mugler v. Kansas, 123 U.S. 623 (1887). *Mugler* was a property-rights complaint against Kansas's newly enacted "dry" laws and is often cast in the role of substantive due process's inaugurator, not because it accepted the plaintiffs' claims—it did not—but

Even if *Meyer* and *Pierce* themselves are good flavors, they have yielded up more than their share of "vomit" and "earwax."[175]

Is the problem only that the Supreme Court has not accepted Justice Scalia's advice in *Michael H.*, that is, to limit substantive due process to historically-grounded rights-claims defined specifically enough to allow for historically-informed discernment as to whether our legal traditions support or oppose that claim? Or, could it just be that the problem comes from looking in the wrong jar? And if the latter, does Justice Thomas's methodology for restraining privileges and immunities as pre-state rights rather than state-created ones, per his *Saenz* dissent, solve the Bertie Botts problem—or perhaps I should say, the judicial activism problem?

The next stage in answering this problem lies in further and closer analysis of the history and original meaning of "privileges" and/or "immunities," an ongoing endeavor in which Professors Michael Kent Curtis[176] and John Harrison[177] were pioneers, albeit disagreeing.[178] "For another day," as Justice Thomas remarked in *Troxel*.[179]

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because in dicta it left the door open to assessing the fairness of laws under the Fourteenth Amendment Due Process Clause. *Id.* at 653, 660–61. Of course, a precedent of sorts had been set in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450–52 (1856), in which the Court held that the federal government had violated the Due Process Clause of the Fifth Amendment by allowing the emancipation of a slave when that slave was taken into a free state or territory. This, the Court claimed, was a violation of the slaveholder's Fifth Amendment right not to have his "property" taken without due process. *Id.* at 450.

[173] *West Coast Hotel Co. v. Parrish* is widely considered the signature case for the Court's retreat from substantive due process, at any rate of the "economic" kind. 300 U.S. 379, 391 (1937). Although, *Nebbia v. New York* deserves mention in this regard as well. 291 U.S. 502, 531–32 (1934).

[174] In *Griswold v. Connecticut*, Justice Douglas's opinion for the Court studiously avoided substantive due process, finding a protected zone of privacy in the penumbras of the specific guarantees of the Bill of Rights. 381 U.S. 479, 482–84 (1965). Justice Harlan's concurrence, however, advocated it. *Id.* at 499–500 (Harlan, J., concurring). *Griswold* has since been seen as the inaugurator of a "new" substantive due process era that culminates in *Planned Parenthood v. Casey* and *Lawrence v. Texas*, though with cautious halts along the way such as *Washington v. Glucksberg*. *See* Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1937–45 (2004) (discussing the history of substantive due process up to and including *Lawrence*).

[175] ROWLING, *supra* note 171, at 217–18.

[176] MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE 2 (1986) ("A reasonable reader might conclude that the Fourteenth Amendment was intended to change things so that states could no longer violate rights in the federal Bill of Rights . . . [and that] this was what was intended by . . . the privileges or immunities [clause] . . . . I believe that the reader would be right.").

[177] John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1387–88 (1992).

[178] In his *McDonald* concurrence, Justice Thomas mentions yet another, more recent analysis, Kurt T. Lash, *The Origins of the Privileges or Immunities Clause, Part I:*

A student who looks for candy beans in an empty jar, or who, to keep this already-strained metaphor going, looks for substantive candy beans in a jar marked "process," is likely to come up empty-handed. But when you are on the Supreme Court and you have at least four other votes, you can rule that you have *found* a substantive bean. Perhaps what you have really found is—spinach! Which, ironically, is a Bertie Botts flavor.[180]

"Privileges and Immunities" as an Antebellum Term of Art, 98 GEO. L.J. 1241 (2010). McDonald v. City of Chicago, 130 S. Ct. 3020, 3064 (2010) (Thomas, J., concurring).

[179] Troxel v. Granville, 530 U.S. 57, 80 (2000) (Thomas, J., concurring).

[180] ROWLING, *supra* note 171, at 78.

A BETTER BEGINNING: WHY AND HOW TO HELP NOVICE LEGAL WRITERS BUILD A SOLID FOUNDATION BY SHIFTING THEIR FOCUS FROM *PRODUCT* TO *PROCESS*

Miriam E. Felsenburg & Laura P. Graham[*]

INTRODUCTION

Several years ago, we set out to discover why early legal writing is so difficult for many beginning law students and what we can do as legal writing professors to improve the learning process for them. In a wide-ranging study of the early experiences of beginning legal writers, we confirmed our anecdotal observations that first-year law students were too confident about both their general writing strengths and their ability to learn legal analysis and legal writing.[1] In our prior article describing the study, we identified several key factors that contributed to this overconfidence,[2] and we illustrated how this overconfidence impeded students' progress in both legal analysis and legal writing.[3] In this follow-up article, we suggest strategies to better orient first-year students to law school learning and to help these students establish more manageable goals for early legal writing.

In August 2007, we surveyed 265 first-year law students at two diverse schools, which we designated School X and School Y, and asked a

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[*] Professor Felsenburg and Professor Graham are long-time Associate Professors of Legal Writing at Wake Forest University School of Law; both teach first-year and advanced legal writing courses. They would like to thank Dean Blake Morant and Associate Deans Suzanne Reynolds, Ronald Wright, and Sidney Shapiro for encouraging and underwriting their continuing scholarship; Christine Nero Coughlin, Director of Legal Analysis, Writing, & Research; their colleagues on the Legal Analysis, Writing, & Research faculty; and their families, for their continued support.

[1] Our study, its results, and our conclusions based upon the study are described in detail in a previous article. Miriam E. Felsenburg & Laura P. Graham, *Beginning Legal Writers in Their Own Words: Why the First Weeks of Legal Writing Are So Tough and What We Can Do About It*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 223, 273–82 (2010). Through our article, we explored the remarkably high level of confidence that many surveyed first-year law students exhibited in the early weeks of law school and reported on the seemingly inevitable plummet in their confidence that occurred as they realized just how difficult legal writing is. Our initial survey conducted in the first few weeks of law school revealed that only about 7% of students who responded were either "slightly" or "not at all" confident in their general writing ability, and less than 5% indicated that they were "not at all confident" about their ability to learn legal writing. *Id.* at 240.

[2] *Id.* at 277.

[3] *Id.* at 279–82 (linking the steep decline in student self-confidence after approximately eight weeks in law school to significant decreases in student performance in legal writing and other law school courses).

broad range of questions about their experiences and expectations as they entered law school.[4] When asked how confident they were about their general writing ability, students at both schools reported dramatically high levels of confidence.[5] More specifically, when asked about their confidence in their ability to learn legal writing, around 70% reported that they were either "confident" or "very confident."[6] Remarkably, only about 5% said they were "not at all confident" in spite of their novice status as law students.[7]

We repeated this survey in August 2009 at School X with similar results.[8] When asked to rate their confidence in their ability to write, 62% percent of the respondents reported that they were "extremely confident" or "very confident"; an additional 32% were "moderately confident."[9] When asked to rate their ability to learn legal writing, 56% of beginning law students said they were "very confident" or "confident"; again, only a few—7%—said they were "not at all confident."[10]

Not surprisingly, when we surveyed these same students only two months into their first semester, they reported dramatically lower confidence in their ability to learn legal writing.[11] In October 2007, only 27% of the students at Schools X and Y were still "very confident," with a substantial majority—62%—falling in the center of the traditional bell curve.[12] Similarly, in the October 2009 School X survey, only 17% said

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[4] *See id.* at 227–29 (describing the methodology and response to our surveys at School X and School Y); New Law Student Survey at School X (Aug. 2007) (survey and results on file with authors); New Law Student Survey at School Y (Aug. 2007) (survey and results on file with authors).

[5] Felsenburg & Graham, *supra* note 1, at 240 fig.9. We found these numbers surprising. Although the data generated by other survey questions suggested that many of the surveyed students had done significant writing as undergraduates, few of the students were ever evaluated on the *quality* of their writing. Instead, most of the students' college writing assignments were seemingly evaluated based on their mastery of course content. *See id.* at 274–77 (discussing our findings and conclusions about the surveyed students' writing experiences prior to law school).

[6] *Id.* at 240–41.

[7] *Id.*

[8] New Law Student Survey at School X (Aug. 2009) (survey and results on file with authors).

[9] *Id.*

[10] *Id.*

[11] New Law Student Survey at School X (Oct. 2009) (survey and results on file with authors). Past research and findings of other leading scholars in this area seem to support our studies' results concerning the tremendous decrease in self-confidence experienced by many first-year law students as the first semester of school progresses. *See, e.g.*, Ruth Ann McKinney, *Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution?*, 8 LEG. WRITING: J. LEGAL WRITING INST. 229, 241 (2002) (describing the noticeable decrease in self-efficacy among law students during the first year of school).

[12] Felsenburg & Graham, *supra* note 1, at 252–53.

they were "very confident" at this point in the semester, with a full 10% reporting that they were "not at all confident" in their ability to learn legal writing.[13]

Thus, through our study, we confirmed that many first-year law students are unprepared for the demands of learning legal analysis and legal writing and are deeply discouraged when they do not experience immediate success.[14] In fact, some students we surveyed had even become resentful and distrustful.[15] Scholars who study trends in law school learning have routinely commented that if first-year students are unable to rebound from early disappointment and frustration, their receptivity to the entire process of legal education may be reduced, often for the remainder of their law school career.[16]

As we have noted, the legal writing classroom is usually the place where law students are first introduced to the foundational process of

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[13] 2009 Survey at School X, *supra* note 11. Significantly, no respondents reported they were "extremely confident" in their legal writing abilities by this point in the semester. *Id.*

[14] Felsenburg & Graham, *supra* note 1, at 266, 280.

[15] *Id.* at 286. For example, when asked whether their experiences in the first eight weeks of law school had altered their views of their strengths as writers, many students responded affirmatively. Some of the responses conveyed deep frustration: "I feel like I don't know anything anymore."; "Law school has made me realize I'm horrible at writing like a lawyer." *Id.* at 279. Similar frustration emerged in students' responses to the companion question about whether their views of their weaknesses as writers had changed: "My apprehension about writing has been strengthened; my confidence has been shakened [sic]."; "YES! I can't write simple!" *Id.* at 280, 289.

[16] In an important article about the need for effective law school orientation programs, Professor Paula Lustbader noted that "[t]he typical first-year [law school] classroom is a foreign experience for most students." Paula Lustbader, *You Are Not in Kansas Anymore: Orientation Programs Can Help Students Fly over the Rainbow*, 47 WASHBURN L.J. 327, 344 (2008). Lustbader further keenly observed that many students, especially those with different learning styles or who come from diverse backgrounds, "have a harder time" and often "begin to doubt whether they are meant to be lawyers." *Id.* Lustbader also emphasized the need for law schools to "confirm students' self-confidence" from the beginning of the students' experience, since "a lack of confidence or an inflated confidence can impair students' motivation and academic performance." *Id.* at 361. In the same vein, Ruth Ann McKinney has noted,

> The task for educators who want to maximize our students' performance becomes clear: increase the self-efficacy of our students in relation to a specific task necessary for their ultimate success and we will increase the chance that they will not only succeed, but will excel. Without any additional effort on our part, students will become more likely to seek help when they need it, take logical steps to accomplish their goals efficiently, try harder, experiment more, be persistent in the face of early failures, and be tolerant of constructive criticism.

McKinney, *supra* note 11, at 236.

legal analysis.[17] It follows then that the legal writing classroom is also usually the place where students receive their earliest feedback on how well they are learning to perform legal analysis.[18] Therefore, we believe it is of utmost importance that legal writing professors design "a better beginning" for their first-year students.

Part I of this Article discusses the importance of giving students a fuller, clearer orientation to the study of law in general. This orientation should emphasize the process of legal analysis as the foundation for all other law school learning. Part II suggests three specific ways that legal writing professors can design their courses and teaching practices to facilitate students' receptivity to this process: (1) setting clear, realistic goals and objectives for the first semester of legal writing; (2) deliberately encouraging students to be more active metacognitive learners; and (3) providing more opportunities for students to pre-write and to "write to learn" before asking them to "write to teach" to a legal reader.

I. ORIENTING STUDENTS TO WHAT "LEARNING THE LAW" IS REALLY ABOUT

Perhaps the most important step in giving students a "better beginning" is to help them understand what it is that they will be learning in law school. We should assume that beginning law students are like most other "lay persons" when it comes to their understanding of what lawyers know and how they come to know it. Even well-educated, sophisticated lay persons often misunderstand the true nature of what lawyers must be able to do in practice. For example, the popular spy novelist Ken Follett once described the experience of a character with amnesia as follows: "Accessing the memory was not like opening the refrigerator, where you could see the contents at a glance. . . . *If he were a lawyer, would he be able to remember thousands of laws?*"[19] In other words, Follett seemingly believed, as do many other lay persons, that the work of a lawyer is simply to "remember thousands of laws."

More recently, in a *New York Times* op-ed column, Nobel Prize-winning economist Paul Krugman explored how "technological progress is actually reducing the demand for highly educated workers."[20] He specifically cited "the growing use of software to perform legal research," stating that "[c]omputers, it turns out, can quickly *analyze* millions of

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[17] Felsenburg & Graham, *supra* note 1, at 224 ("Early legal writing classes often give students their first exposure to the key skills they must develop to succeed as law students and as lawyers.").

[18] *See* McKinney, *supra* note 11, at 250–51 (describing how legal writing instructors have the rare opportunity to provide early feedback to students on their law school performance).

[19] KEN FOLLETT, CODE TO ZERO 146 (2000) (emphasis added).

[20] Paul Krugman, Op-Ed., *Degrees and Dollars*, N.Y. TIMES, Mar. 7, 2011, at A21.

documents, cheaply performing a task that used to require armies of lawyers and paralegals."[21] While it is true that computer software can now assist lawyers in managing documents, producing deposition summaries, and streamlining other data reviewing tasks, these are not the equivalent of legal analysis, as Krugman suggests. For the foreseeable future, it will still take a trained lawyer to identify legal issues, analyze relevant legal authorities, and predict or advocate a certain outcome—important skills traditionally learned in the law school classroom. Thus, even as sophisticated a lay person as Krugman demonstrates a fundamental misunderstanding of the nature of legal analysis.

As our earlier research revealed, many first-year law students also share this lay understanding of what law school will teach them. They often mistakenly equate "learning the law" with "learning laws."[22] For example, in the August 2007 survey, we asked new law students to describe what they thought the study of law involved.[23] Here are a few illustrative responses: "Studying what the law is and how to work with it"; "I think it is studying . . . the laws that we will be required to work within"; "Being able to articulate laws and express their purpose"; "[L]earning what both federal and state laws are and how to apply those laws"; "Knowing rules and knowing how to research to find out rules if you do not know them."[24]

We cannot fault our students for this misunderstanding. Law, after all, is unlike the other "learned professions" of medicine and the clergy.[25] A first-year medical student, for example, is likely very familiar with the work of a doctor and with the kinds of knowledge a doctor must have. Similarly, a first-year clergy student is likely very familiar with the work of a priest, rabbi, minister, or imam and with the kinds of knowledge those persons must have. In contrast, while beginning law students may have some basic familiarity with the work of lawyers, they may not be as familiar with the kinds of knowledge that lawyers must have to do that

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[21] *Id.* (emphasis added).

[22] *See infra* notes 23–24.

[23] 2007 Survey at School X, *supra* note 4; 2007 Survey at School Y, *supra* note 4.

[24] Felsenburg & Graham, *supra* note 1, at 255, 260; *see also* 2007 Survey at School X, *supra* note 4.

[25] *See* Melissa H. Weresh, *I'll Start Walking Your Way, You Start Walking Mine: Sociological Perspectives on Professional Identity Development and Influence of Generational Differences*, 61 S.C. L. REV. 337, 339 (2009) ("Law has historically been considered among the 'learned professions,' including medicine and the clergy.") (citing Edward D. Re, *Professionalism for the Legal Profession*, 11 FED. CIR. B.J. 683, 684 (2001–2002) ("Lawyers have derived great pleasure and pride in being members of one of the historic and learned professions along with the clergy and medicine, which have been traditionally regarded as professions throughout the centuries.")).

work.[26] Brand new law students often mistakenly think that they will be studying specific laws in various subject areas and that once they "learn enough laws" they will be competent to practice law.[27]

Moreover, first-year law students often assume that in law school, they can be successful if they practice the same habits that led to their success as undergraduates.[28] Most likely, in many of their undergraduate courses, these students worked with definable bodies of knowledge and were assisted by expert teachers whose goal was the students' mastery of the particular subject matter.[29] Thus, the students were typically asked in college to read and discuss the content of the subject area, to memorize the content of the subject area for examinations, or to write research papers identifying and commenting on the trends and themes of the subject area.[30]

For example, imagine that an undergraduate student majoring in English takes a course on American poetry. As part of the course, the student is asked to select a specific American poet and to write a research paper about that poet's body of work. Imagine further that the student selects the poetry of Emily Dickinson as the subject of his paper. In his research, the student learns that Dickinson published exactly 597 poems that scholars have commonly divided into five categories,

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[26] *See generally* Nancy M. Maurer & Linda Fitts Mischler, *Introduction to Lawyering: Teaching First-Year Students to Think Like Professionals*, 44 J. LEGAL EDUC. 96, 100–01 (1994) (suggesting that law students struggle with the first-year curriculum because they have no experience with what lawyering entails in practice).

[27] *See* KENNEY F. HEGLAND, INTRODUCTION TO THE STUDY AND PRACTICE OF LAW IN A NUTSHELL 1–2 (5th ed. 2008) (noting that new law students often expect to "get to law school, . . . go to class, sit back and *learn* the law."). Similarly, first-year law students we surveyed at School X and School Y believed that the study of law involved "studying laws," studying "the rules used to govern societies," and "learning, memorizing, and understanding definations [sic] of . . . concepts and ideas." 2007 Survey at School Y, *supra* note 4; 2007 Survey at School X, *supra* note 4.

[28] For instance, one student who responded to the August 2007 survey at School X stated that he believed the study of law entailed "[a] *mastery* of the basic skill required of the profession." 2007 Survey at School X, *supra* note 4 (emphasis added); *see also* Anne Enquist, *Talking to Students About the Differences Between Undergraduate Writing and Legal Writing*, 13 PERSP. TEACHING LEGAL RES. AND WRITING 104, 104–05 (2005) (describing how novice legal writing students typically assume that their positive writing experiences as undergraduates will translate into immediate success in legal writing as first-year law students).

[29] In fact, the prevalent learning theory in many of their undergraduate courses was likely the "mastery learning" approach. This theory posits that "under appropriate instructional conditions virtually all students can learn well, that is, can 'master,' most of what they are taught." James H. Block & Robert B. Burns, *Mastery Learning*, 4 REV. RES. EDUC. 3, 4 (1976).

[30] *See generally* HEGLAND, *supra* note 27, at 1–3 (discussing undergraduate study habits that will not be effective in law school).

including poems on Nature.[31] The student narrows his topic to the Nature poems, of which exactly 111 were published.[32] He then systematically reads each one of the 111 Nature poems as well as several commentaries on those poems by experts on Dickinson's poetry. At this point, the student is ready to begin writing his research paper, in which he demonstrates his knowledge of and his personal reactions to the Nature poems. Assuming he does a capable job, he will likely receive a high mark on the paper,[33] thus purportedly indicating his mastery of the Nature poems of Emily Dickinson. Further, the student's mastery is permanent in the sense that the body of knowledge is fixed—the content of Dickinson's Nature poems is never going to change.

Law students often mistakenly expect learning the law to be like learning the Nature poems of Emily Dickinson. They expect the law to be simply a new subject area that they will be able to read in full, understand, memorize, and recall, just as they have successfully done with many other subject areas they have encountered in their academic careers.[34] In short, they believe that by the end of law school, they will have been exposed to, and will have *mastered,* the contents of the law.

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[31] In one volume of Dickinson's complete poems, the categories are life, nature, love, time and eternity, and "the single hound." *See generally* POEMS OF EMILY DICKINSON (Louis Untermeyer ed., Heritage Press 1980) (1890) (listing these five categories in the volume's table of contents).

[32] COLLECTED POEMS OF EMILY DICKINSON ix–xii (Mabel Loomis Todd & T.W. Higginson eds., Avenel Books 1982) (1890).

[33] *See* Enquist, *supra* note 28, at 104–05. In this piece, which can be described as an "open letter" to new law students, Enquist articulated some of the writing habits of successful undergraduates that may not translate into legal writing success:

> You got the 'A' by making the 'creative' point, by offering up the unusual insight, maybe even something that professor had not already thought about or read about. The unwritten rule that most successful undergrad writers have absorbed is that the secret to getting good grades on papers is to dress up your ideas; make them seem more sophisticated than they really are. In short, make simple things seem complex.
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> . . . .
>
> Over-quoting during one's undergrad days had the double benefit of bringing lots of expertise that the writer doesn't have into the writing all while adding length!
>
> . . . .
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> It is no secret that many undergrad writers pad their writing to meet the length requirements of assignments. . . . The longer the paper, the more likely it is to garner a high grade.

Id. Significantly, the qualities that likely earned students high grades on their undergraduate writing are not always synonymous with the qualities of good legal writing. *Id.* at 105.

[34] *See* 2007 Survey at School X, *supra* note 4 (illustrating that incoming law students often expect law school to be "[l]earning what the law is" and a "mastery of the basic skill required of the profession"); *see also* HEGLAND, *supra* note 27, at 1–2 (introducing new law students to the idea that law school learning "won't be the same old

Of course, the law is not a "content area" with a finite amount of material to be learned. Not even the most advanced torts scholar, for example, will or could ever "learn" the contents of every torts case.[35] And even if she could, there would be new cases and new statutes the next day, and the next, *ad infinitum*. The content of tort law (and indeed every other area of the law) will never be fixed.[36] Thus, when a first-year student undertakes to "learn torts," she is soon forced to accept that no matter how diligently she works, she will never conquer the field of torts as she once did American poetry.

Broadly put, "learning the law" is really more about becoming comfortable with the *process* of analyzing and applying the law—in traditional phraseology, learning to "think like a lawyer"—than it is about learning the actual content of any particular laws or bodies of law.[37] New law students should be deliberately taught that "learning the law" is not going to be like learning other subject areas—that is, that they will never learn all of the law or *master* it.[38] They should also be deliberately taught to become comfortable with the inherent ambiguity of the law—that is, that arriving at a "right answer" or conclusion is not

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stuff" as college coursework because law school focuses uniquely on training students in analytical thinking).

[35] *See* Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4 (1936) (describing how the law has continued to develop with "ever accelerated speed" and "its content multiplied and refined" since the legal system first took root in the United States).

[36] *See id.*

[37] In her recent article about the knowledge required to learn law, Professor Michelle Harner described the "key analytical skills" of law students as "spotting and dissecting issues, identifying applicable tools and potential barriers, embracing ambiguity, and thinking creatively to resolve issues." Michelle M. Harner, *The Value of "Thinking Like a Lawyer,"* 70 MD. L. REV. 390, 392 (2011). These skills, she said, "form a solid foundation from which a lawyer can excel and serve the interests of her clients." *Id.*; *see also* GERALD F. HESS & STEVEN FRIEDLAND, TECHNIQUES FOR TEACHING LAW 7 (1999) ("[T]he basic nature of education [is] not the transmission of knowledge, but the transformation of the learner. This view of education as transformation is consistent with the dominant conceptualization of legal education, which consistently identifies 'thinking like a lawyer' as a major goal of legal education.").

[38] In a widely-cited 1985 article, Professors Jay M. Feinman and Marc Feldman argued in favor of the widespread adoption of mastery learning in legal education: "Mastery learning dictates that educational excellence be our goal, and it provides an approach to teaching and learning by which this goal can be attained." Jay M. Feinman & Marc Feldman, *Achieving Excellence: Mastery Learning in Legal Education*, 35 J. LEGAL EDUC. 528, 528 (1985). Moreover, they explicitly stated that "any subject matter [within the law school curriculum] is suitable for mastery." *Id.* at 551. We certainly do not take issue with the overall goal of expecting and encouraging excellence in all students, and we recognize that certain "mastery learning" techniques can be useful in the law school classroom. However, we believe strongly that the process of legal analysis is not capable of being "mastered" in a single semester of law school, in three years of law school, or ever.

always possible or even expected as it may have been in college.[39] If students are not exposed to these truths very early on in law school, and if they do not embrace them, their confidence in their own learning abilities will likely take a drastic plunge.[40] We believe this plunge in confidence is entirely counterproductive to many students' early law school adjustment.

To achieve a recasting of students' expectations about law school, we should correctly describe the nature of law school learning beginning the moment that students enter their first law school class.[41] Legal writing professors are often uniquely situated to begin this early intervention. We are often the first law school professors our students meet. We typically spend significantly more time with students in the early weeks of law school than their other professors do, and it is usually our early feedback that first alerts them to the difficulties that they will face in adjusting to law school learning.[42]

Thus, to give our students the "better beginning" they need, we should emphasize from day one that the focus of law school learning, including learning legal writing, is on the *process* of legal analysis rather than on "learning laws." As professors, we should be intentional about conveying that the process of legal analysis is foundational to everything our students will ever learn in law school and everything they will ever

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[39] *See, e.g.*, James D. Gordon III, *How Not to Succeed in Law School*, 100 YALE L.J. 1679, 1695 (1991) (discussing how reaching a particular conclusion on a law school exam is not crucial).

[40] Lustbader, *supra* note 16, at 344–45 ("[T]he learning strategies needed to excel in law school are not like those from other academic settings. Many students are, figuratively, hit in the head with an apple when they realize that they must do much more critical thinking and learning on their own. Class time is no longer a lecture that clarifies readings. Rather, more often than not, class time obfuscates the readings. Thus, what worked for students in the past may not work as successfully for them in law school. . . . [L]aw students undergo unnecessary emotional distress and spend their time and energy just trying to figure out the basics."). As one admittedly tongue-in-cheek commercial video for new law students notes, law school is "the intellectual equivalent of being in a boxing match with Mike Tyson." ALL ABOUT: LAW SCHOOL (Ipso Facto Films, Inc. 2005).

[41] *See* Feinman & Feldman, *supra* note 38, at 546. In recognizing as far back as 1985 the inadequacy of the present model of legal education in this regard, Professors Feinman and Feldman remarked, "The essence of the first year of law school is that students, through some mystical process, acquire the undefined skill of thinking like a lawyer." *Id.*

[42] *See* McKinney, *supra* note 11, at 232 ("[O]f everyone in the legal academy . . . [legal writing professors] are in the best position to take a leadership role" in making "small (and large) changes in the law school classroom that would create potentially powerful results."). Professor McKinney especially notes that legal writing professors are "already in the enviable position of being able to teach in small classrooms" and "have "significant one-on-one student contact." *Id.* at 246.

do as lawyers.[43] We should also be candid about the fact that even the best students will find the process of legal analysis difficult to learn, will have to practice it constantly, and will never master it.[44] Once we successfully help our students adjust their expectations in this way, they will be more receptive to specific strategies designed to foster their early success as legal writers.

II. THREE EARLY INTERVENTIONS

We recommend implementing three interventions in the legal writing classroom that are designed to enhance our students' early development as legal thinkers and writers. Because of the newness of the legal environment, the three specific interventions we recommend share a common theme: emphasizing the *writing process* over the *written product* by allowing time for students to practice and absorb the fundamentals of legal analysis in a more deliberate, step-by-step fashion. These interventions should be the focus of the first few weeks of legal writing instruction.

A. Clear Communication of Course Goals and Objectives

As we have discussed, the law and, by extension, legal writing are not subjects that can be mastered. Thus, when articulating our goals and objectives for the first semester of legal writing, we should avoid using any language that suggests to our new students that mastery is the goal. Instead, we need to carefully choose our words to convey to our students that as novices in the law and in legal writing, they should not expect immediate success.[45]

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[43] DAVID S. ROMANTZ & KATHLEEN ELLIOT VINSON, LEGAL ANALYSIS: THE FUNDAMENTAL SKILL xiii (1998) ("[L]egal analysis [is] the fundamental skill required to survive, enjoy, and succeed in law school."); *see also id.* at 4 ("The rules and principles of legal analysis . . . allow attorneys to fashion persuasive arguments on almost any legal issue.").

[44] *See* Corinne Cooper, *Letter to a Young Law Student*, 35 TULSA L.J. 275, 282 (2000) (explaining to law students that law school is meant to teach the skill of legal analysis and that this skill is "never fully mastered").

[45] The American Bar Association's current emphasis on outcomes and assessments makes this a particularly opportune time for legal writing educators to reevaluate our goals and objectives and to revisit how we communicate them to our students. *See* Catherine L. Carpenter et al., *Report of the Outcome Measures Committee*, 2008 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS BAR REP. 54, *available at* http://apps.americanbar.org/legaled/committees/subcomm/Outcome%20Measures%20Final%20Report.pdf (recommending that the current ABA Accreditation Standards be "re-examine[d] . . . and reframe[d] . . . to reduce their reliance on input measures and instead adopt a greater and more overt reliance on outcome measures"); *see also* ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION: A VISION AND A ROADMAP 35, 40 (2007) (encouraging legal educators to "shift the focus of legal education from content to outcomes" and advising law schools to "describe the specific educational goals of each course . . . in terms of what

Especially where introductory legal writing course names do not include any reference to "analysis," students will naturally expect that these courses will primarily be focused on learning the conventions of legal writing format and style.[46] As our study showed, many students were stunned to find that early legal writing was not about learning mechanics but rather about learning legal analysis—that is, identifying issues, understanding the law, and carefully applying the law to new facts.[47] Further, these students were frustrated by the fact that their professors would not give them a "fill-in-the-blank" template for legal analysis.[48] The results of our survey (and similar studies conducted by our colleagues) suggests that legal writing professors need to more clearly explain that effective legal writing depends far more on learning the process of legal analysis than on observing the particulars of format and style.[49]

At Wake Forest University School of Law, where we teach Legal Analysis, Writing, and Research, our most recent course description for the first-year legal writing course intentionally describes the objectives of the course very generally:

> The Legal Analysis, Writing and Research course (LAWR) is designed to teach you how to think and communicate like a lawyer. Specifically, the course is designed to teach you *basic* legal analysis, writing and research skills. These skills are the "tools of the trade" for the legal profession, and you will continue to use and develop these skills throughout your academic and legal career.[50]

While this may be a fair statement of the general thrust of the course, the phrase "teach you how to" may actually serve to reinforce some students' misplaced expectations that there is an easy, step-by-step

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students will know, understand, and be able to do, and what attributes they will develop" by completing the course).

[46] *See* Felsenburg & Graham, *supra* note 1, at 269 (noting through our study that novice legal writers "often viewed their task as simply reporting information, [and] many of them appeared to believe that their professor's primary job was to teach them the 'magic formula' for conveying this information").

[47] *Id.* at 271–72 (describing students' responses in October 2007 to the question of whether their opinion of what legal writing involved had changed since August 2007).

[48] *Id.* at 270.

[49] Legal writing instructors need to be "clear and explicit in [going] about teaching students analytical skills." Christine M. Venter, *Analyze This: Using Taxonomies to "Scaffold" Students' Legal Thinking and Writing Skills*, 57 MERCER L. REV. 621, 622 (2006). Venter noted that "precisely how legal writing teachers are to teach analysis and precisely how students learn to 'do' analysis, remains somewhat mysterious, both to faculty and, more importantly, to students themselves." *Id.* at 623. In fact, "legal writing faculty have struggled to reach a consensus on how best to teach analysis, or even if they should teach it explicitly at all." *Id.* at 624.

[50] Course Description for Legal Analysis, Writing and Research at Wake Forest Univ. Sch. of Law (2010–2011) (on file with authors).

approach to effective legal writing that we will show them and that they can master in the nine-month span of the course.

In fact, until recently, we used terminology on our course syllabi that likely created unrealistic expectations on the part of first-semester students at Wake Forest. In 2008, for example, we used the following language in describing our course objectives: "The primary goal of the Legal Research and Writing[51] course is to train you to be proficient (even excellent, perhaps!) legal researchers, analysts, and writers."[52] Imagine a first-year student's reaction upon reading this lofty statement of our course goals! It would be perfectly natural for a novice student, based on this misleading language, to expect to master the skills of effective legal writing by the end of the course.

However, as a result of our study,[53] by 2010, we had significantly revised our course goals and objectives to clarify to our students that legal writing is not a mastery subject, and that as novices, the students' primary goal was to begin to understand the *process* of legal analysis.

> The primary goal of the LAWR course is to help you advance from "novice" status as legal researchers, analysts, and writers to "advanced beginner" status. Analyzing, writing, and researching are basic "tools of the trade" for legal professionals, and our course objectives focus on these tools:
>
> ANALYSIS: You will learn how to read various types of legal authorities (cases, statutes, etc.) efficiently and effectively, and you will learn strategies for taking notes on your reading. You will learn successful strategies for conducting sound legal analysis using various legal reasoning techniques. Legal analysis is a unique skill that requires careful reading and critical thinking. While you will probably not master legal analysis in this course (indeed, most lawyers never really stop "learning" legal analysis), this course will lay a solid foundation upon which you will continue to build your legal analysis skills throughout your life as a lawyer.
>
> WRITING: You will learn the basic skills that are required to meet the needs and expectations of the legal professionals for whom you will be writing as a lawyer. We will begin by learning how to write an objective memorandum, which encompasses the key skill of writing about your analysis of a single argument. Then, we will build on that key skill throughout the remainder of the year. In the second semester, we will move to persuasive writing. Throughout the year,

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[51] In 2010, in a step toward emphasizing the importance of legal analysis to the students' education, Wake Forest University School of Law changed the name of the first-year legal writing course from "Legal Research and Writing" to "Legal Analysis, Writing, & Research."

[52] Syllabus for Legal Research & Writing at Wake Forest Univ. Sch. of Law (Fall 2008) (on file with authors).

[53] *See supra* notes 1–3 and accompanying text.

> you will also learn basic methods of legal citation, and you will be exposed to several common formats for legal documents.[54]

While there is still room for improvement even in this language (e.g., by eliminating the "you will learn" language), this revised course syllabus we implemented at least correctly acknowledges the following: that the students are novices; that they will not "learn how to" do legal writing (much less master it) in their first year; and that legal analysis is the foundation and the starting point for everything they will learn about legal writing.

In sum, the specific words we use to describe our goals and objectives are important for first-year students and should be chosen with great care. We should use words that acknowledge our students' novice status, such as "beginning," "introduction," "basic," and "novice." We should use words that emphasize how foundational legal analysis is to good legal writing, such as "analysis" and "process." And we should use words that reflect the need for hard work and constant practice in learning how to perform legal analysis, such as "practice," "build on," and maybe even "grapple with." Such language will reinforce to new law students that the first semester of legal writing is more about *learning for themselves* than about *writing for someone else*; it is more about *process* than *product*; it is more about *beginning* than *finishing*.

B. Encouraging Students to Be More Active Metacognitive Learners

Keeping in mind our students' novice status and the fact that the process of legal analysis is the foundation for all law school learning, we should deliberately support and encourage students to consciously be metacognitive learners—that is, to "manage and control their [own] processes of learning."[55] There is a growing body of advanced scholarship about what metacognition is and how law students can benefit from it.[56] Put simply, metacognition is "thinking about thinking."[57]

In the law school context, the student who expects to be a passive vessel for knowledge supplied by expert teachers is less likely to be successful than the student who carefully monitors her own learning

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[54] Syllabus for Legal Analysis, Writing, & Research at Wake Forest Univ. Sch. of Law (Fall 2010) (on file with authors).

[55] Donna Bain Butler, *Use Metacognitive Strategies to Promote Learning and Advance Writing Proficiency*, THE SECOND DRAFT, Spring 2011, at 18, 18.

[56] *See, e.g.*, Robin A. Boyle, *Employing Active-Learning Techniques and Metacognition in Law School: Shifting Energy from Professor to Student*, 81 U. DET. MERCY L. REV. 1 (2003); Anthony S. Niedwiecki, *Lawyers and Learning: A Metacognitive Approach to Legal Education*, 13 WIDENER L. REV. 33 (2006); Larry O. Natt Gantt, II, *Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind*, 29 CAMPBELL L. REV. 413 (2007).

[57] Butler, *supra* note 55, at 21 n.1.

process.[58] Novice law students are "unable to use . . . knowledge effectively because [they] will not know the structure of the discourse, the order in which to present ideas, when to emphasize different concepts, and what information [they need] to make explicit versus what information is understood implicitly."[59] Thus, to be successful, law students should be explicitly told early on to use metacognitive strategies (i.e., to not take shortcuts, to test themselves with their own questions, to read every word assigned slowly, to skip nothing, to take initiative to understand what they are reading, to know why they are outlining, to review as they go, to know the limits of study aids, etc.).[60] If they practice these principles, they will build a more solid foundation for legal learning by participating actively in their own learning processes.

In the context of legal writing, metacognition further emphasizes the focus "on students' writing *processes*, rather than focusing on students' writing *product*," thereby helping students "develop professional proficiency in writing."[61] More specifically, metacognitive strategies for early legal writers enable them to engage in "*self-regulation*," a term that "refers to learners' ability to make adjustments in their own learning processes in response to their perception of feedback regarding their current status of learning."[62]

One might assume that most beginning law students already possess considerable metacognitive skills based simply on the fact that they have done well in their previous academic endeavors.[63] However,

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[58] *See* HEGLAND, *supra* note 27, at 2 ("When you get to class, professors assume you understand the cases; their job is to put you to work. You won't passively take notes; you'll actively analyze the cases, testing their coherence, exposing their assumptions, and pondering their implications.").

[59] Paula Lustbader, *Construction Sites, Building Types, and Bridging Gaps: A Cognitive Theory of the Learning Progression of Law Students*, 33 WILLAMETTE L. REV. 315, 327 (1997).

[60] Jennifer S. Bard & Brett Gardner, 30 Ways for First Year Law Students to Achieve Success 9–14 (Aug. 25, 2010) (unpublished manuscript) (on file with authors); *see also* MICHAEL HUNTER SCHWARTZ ET AL., TEACHING LAW BY DESIGN: ENGAGING STUDENTS FROM THE SYLLABUS TO THE FINAL EXAM 100–04 (2009) (advocating the use of guided journaling, online class journals, and a variety of other exercises designed for the purpose of "getting students to take their metacognitive pulse"). Rather than simply expecting these successful learning habits to develop automatically in our students, we must be clear in our expectations as professors in order for our students to reach their optimum potential. *Id.* at 32–33.

[61] Butler, *supra* note 55, at 18 (emphasis added).

[62] *Id.*

[63] Students admitted to law school have typically excelled in their undergraduate work. *See* Felsenburg & Graham, *supra* note 1, at 266 n.85 (noting in our own study that most law students we surveyed had above-average undergraduate GPAs and had been at or near the top of their classes throughout their educational experiences); *see also* ANDREW J. MCCLURG, 1L OF A RIDE: A WELL-TRAVELED PROFESSOR'S ROADMAP TO SUCCESS IN THE

our study suggested that on past major writing projects, many beginning law students had not routinely engaged in the kinds of strategies that would facilitate true metacognitive learning.[64] Thus, it is critical that we incorporate into our first-year legal writing courses devices that require our students to consciously engage in metacognition.

Legal writing professors have already recognized the need to teach students metacognitive techniques.[65] Examples of such techniques include the private memo,[66] student portfolios,[67] and self-editing checklists.[68] Most of these techniques, however, come into play at some point *during the production of a written product*—at the drafting, writing, rewriting, and/or editing stages. Our review of the existing literature suggests that the use of metacognitive strategies to help students *learn the process of legal analysis* is not nearly as common.[69] As a result, we propose two interventions that could promote metacognition at an earlier stage in the legal writing course.

1. Using Examples More Carefully

One common indicator that many students are not consciously using metacognition in early legal writing is their constant and fervent pleas for examples of successful legal memoranda and briefs.[70] Of course, most

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FIRST YEAR OF LAW SCHOOL 29 (2009) (noting the nature of law students generally as "high achievers" who have "performed well academically their entire lives").

[64] *See infra* note 69 and accompanying text.

[65] *See supra* note 56.

[66] Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to "Think Like Lawyers": Integrating Socratic Method with the Writing Process*, 64 TEMP. L. REV. 885, 894 (1991).

[67] Steven J. Johansen, *"What Were You Thinking?": Using Annotated Portfolios to Improve Student Assessment*, 4 LEGAL WRITING: J. LEGAL WRITING INST. 123, 123–25 (1998).

[68] *See, e.g.*, MARY BETH BEAZLEY, A PRACTICAL GUIDE TO APPELLATE ADVOCACY 135–44 (3d ed. 2010); RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE (front & back inside covers) (6th ed. 2009); LAUREL CURRIE OATES & ANNE ENQUIST, THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING 135–36, 797 (5th ed. 2010). These checklists, however, are designed for use after the student has *completed a substantial draft* of the written product. *See, e.g.*, BEAZLEY, *supra*, at 135 (advocating use of her self-graded draft technique after a student has already "complet[ed] a good draft of [her] document"); NEUMANN, *supra*, at front cover ("*While rewriting your work to turn it into a final draft*, consider these questions and the ones on the inside back cover.") (emphasis added).

[69] *See, e.g.*, Butler, *supra* note 55, at 18–21. Butler suggests that students need "self-regulating checklists to guide and enhance their thinking and performance: for *pre-writing*, for drafting, and for revising." *Id.* at 21 (emphasis added).

[70] *See* Felsenburg & Graham, *supra* note 1, at 269–71 (documenting several surveyed students' requests for examples). One student wrote, "I wish that we had some real-world examples of what our writing should look like that had been vetted by the professor to be sure that they adhered to the standards that she sets." *Id.* at 270.

legal writing professors provide such examples, and students can benefit at some point from seeing how an objective memo or a brief should look; however, the temptation for beginning law students is to use these examples as "go-bys," thus skipping the crucial metacognitive process. Students want to be shown "how to do" legal analysis and then reproduce what they are shown.[71] They do not realize, though, that what appears to be the best example memo in the world analyzing whether a home invasion constitutes "burglary" under the relevant statute and case law is completely useless in analyzing whether the "last clear chance" to avoid an automobile accident is a valid defense to a tort in a given jurisdiction.

Therefore, in keeping with the goal of encouraging metacognition, legal writing professors should be very transparent when providing students with examples of finished memos, briefs, etc. We should tell our students up front that there is no "fill-in-the-blank" method for legal analysis; thus, while the examples may be helpful in illustrating the general content and format of a document, they will not be helpful at all in analyzing the specific issues raised by the assignment they are working on currently in their course.[72]

One way to satisfy our students' desire to see examples of finished legal memos without sacrificing their engagement in the metacognitive process is to actively use an example memo to illustrate the *process* that the author used in developing her analysis of the issues in the example memo.[73] In class, students could be asked to deconstruct the analytical process the writer used to (1) arrive at the narrow issue; (2) identify and articulate the applicable rule; (3) identify the determinative facts the writer emphasized in her analysis and why; and so on. This kind of critical deconstruction will help students focus on the analytical *process* the example-writer used separately from the actual written *product* itself. This exercise has the additional benefit of helping students recognize that legal analysis is issue-specific and fact-specific and must

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[71] Beginning law students are expert mimics and teacher-learners. They have mastered the use of examples and forms, and they are nearly professionals at teasing out what the teacher is looking for and doing it exactly that way. *See id.*

[72] If we use samples carelessly, however, we run the risk that "students will try to artificially and mindlessly force their analysis into the form they see in the sample." Judith B. Tracy, *"I See and I Remember; I Do and Understand": Teaching Fundamental Structure in Legal Writing Through the Use of Samples*, 21 TOURO L. REV. 297, 314 (2005).

[73] Felsenburg & Graham, *supra* note 1, at 271. One student noted that "[r]eading others' work seemed merely to offer a template. It didn't aid in how one puts their [sic] own ideas together and transcribes them." *Id.*

be performed anew on every issue raised in every legal writing assignment.[74]

2. Helping Students See Pre-Writing as Crucial to Learning Legal Analysis

Another way to help beginning first-year law students change their focus from the written *product* to the *process* of legal analysis is to concentrate more heavily on pre-writing[75] as a metacognitive component of learning. In an early article encouraging more focus on the *process* of writing rather than the *product*, scholar Natalie Markman recommended,

> More teachers of legal writing should make a clear and conscious choice to get themselves and their students to engage in writing as a process, rather than discussing format and analysis in class and then awaiting a final product or perhaps one draft when the deadline arrives. This involvement would result in more fruitful interaction among teacher, student, and the written work. Assignments should allow for revision, interchange, and thinking aloud. Writing teachers could forgo a lengthy memorandum or brief for several shorter documents to allow students to work on more drafts within the same limited amount of time, and to see writing as a process rather than just an end product. Teachers could condense lecture material into fewer class sessions and meet with each student more frequently to discuss the writing process. Ongoing teaching of analysis and expression would replace after-the-fact evaluation. Students would benefit by becoming more critical and effective legal writers.[76]

On early assignments, law students are unlikely to recognize the importance of pre-writing steps to assess their own analytical process and the validity of their analysis of an issue before they begin drafting. In all likelihood, the majority of our law students did not habitually engage in significant pre-writing activities as undergraduates.[77] In addition, pre-writing can be very challenging for students to learn. Jill

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[74] This is not to say that the examples could not also be used later to show good legal writing format and style, but we suggest waiting to use examples in this way until students are more experienced in legal analysis.

[75] "'Pre-writing'" is a term, borrowed from composition theory, that denotes a stage in the writing process." Terrill Pollman & Judith M. Stinson, *IRLAFARC! Surveying the Language of Legal Writing*, 56 ME. L. REV. 239, 284 (2004).

[76] Natalie A. Markman, *Bringing Journalism Pedagogy into the Legal Writing Class*, 43 J. LEGAL EDUC. 551, 560 (1993).

[77] In our August 2007 survey, we asked students at School X how often they had done certain tasks as part of their writing process on major products. Felsenburg & Graham, *supra* note 1, at 301. About 14% of the respondents said they only "sometimes" did background reading, and more than 24% of the respondents said they only "sometimes" outlined. In contrast, when it came to post-writing tasks, the figures were higher. Almost 71% said they "always" proofread, and almost half said they "always" attended to formatting requirements. New Law Student Survey at School X (Aug. 2007), *supra* note 4.

Ramsfield, a noted legal writing scholar, captured this well in describing her own writing process:

> Here is something I know now that I wish I had known a lot earlier: how absorbing and demanding is the prewriting process. It takes about ten times longer than you think, requires excellent note-taking, patience, and careful connection among ideas. Never think you will remember something you've read; mark it, color-code it, and record it well enough to connect it to new ideas you are having as you read further.[78]

Even students who do think about pre-writing likely have only a limited understanding of what true pre-writing entails. This is perhaps because most of the legal writing textbooks that discuss pre-writing typically include only brief descriptions of the pre-writing stage—one to three pages at most—as part of an emphasis on the recursive nature of the entire writing process.[79] And these descriptions focus very little on *how* students can pre-write effectively as a means of developing their analysis. They focus instead on such tasks as organizing and outlining, which we believe are really early steps in the *writing* process rather than in the *pre-writing* process.[80] Organizing and outlining are tasks that presuppose at least a working understanding of the issues and the applicable rules and some effort to work through the analysis.[81]

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[78] Linda H. Edwards, *A Writing Life,* 61 MERCER L. REV. 867, 891 (2010) (quoting Jill Ramsfield, Professor of Law and Director of the Legal Research and Writing Program at the University of Hawai'i).

[79] *See, e.g.,* CHARLES R. CALLEROS, LEGAL METHOD AND WRITING 10 (6th ed. 2011); JOHN C. DERNBACH ET AL., A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD 212–13 (4th ed. 2010); DIANA V. PRATT, LEGAL WRITING: A SYSTEMATIC APPROACH 212–14 (4th ed. 2004). For example, in his highly respected textbook, Professor Charles Calleros describes "pre-writing" in the first few pages of the book:

> [T]his process of "pre-writing" may take the form of refining the issues that you intend to research, taking your research notes in an organized manner, and developing your analysis of the law as your research proceeds. The most important stage of pre-writing, however, is the process of organizing the points that you wish to express after you have completed your research. If you take this step seriously, you can develop an outline as a means of clarifying your analysis.

CALLEROS, *supra,* at 10. Thus, while recognizing the need to take some steps before beginning to draft, Professor Calleros and most other authors quickly move from the thinking stage directly to outlining, which we believe is part of the writing process itself and not part of pre-writing at all.

[80] CALLEROS, *supra* note 79, at 201–02 (showing outlining as the main part of the pre-writing process); DERNBACH, *supra* note 79, at 213 (encouraging students to start writing as soon as possible); PRATT, *supra* note 79, at 212–14 (including outlining in the pre-writing process).

[81] For example, Professor Pratt's textbook, by its very organization, recognizes that the student must understand cases and statutes (chapters 4 & 5) and must perform the steps of legal analysis (chapter 6) before proceeding to organizing the analysis (chapter 7). PRATT, *supra* note 79, at ix.

From our research and study, it appears that the pre-writing process is too often given short shrift in the legal writing classroom. Legal writing professors can help students become better metacognitive learners by deliberately planning assignments to allow significant time for true pre-writing, which we believe is best defined as "[t]he stage in the legal writing process where the assignment is organized, researched, and *analyzed*."[82] Pre-writing should be a process in itself, consisting of a number of recursive steps: (1) thinking through the analysis; (2) giving oneself the freedom to explore connections between ideas and to speculate about alternative approaches; and (3) accepting that the law is not always going to provide a "right answer" but only a "best answer" under the circumstances and facts of the problem.[83] We need to teach our students that it is okay—and in fact desirable—to spend some time literally or figuratively looking out the window and simply exploring the analytical possibilities broadly before deciding what their written memos should say.

We recognize that there are various exercises that are already used effectively to teach analytical skills to law students.[84] However, we suspect that these exercises are often used in a scattershot way, as opposed to a systematic way that facilitates pre-writing skills. While students might learn something useful from each individual exercise, they struggle to apply what they learn from one exercise to the next slightly more difficult task. Thus, the exercises do not help them marshal their own metacognitive resources as they learn the process of legal analysis. Consequently, when they come to a "bump" in the "analytical road," they often begin to question their ability to use their

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[82] WILLIAM H. PUTMAN, LEGAL ANALYSIS AND WRITING 297 (3d ed. 2009) (emphasis added).

[83] Kirsten K. Davis, *Take the Lime and the Apple and Mix 'Em All Up*, THE SECOND DRAFT, Aug. 2005, at 13, 13 (providing examples of exercises that professors can use early in the semester to teach students that "law school is not about answers but about embracing the ambiguities of the law, analyzing all possibilities that arise in those ambiguities, and making arguments in those zones of uncertainty").

[84] For example, several legal writing professors use a variation of "the fruit exercise" to teach analogy. *See id.* (describing an exercise using students' knowledge about apples, limes, and potatoes to "introduce students to issue analysis, rule synthesis, analogy and distinction, and the hierarchy of authority"); *see also* Lurene Contento, *Back to Basics: Retro Visual Exercises That Promote Active Learning*, THE SECOND DRAFT, Spring 2008, at 5, 5 (describing a "rule scramble" exercise to help students learn to "separate the irrelevant from the relevant and organize rules into a clear, coherent narrative"); Camille Lamar Campbell, *How to Use a Tube Top and a Dress Code to Demystify the Predictive Writing Process and Build a Framework of Hope During the First Weeks of Class*, 48 DUQ. L. REV. 273, 276 (2010) (describing an exercise to "introduce fundamental legal concepts such as stare decisis, the common law process, and the process of predictive legal analysis, in an easily accessible, non-legal context").

new knowledge and skills to get over the bump.[85] By spending more time on the pre-writing process and approaching pre-writing in a more structured way, legal writing professors can help students see the early weeks of legal writing as a time of experimentation and growth as legal analysts and not as a time of frustration and failure as legal writers.

C. Graduated Assignments Emphasizing Process over Product

The current norm in many legal writing programs is to require students to produce a full-scale objective memorandum very early in the first semester. While the complexity of the requirement may vary,[86] the goal of such an assignment, by its very nature, is to communicate legal analysis to a sophisticated legal reader—in other words, the goal is "writing to teach."[87] This lofty goal seems to us to fly in the face of the students' novice status; it asks them to communicate legal analysis to an outside audience before they have had adequate practice in *performing* legal analysis. We believe that a better practice is to graduate the assignments in the first semester to allow students time to pre-write and to draft—to "write to learn"[88]—before we ask them to take any steps toward the production of a full-scale objective memo.

By analogy, when teaching a novice to play tennis, the instructor would not begin by asking her to play a complete match and then telling

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[85] *See* Leah M. Christensen, *Enhancing Law School Success: A Study of Goal Orientations, Academic Achievement and the Declining Self-Efficacy of Our Law Students*, 33 LAW & PSYCHOL. REV. 57, 78 (2009). Christensen explained that many law students can be characterized as "helpless" learners. That is, when they "bumped up against difficulty," they "quickly [began] questioning their ability (and . . . quickly lost hope of future success)." *Id.* at 78. Christensen contrasted these "helpless" learners with goal-oriented learners, who, upon encountering difficulty, "began issuing instructions to themselves on how they could improve their performance." *Id.*

[86] Some are closed while others are open; some are on a single issue while others are multi-issue problems; some involve a statute while others involve only common law, etc.

[87] CALLEROS, *supra* note 79, at 208.

[88] *See* Laurel Currie Oates, *Beyond Communication: Writing as a Means of Learning*, 6 LEGAL WRITING: J. LEGAL WRITING INST. 1, 20–22 (2000). As originally conceived, the "writing to learn" theory assumed:

> [W]riting is a unique mode of learning because some of its underlying strategies promote learning in ways that other forms of communication do not. For example, unlike talking, listening, or reading, writing is, almost simultaneously, enactive (we learn by doing), iconic (we learn by depiction in an image), and representational or symbolic (we learn by restatement in words). . . .
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> . . . Moreover, writing is self-paced; it "allows for—indeed, encourages—the shuttling among past, present, and future," a process which, through analysis and synthesis, results in the production of meaning.

Id. at 2–3 (quoting Janet Emig, *Writing as a Mode of Learning*, 28 C. COMPOSITION & COMM. 122, 127 (1977)).

her everything she did wrong. He would begin by teaching her the most basic skills of the sport—how to hold the racquet, where to stand on the court, how to prepare for a forehand return, how to toss the ball for a serve, etc. To help her learn the basics of a forehand return, he would have her hit ball after ball after ball. And he would recognize that even after several lessons, she will not be ready to play a game of tennis, let alone a match. Asking a first-year law student to write a complete objective memo after only a few weeks of instruction seems to us to be like asking a novice tennis player to play a match in the U.S. Open.

Our counterparts in the medical school setting have seemingly recognized the need for novice students to progress through increasingly complex stages as they move toward application of their new skills. Medical schools therefore use the familiar "see one, do one, teach one" method.[89] This method for acquiring medical skills is "'based on a three-step process: visualize, perform and [demonstrate].'"[90] Students are first *shown how* to perform a skill correctly, then they *practice* doing the skill themselves, and only then are they asked to *teach* the skill to another student. For example, medical students would watch someone put on a splint, then practice putting on a splint, and finally teach a fellow student how to put on a splint.[91] This model works well for "educating professionals in settings where theory and skill necessarily coincide."[92]

A recent article explores the advantages of introducing the "see one, do one, teach one" model into the legal classroom.[93] The authors posit that this model could help law schools transform their curricula and better prepare students to enter law practice.[94] Specifically, they suggest that law professors use examples more effectively (the "see one"), assign in-class writing or drafting exercises (the "do one"), and use guided, peer review sessions (the "teach one") to reinforce students' learning.[95]

We agree that each of these strategies—using examples, writing in class, and peer reviewing—can serve law students well, but in the first few weeks of law school, they may be premature. Just as medical students must know the basics of anatomy and physiology before they can learn from "seeing one" (an arm being splinted properly, for example), beginning legal writers must know the basics of legal analysis

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[89] Christine N. Coughlin et al., *See One, Do One, Teach One: Dissecting the Use of Medical Education's Signature Pedagogy in the Law School Curriculum*, 26 GA. ST. U. L. REV. 361, 362 (2010).

[90] *Id.* at 363; *see also* JOSEPH SEGEN, CONCISE DICTIONARY OF MODERN MEDICINE 604 (2006).

[91] Coughlin et al., *supra* note 89, at 363.

[92] *Id.* Surely this is applicable to the legal profession.

[93] *Id.* at 378.

[94] *Id.*

[95] *Id.* at 379–80, 395–96, 404–05.

before they can learn from "seeing one" (a well-written example memo). In fact, we think that the most beneficial approach to early legal writing would actually be "do many, see some, and [only then] teach one." Under this approach, "do many" means practicing the steps of legal analysis over and over, with no intended audience other than the student himself. "See some" means using example memos specifically to illustrate the *process* the authors used in developing their analyses, emphasizing that the analyses in the examples cannot serve as a "template" for future assignments. "Teach one"—which should not occur until well into the semester, when the law student is a more skilled analyst—means writing a full objective memo to communicate an original analysis to an educated legal reader.

Delaying the assignment of a full-scale objective memo is necessary, we think, because of the complexity of the task. This complexity has been captured by Laurel Currie Oates, a leading scholar and teacher in the legal writing field, who wrote,

> The structure of memos and briefs forces students to think in a particular way. Students learn to set out the rules first, examples of how those rules have been applied in other cases second, the arguments third, and their conclusion last. In addition, in writing the memo, students are forced to assume a number of different roles. In setting out the rules and cases, they act as a reporter; in determining what each side is likely to argue, they act as an analyst; in predicting how the court is likely to rule, they engage in evaluation; and in advising the attorney about the next step, they become a strategist. In each instance, instead of simply telling what they know, the students are being required to monitor their comprehension, assess the importance of various pieces of information, recognize structures, and make connections between pieces of new information and between new information and previously acquired knowledge, all of which are acts that can result in knowledge transformation.[96]

In light of the complexity of this task, asking our students to write an objective memo in the first two months of law school when they are not yet skilled at reading and understanding cases, at identifying and articulating rules, or at analyzing how rules apply to new fact patterns, may unwittingly set them up for disappointment and perhaps even failure.[97] We believe that early writing assignments should be for the students' own benefit, to help them learn the process of legal analysis. Students should not have to worry in the first weeks of a legal writing course about how to communicate their analysis to an outside reader. Put another way, the intended audience of our students' early work should be the students themselves.

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[96] Oates, *supra* note 88, at 21–22.

[97] *See supra* note 15 and accompanying text.

For example, one early exercise might focus strictly on issue formulation. We use just such an exercise as an early, in-class collaboration exercise. Students are given a fictional statute. The statute uses some legalese but may be paraphrased as follows: "It is illegal for a vehicle such as an automobile to go through a red light."[98] We then pose a hypothetical in which, as a case of first impression, a bicycle-rider has been ticketed for running a red light, and we ask students to identify the issue. The seasoned lawyer would immediately recognize that the issue is whether the statute applies to bicycles, which depends, of course, on whether a bicycle is "a vehicle such as an automobile." However, it usually takes our novice students an entire class period to arrive at this fairly straightforward issue. We then build on this exercise by giving students a series of similar problems and simply asking them to write the issues.[99] Then later, after the objective memo is introduced, we build on this exercise by teaching students that when communicating a specific issue to a reader, they should add key facts (such as how many wheels the bicycle has, etc.) to make the issue more useful and understandable to the reader.

Likewise, we should allow time in our course schedule for students to work specifically on rule formulation—not in the context of a particular memo assignment, but in a broader sense. For example, we build on the issue formulation exercise by giving students two, short, fictional cases—one about a moped and one about a toy scooter—and asking them to formulate the rules of each case.[100] The rules in these fictional cases are not complex (e.g., "The child's toy scooter is not a vehicle such as an automobile because . . . ."). Yet we find it is difficult for students to articulate even these carefully crafted, deliberately simplified rules from deliberately simplified cases.

Many legal writing professors are likely already using exercises like these in the early weeks of the first semester; however, we suspect that many of us are spending too little time on these individual components before assigning a full-scale memo. For example, after just two weeks of legal writing instruction, we had typically asked our students to write a complete objective memo—Issue, Short Answer, Statement of Facts, Discussion, and Conclusion—analyzing whether a Segway® is a vehicle

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[98] The fictional statute is cited in two fictional cases the students have been given to use in assignments throughout the semester. *See infra* note 101.

[99] Assignments such as this one could easily be done as "pair and share" assignments for peer learning in class. For example, after working through how to formulate the bicycle issue, the students could work together to formulate similar issues about airplanes or baby carriages or motorized wheelchairs. These exercises would not require grading or even reviewing by the professor, but would provide excellent pre-writing tools for a formal memo assignment about yet another type of conveyance.

[100] *See infra* note 101.

such as an automobile and using the two simple cases as precedent.[101] This had required us to introduce our students to the IRAC[102] structure, as well as to legal citation and legal writing style—all without a thorough foundation in the process of legal analysis.[103]

This fall, on the other hand, we structured our courses so that for at least the first half of the semester, our students did not have to submit any writing in memo format.[104] In fact, we did not make any writing assignments (other than case briefs) until we had spent more than two weeks discussing rule identification and practicing both rule-based reasoning and analogical reasoning.[105] In the first writing assignment, we asked students simply to write down the steps they went through in analyzing the legal issue presented in the assignment.[106] We did not specify any particular format, so some students used a bullet format, others an outline format, and still others a narrative format. This allowed them to focus solely on the analytical process without having to worry about the writing style or format that an outside reader would expect.

We were then able to effectively introduce the memo format using the analysis that our students had just written. We drafted a sample memo, and we talked with our students about how *communicating* the analysis to an outside reader differed from *conducting* the analysis.[107] Our students thus learned the distinction between writing to learn and

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[101] Assignment 1, Legal Analysis, Writing, and Research, Wake Forest Univ. Sch. of Law (Aug. 2010) (on file with authors).

[102] *See* Felsenburg & Graham, *supra* note 1, at 258 n.61 (explaining the structural paradigm of IRAC (and its variants) and its use as a legal writing model); *see also* BARRY FRIEDMAN & JOHN C.P. GOLDBERG, OPEN BOOK: SUCCEEDING ON EXAMS FROM THE FIRST DAY OF LAW SCHOOL 26–33 (2011) (offering a helpful explanation of the IRAC framework for analysis to beginning law students).

[103] The IRAC/CRAC paradigm is useful when students are ready to communicate legal analysis to a legal reader, but it can be a hindrance to learning basic analysis if it is introduced too early:

> Because most students see CREAC and its ilk as a formula they can plug in to write a memo, they fail to see the big picture of what is required for sound, lawyerly analysis. Students then fail to understand that "legal reasoning is a dynamic, iterative process which must be adapted to the needs of a particular legal problem." They also fail to understand that "legal reasoning involves the structured manipulation and utilization of information, not the information itself."

Venter, *supra* note 49, at 624–25 (quoting Kevin H. Smith, *Practical Jurisprudence: Deconstructing and Synthesizing the Art and Science of Thinking Like a Lawyer*, 29 U. MEM. L. REV. 1, 2 (1998)).

[104] Syllabus for Legal Analysis, Writing, & Research at Wake Forest Univ. Sch. of Law (Fall 2011) (on file with authors).

[105] *Id.*

[106] *Id.*

[107] *Id.*

writing to communicate.[108] Our students' first actual writing for an outside reader was not due until about seven weeks into the semester,[109] and we did see better results on that assignment, as compared to previous years' assignments, for having allowed them to focus primarily on analysis for the first few weeks. Our approach is just one example of how early assignments could be redesigned to give novice legal writers more time to develop as legal learners.

CONCLUSION

In this Article, we have urged legal writing professors to take a more deliberate approach to their early writing instruction in three ways: (1) by setting and communicating clearer, more realistic goals regarding our students' early progress; (2) by deliberately encouraging our students to use their metacognitive skills, especially at the pre-writing stage; and (3) by slowing down the pace of early assignments to allow students to become familiar with and practice legal analysis without the pressure of producing a finished memo intended to educate a sophisticated legal reader. We believe that each of these strategies will help our students reshape their understanding of the foundation of legal education by focusing them on the *process* of legal analysis rather than on the resulting written *product*. By avoiding the temptation to ask first-year law students to do "too much too soon," we can help them avoid the seemingly inevitable and damaging loss of self-confidence that affects so many of them, thus giving our students the "better beginning" they need.

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[108] Oates, *supra* note 88, at 1.

[109] And that was only the discussion section; not until the final assignment of the semester, due in mid-November, were students asked to follow full memo format. Fall 2011 Syllabus for Legal Analysis, Writing, & Research, *supra* note 104.

COMMEMORATIVE ADDRESS: CELEBRATING TWENTY-FIVE YEARS OF GOD'S FAITHFULNESS†

*Dean Jeffrey A. Brauch**

The year was 1986. Ronald Reagan was President. William Rehnquist became the Chief Justice of the United States. The dictator of the Philippines, Ferdinand Marcos, fled the country after twenty years of rule. There were some disturbing events that year, too. The Iran-Contra affair came to light, and, almost as disturbing, the Chicago Bears won the Super Bowl. Nineteen eighty-six was a huge year in the world of entertainment. Some of you may remember these movies coming out that year: *Top Gun* and *Ferris Bueller's Day Off*. Bobby Ewing came out of the shower alive, which meant that the prior season of the nation's top television show, *Dallas,* had all been a dream. The advertising campaign, "Pork, the other white meat," went viral that year. Of course, nothing literally went "viral" back then, but this was big in 1986.

More important for eternity, however, was that this law school first opened its doors in Virginia Beach in 1986. As Associate Dean Doug Cook and Judge Teresa Hammons have already shared this morning, the school opened its doors, but in many ways it was a continuation of a vision of the law school that began at Oral Roberts University before continuing here at Regent University.

Now, those of you who were here at that time or who know much about the early history of Regent Law School understand that the school was originally met with some skepticism. There were some who said, "There is no way you can have a Christian law school or at least a Christian law school that takes its faith seriously." "There is no way you are going to get it accredited by the American Bar Association." "You may have a Sunday school with a little smattering of the law, but there is no way that you are going to have excellence in that law school. You cannot recruit a top-notch faculty. You cannot have academic freedom. You simply cannot have what is needed for a Christian law school to be outstanding."

Here we are twenty-five years later, and I want to tell you that not only are we approved by the American Bar Association ("ABA"), but we have accomplished much more than that. We now have one of the

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highest bar passage rates in the Commonwealth of Virginia. We have an alumnus who is the governor of Virginia. We have nineteen alumni who are currently serving as judges and twenty-three who have served as judges overall. Regent graduates have won national ABA moot court and negotiation championships.

I want to assure you that it is possible for a law school to be thoroughly excellent and thoroughly Christian. And I want to join Judge Hammons in saying, "Praise God for His faithfulness." None of this would have happened but for the Lord and His call on the lives of the individuals who have come to study, to teach, and to serve at this law school. We are going to celebrate a lot of people throughout this day. We are also going to celebrate some milestone events that have taken place in the last twenty-five years. But we must not forget that all the glory goes to God for what has taken place in this law school.

I have the blessing to share a few thoughts this morning about where, by God's grace, we have come in the past twenty-five years as a law school and a few thoughts about where we may be going. I want to start with what I consider to be the unchanging foundation of this school. There are three commitments that I want you—especially those of you who came early in the history of this school—to know have not changed here. They have not wavered in the last twenty-five years at this law school, and by God's grace they never will.

The first commitment is to the mission of the law school, which has not changed since its earliest days at Oral Roberts University, to 1986, to today.[1] We believe that God has called men and women into the practice of law to serve Him as ministers of justice. Yes, like He calls pastors, missionaries, and others to go into specific fields of endeavor, He calls lawyers to serve Him as ministers of justice and, we believe, to serve in a certain way. They are to be outstanding. They are to be top-notch in what they do, but they are also to be men and women of

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[1] Over the years, the unique vision of this law school has been recorded and reflected upon in historic editions of the school's scholarly publications. In the first volume of the *Journal of Christian Jurisprudence*, Dean Charles A. Kothe described the founding and mission of the O.W. Coburn School of Law at Oral Roberts University. *See* Charles A. Kothe, *Preface*, 1 J. CHRISTIAN JURIS. 1, 1–3 (1980). As Dean Kothe explained in 1980, the vision from the very beginning was for "[n]ot just another law school" but one that would train students to "not only become technically competent lawyers with high ethical values but to learn how to integrate their Christian faith into their chosen profession." *Id.* at 1–2. Several years later, when the law school transferred to Virginia Beach, Virginia, Dean Herbert W. Titus made it clear that although the physical location of the law school had changed, the law school's mission remained true to its original purpose. *See* Herbert W. Titus, *Preface*, 6 J. CHRISTIAN JURIS. xvii, xvii–xviii (1987). Even when the law school's name was changed in the early 1990s to Regent University School of Law, the school again did not deviate from its unique philosophical premise of legal education grounded in biblical foundations. *See* Edwin Meese III, *Introduction*, 1 REGENT U. L. REV. 1, 2 (1991).

integrity, courage, and honor, who use their legal abilities to serve others.

Maybe you were like me listening to our 1988 alumnus, Judge Hammons, and to current first-year Regent law student, Leah Cornett, and thinking, "How amazing! How similar those stories are of the direct call of God to come here." Stories like theirs are told every year. Those stories could have been told five years ago, or ten, or twenty, or even twenty-five years ago, because God is calling men and women to serve Him as lawyers and to be equipped for that task here. I will tell you how I first met Leah. I was spending time with a group of students who had served as part of a community service day in the Hampton Roads area. At the end of the community service in the morning, we sat down and ate pizza together under the trees here on campus. There was a group of about seven or eight of us, and somehow we started talking about how we each ended up at this law school. I was overwhelmed when I heard how God had brought these men and women here. Years ago, I had mistakenly told someone, "You know, I hope we get to the place someday where we stop hearing these quirky stories about how people come to Regent. I want people to know about this law school. Every Christian pre-law student ought to know about this place." But now, I praise God for the quirky stories, for the God-ordained stories, and for the men and women who are called here through them.

In carrying out our mission, if God is calling people here, we need to train them with excellence and to thoroughly integrate faith and law into our curriculum. As part of our unchanging mission, we believe that God's Word contains eternal principles of truth that speak to the law—what the law should look like and how one is to practice law.[2] For those who may be at all worried about whether we have veered from that foundational principle, I want to encourage you that we do not take this for granted. Indeed, we now have a training course for new faculty members who come to this school. When new professors start teaching at Regent, we do not just assume that they will do some biblical integration down the road. Instead, we train them using encouragement and examples from existing professors to ensure that we abide by these foundational principles for years to come, for the whole future of this law school.

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[2] *See* Kothe, *supra* note 1, at 3 ("We are committed to an educational philosophy that places God at the heart of our curriculum."); Titus, *supra* note 1, at xvii ("[T]he law school curriculum rests upon a Biblical foundation. That foundation presupposes that God, the Creator of the Universe, impressed upon His creation an objective legal order that man is bound to obey. The study of law, therefore, involves the discovery of the principles of law, the communication of those principles, and the application of them to all of life. This view of law is the one espoused by the great common law scholars from Bracton to Blackstone.").

The second commitment that has not changed and must not change is our commitment to excellence.[3] When I first came here to interview for a teaching job, I remember reading about the school from a prospectus that there were four red brick buildings on campus. So I was sort of picturing my old high school back in Waunakee, Wisconsin. As you might guess, I was pleasantly surprised when I arrived here on campus. What the buildings said to me was that Dr. Robertson, the trustees, and the founders of this university had decided that they were going to build a university that would last, where even the buildings in the way they are designed would communicate that things were to be done in the best way they possibly could be done. I have been so encouraged by how that principle has played out in the time I have been here—how one can see excellence in this school.

I am supremely thankful for my faculty colleagues. Every year we conduct exit interviews with those who are graduating from the law school about their experiences. The number one thing graduates love about this school, no matter what year, is the teaching of the faculty. They consistently report that the faculty teaches with excellence. I previously mentioned Regent's high bar passage rate. There was a time in the school's history when we did not talk much about the bar passage rate. Increasingly it became a major goal, and last year, our bar passage rate was 85.7% in Virginia and 87.2% nation-wide.[4]

I am praising God for what He has done in our programs and among our graduates who have gone out into law practice. You may know about our various championships: our moot court championships, our trial practice championships, and our negotiation championships. I was thinking back this morning before coming today about a conversation I had with one young man on one of our negotiation teams. His team won the ABA regional competition a couple of years ago and then advanced to the national competition. The team finished in the top eight but did not reach the finals. When he got back, I said, "Fantastic job! Congratulations!" but to my surprise he looked devastated. As I was talking with him, I realized that he fully expected to win that competition. Of course, he was thankful for how God had blessed the team and how well they had done, but I will tell you, he is not alone at

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[3] When United States Supreme Court Justice Byron R. White delivered his dedicatory address celebrating the opening of the O.W. Coburn School of Law in the fall of 1979, the Justice commented on his belief that this law school would be set apart by its commitment to excellence: "'Any law school in [any one] of a thousand ways can develop an excellent and special character of its own and I know that this law school plans to do exactly that.'" Kothe, *supra* note 1, at 1–2.

[4] *Regent's Bar Passage Rates: 85.7% in Virginia and 87.2% Nationwide*, REGENT L. NEWS BLOG (June 28, 2011), http://regentlawnews.blogspot.com/2011/06/regents-bar-passage-rates-857-in.html.

Regent in his high expectations. When we send out teams now, they expect to win. They go out, and they expect to win through the power of God. Now, they may not win every time, but I would put our moot court, negotiation, and trial practice programs up against any programs in the country. I want to praise God for what He has done in those programs through the years. That is the second commitment: excellence.

The third commitment that has not changed and must not change at this law school is a heart to serve other people.[5] The law school's motto is: "Law is more than a profession. It's a calling." I really do not have to say much more than what Leah and Judge Hammons have already said about this principle. I am so proud of our alumni and what they have accomplished upon leaving this school. Some have gone into public service; some are serving in very high-profile places and are doing amazing things.

Still, some of you may be sitting here thinking, "I know we were supposed to be 'Christian Leaders to Change the World,' but I do not feel like a world-changer. I just have a traditional law practice. I do criminal defense work. I do family law. I work with people in bankruptcy. I am not changing the world." Yes, you are. I talk with many alumni and hear your stories about clients who are facing family crises or financial crises. These clients come to you with their lives in chaos, and you are not only giving them great legal advice, but equally important, you are also giving them spiritual advice. You are giving them business advice. You are giving them family counsel. You are talking to them as real people with real-life challenges. You are dealing with their problems from a Christian perspective. I want you to know that you are changing the world. You are changing the world one client at a time. I am so thankful for what you as our alumni are doing and for the services you are providing in our communities. Service to others is the third foundational commitment that must never change at this law school.

Now, that is not to say there have been no changes at the law school since its beginning. For one thing, every class has its uniqueness. The 1989 class came as a class of pioneers, just as Judge Hammons's 1988 class came as a class of pioneers. The 1989 class, though, had a particular activity that united them—a rather unusual class project, to sue the ABA. They lost that suit, but many of us believe that the

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[5] Oral Roberts, the visionary of the law school, once captured the school's mission in these remarks: "Law is basic to life. And whether laws are God's or man's, I believe they have a common purpose—to make man whole, to bring us together, and to give order and unity to our lives." Kothe, *supra* note 1, at 2. In the first volume of the *Journal of Christian Jurisprudence*, Dean Kothe likewise commented on the law school's goal of raising up students who have a heart to serve others through the legal profession: "Our first goal at the O.W. Coburn School of Law is to equip our students with the ability to bring God's healing power to reconcile individuals and to restore community wholeness." *Id.*

pressure and scrutiny that were put on the ABA helped to bring provisional accreditation very shortly afterward. On a lighter historical note, the 1997 class welcomed the "Weinermobile" to campus, which was awesome in its own right. Many in the class of 2004 did not see the Janet Jackson Super Bowl wardrobe malfunction because they were in the Atlantic Ocean at the time as part of the "February Freeze." I must confess that I—in a less than sane moment—may have joined in that event. The 2009 class had the "Best Section Ever" and drafted the now-infamous petition to bring Internet access into the classroom. The '09 class then had the gall, as a class prank, to send an e-mail to 1Ls during their exam period stating that they had gone to the administration and said, "We were wrong. Take out the Internet access and remove it for all future classes." The class of 2009, a class I love deeply.

I would say there are two major changes that have occurred since the founding of this school. First, I think that we are doing more clinical education and more hands-on experiential learning than we have ever done before. We have always had great trial practice training, negotiation training, and appellate advocacy training, but we also now have a legal clinic that is doing great work to help men and women who are impoverished or just struggling with life's challenges. We also have outstanding practicums. Professor Randy Singer, one of the great civil litigators in our area, offers a civil litigation practicum in which our students can work and learn alongside him in his practice. We have a practicum with Professor Bruce Cameron on labor law. This spring, we will have a practicum on immigration law in which students will work alongside alumnus Hugo Valverde on asylum cases, helping to bring people to the United States who have been persecuted for their faith overseas. It has been encouraging to see the amount of hands-on opportunities that our students have available to them.

The second major change is the growth in our international programs. It has become obvious that when God led our leaders to the university's motto: "Christian Leadership to Change the World," He did not mean just America. He meant the entire world. And so today, if you are a student at this law school, you have a chance to spend a summer abroad in Strasbourg, France or Israel. You have the opportunity to do an entire semester abroad in China, Korea, or Spain. We have also started a Center for Global Justice. If you talk with today's students, you will discover that many of them have come to this law school because they want to make a difference in the lives of the oppressed, the abused, and the enslaved around the world. God is opening doors for them to be equipped for that work through studying here at Regent.

So, as we look toward the next twenty-five years, I want to share with you, as alumni, where we are headed and two ways we need your help. The first relates to the Center for Global Justice that I just

mentioned. I encourage you to talk with our current students while you are here today. Why did they come to this school? What is God putting on their hearts? So many of them have heard about the number of women and children who are bought and sold today, about the tens of millions of children who are left without parents, and about the thousands of children who are used as soldiers in Africa. Our students hear about those things, and they are motivated not only to pray or to make a financial gift, but to go and do. And so, the Center for Global Justice is our effort to equip these men and women to do this work that has the power to change the lives of men and women all around the world.

Faculty members are also going to be very involved in the work of the Center. We have been contacted by several universities in Africa who want to start Christian law schools. They know that the biggest challenges they face are the shortcomings in applying the rule of law. Their governments struggle with corruption. They lack transparency. Appropriate laws may exist, but they are not being enforced. One of the responses is to train leaders for the next generation in Africa. I think that this school should come alongside to support those who want to start Christian law schools. We already have faculty members who are ready to go, to begin some of the training, to assist them in starting schools like Regent in Africa, to train men and women who will bring a Christian perspective and the rule of law to their countries. But there are only twenty-eight of us on the faculty. If we are going to come alongside schools there and to do training there, we are going to need alumni to join us. I want you to think about legal mission trips in the years to come, faculty and alumni together. I believe God is going to open doors and lead in that direction.

Second, you may have heard that there is much discussion today about legal education—what is working and what is not working. An extensive study done in 2007 by the Carnegie Foundation essentially reported that legal education is great in certain ways.[6] It teaches students to think analytically—to think like a lawyer—and it teaches them a lot about the substantive law.[7] But Carnegie also concluded that law schools were not doing other things well. As a whole, we are not training students very well in lawyering skills, and we are not training them in what the Carnegie report calls "professional identity."[8]

What are lawyers about? What is their purpose? What is the profession meant to do? Is it just to serve ourselves? Is it just a business?

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[6] WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007).

[7] *Id.* at 185–86.

[8] *Id.* at 126–28.

Or, is there a moral basis and a purpose for the law? Some of our faculty members, like Professor Ben Madison and Associate Dean Natt Gantt, are taking the lead in responding to Carnegie's professional identity challenge. They are able to present the legal academy with elements of the Regent Model where the training does not just involve academics, but also emphasizes skills training and above all character training. As I evaluate our training in this area, we have done a good job of integrating faith into the substance of the law that we teach, but we need to go even further in integrating faith into day-to-day practice for Christian lawyers. We are going to be spending more time on this issue as professors. But we need you, our alumni, to be involved. You are on the ground. You are making decisions every day about how your faith applies to the day-to-day work of Christian lawyers. This needs to be a partnership between Regent alumni and professors as we move forward in this area.

I hope you are encouraged. I know I am. Every day I come to work, and although this job has its share of challenges and struggles like any other job, I look around as Dean and think, "Thank you God for bringing me here. Thank you God for bringing these students that I am honored to teach, spend time with, encourage, and be encouraged by." I want you to be encouraged today. Thank you very much.

CULTURE OF THE FUTURE: ADAPTING COPYRIGHT LAW TO ACCOMMODATE FAN-MADE DERIVATIVE WORKS IN THE TWENTY-FIRST CENTURY*

ABSTRACT

Fan-made derivative works based on works of popular culture have a growing importance in twenty-first century culture, and in fact represent the rebirth of popular folk culture in America after a century of being submerged beneath commercial mass-media cultural products. The Internet has enabled what scholar Lawrence Lessig calls a "read/write"[1] culture where ordinary Internet users are empowered to become active creators of culture rather than mere passive consumers. Yet, if this exciting trend is to continue, the copyright laws of the twentieth century must adapt to accommodate the possibilities of the twenty-first.

This Note describes the importance of amateur, fan-made derivative works in the new folk culture of the twenty-first century and demonstrates how this culture is under attack by the creators of the popular works to which it pays tribute. It describes how overreaching copyright claims by media companies cast a considerable chilling effect on vibrant new art forms such as fan fiction, fan-made videos, and virtual worlds. Finally, this Note argues that the Copyright Act[2] must be amended to (1) explicitly clarify that non-commercial, transformative works are fair use, (2) ban the use of the Digital Millennium Copyright Act ("DMCA")[3] takedown process and automated copyright filters to block this type of content, and (3) provide real penalties to deter copyright owners from abusing copyright law to suppress legitimate, follow-on creativity.

INTRODUCTION

> You must imagine, at the eventual heart of things to come, linked or integrated systems or networks of computers capable of storing faithful simulacra of the entire treasure of the accumulated knowledge and artistic production of past ages, and of taking into the store new

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* Winner of the fourth annual Chief Justice Leroy Rountree Hassell, Sr. Writing Competition, hosted by the Regent University Law Review.

1 LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 28 n.* (2008) ("The analogy is to the permissions that might attach to a particular file on a computer. If the user has 'RW' permissions, then he is allowed to both read the file and make changes to it. If he has 'Read/Only' permissions, he is allowed only to read the file.").

2 17 U.S.C. §§ 102–1332 (2006).

3 Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified at 17 U.S.C. §§ 512, 1201–1205, 1301–1332 (2006)).

> intelligence of all sorts as produced. The systems will have a prodigious capacity for manipulating the store in useful ways, for selecting portions of it upon call and transmitting them to any distance . . . . Lasers, microwave channels, satellites . . . and, no doubt, many devices now unnamable, will operate as ganglions to extend the reach of the systems to the ultimate users as well as to provide a copious array of additional services.[4]

These words, originally written by Judge Benjamin Kaplan in 1967, were some of the most prescient predictions of the present-day Internet, made almost thirty years before it became a reality. Today, the global computer network that Kaplan called his "own bedtime story or pipedream"[5] has not only become real, but over a period of a mere fifteen years has become integrated at the very heart of modern American society.[6] The Internet is now a crucial part of business, commerce, government, art, science, literature, and personal interaction—such that it is hard to imagine how we ever lived without it only twenty years ago. Nevertheless, there is one final barrier that is preventing the Internet from achieving its true potential to revolutionize our culture.

Copyright law, which once served to promote new forms of cultural production, has now become a hindrance to them, as the law has failed to adapt[7] to a new culture built on precisely what copyright forbids—the easy and unlimited copying of information. The new breed of amateur creators born of this culture does not need copyright to "incentivize" their production of creative works. They do it for the pure joy of creating something that will be seen and appreciated by potentially millions of people around the globe.

Nowhere is this truer than in the world of fan-made, "follow-on" creativity—creative works based on popular cultural phenomena like books, movies, and television shows.[8] Despite the tremendous new forms

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[4] BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 119 (photo. reprint 2008) (1967).

[5] *Id.*

[6] Steve Almasy, *The Internet transforms modern life*, CNN (Oct. 10, 2005), http://articles.cnn.com/2005-06-23/tech/evolution.main_1_netscape-browser-world-wide web?_s=PM:TECH.

[7] *See* LESSIG, *supra* note 1, at 253.

[8] I use the term "fan-made media" to encompass a wide variety of amateur derivative works, which are "based on an identifiable segment of popular culture, such as a television show, and [are] not produced as 'professional' writing." Rebecca Tushnet, *Legal Fictions: Copyright, Fan Fiction, and a New Common Law*, 17 LOY. L.A. ENT. L.J. 651, 655 (1997) (defining "fan fiction"). While my definition encompasses Tushnet's definition of "fan fiction," it is considerably broader as it includes fan-made works in numerous media forms, not just written text. Neither is it limited to works of fiction, but also includes "remixes" of popular works such as mashups and parodies, as well as interactive adaptations of popular culture such as virtual worlds.

of creativity the Internet has enabled, the copyright laws of the pre-Internet age are threatening to stifle that creativity, as large corporate copyright holders are increasingly insensitive to the desires of fans to interact with popular culture by basing their own creations upon it.[9] As a result, the current reality of online practice is vastly out of step with the law, and sooner or later the law must adapt to changing cultural norms.

This Note argues that current copyright laws are ill-suited to deal with the challenges of amateur, follow-on creativity based on popular copyrighted works, which is likely to become an increasingly important part of American culture in the twenty-first century. It will argue instead for the creation of new laws specifically designed to deal with this form of cultural creation, which must, at a minimum, involve strong protections for amateur creativity and penalties for major media companies that fail to respect it.

I. THE GOALS OF COPYRIGHT AND THE ROLE OF FAN-MADE WORKS IN TWENTY-FIRST CENTURY FOLK CULTURE

The Copyright Clause of the U.S. Constitution declares that Congress shall have the power "*[t]o promote the Progress of Science and useful Arts*, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[10] Taken together, the protections authorized by this clause of the Constitution are intended to promote the "progress" of literature, art, and science in our society.[11] In other words, the purpose of copyright is to promote the growth of culture.[12] Every proposed system of copyright protection must keep this goal in mind and should be evaluated based on whether the system in question promotes or hinders cultural development.

We live in a time of great cultural change, brought about by the advent of revolutionary new technologies that are transforming our society at a faster rate than ever before. One of the most important cultural developments that has resulted from these new technologies is the emergence of a participatory culture of "user-generated media"[13] on

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[9] *See id.* at 653.

[10] U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

[11] *See* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 146 (1989) ("The Patent Clause itself reflects a balance between the need to encourage innovation and the avoidance of monopolies which stifle competition without any concomitant advance in the 'Progress of Science and useful Arts.'").

[12] *See* LESSIG, *supra* note 1, at xvi.

[13] HENRY JENKINS, CONVERGENCE CULTURE: WHERE OLD AND NEW MEDIA COLLIDE 334 (2006) (defining user-generated content as "[a]n industry term used to refer to content submitted by consumers, often in a context where the company asserts ownership over and makes a profit upon content freely contributed by its 'community.'").

the Internet.[14] This trend is at last reversing one of the most pernicious consequences of twentieth-century media technologies—the suppression of amateur "folk" culture in favor of mass-market, corporate culture.[15]

During the nineteenth century, popular culture was much more participatory and democratic in the sense that nearly everyone could be involved in cultural production.[16] With the advent of twentieth-century, mass-media technologies, however, this tradition of amateur culture began to change. Cultural production came to be dominated by a series of large media conglomerates that churned out cultural works through an industrialized process not unlike the manufacturing of cars or furniture.[17] Only corporations could secure the tools and resources necessary to produce cultural works, which were simply too expensive for ordinary people to afford.[18] Culture shifted from a bottom-up tradition of amateur folk culture to a top-down, professionalized system with a strict dichotomy between cultural "producers" and "consumers."[19]

Composer John Philip Sousa anticipated this change when observing the cultural impact of the first phonographs, fearing that they would turn Americans into mere passive consumers of culture, undermining the people's direct connection and involvement with music.[20] As Sousa stated, *"[T]he tide of amateurism cannot but recede*, until there will be left only the mechanical device and the professional executant."[21] Unfortunately, Sousa's prediction largely came true, and popular folk culture was rapidly displaced by commercial mass media.[22] While amateur folk culture still existed, it was largely driven underground and lost nearly all prominence in American life, relegated to small circles of family and friends.[23]

Just as changes in the technology of cultural production and distribution in the early twentieth century almost erased amateur

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[14] *See, e.g., id.* at 167–68 (describing Raph Koster's work for LucasArts on engaging the fan community in the design and creation of the Star Wars universe for his online game).

[15] *Id.* at 139–40 (arguing that mass media displaced American folk culture during the twentieth century but that folk culture has pushed back in the twenty-first).

[16] *Id.* at 139 (noting that in the 1800s, "[c]ultural production occurred mostly on the grassroots level" and that even emerging forms of commercialized entertainment "competed with thriving local traditions of barn dances, church sings, quilting bees, and campfire stories.").

[17] *See id.*

[18] *See id.*

[19] *Id.* at 139–40.

[20] LESSIG, *supra* note 1, at 25.

[21] *Id.* at 26 (alteration in original) (quoting John Philip Sousa, *The Menace of Mechanical Music*, 8 APPLETON'S MAG., July–Dec. 1906, at 278, 281).

[22] *See* JENKINS, *supra* note 13, at 139.

[23] *Id.* at 139–40.

culture, however, technological changes at the beginning of the twenty-first century have reversed that trend. Over the last twenty years, the advent of personal computers and the Internet has brought about a revival of amateur grassroots creativity by once again giving ordinary people access to the tools of cultural production.[24] In what Jenkins calls, "the public reemergence of grassroots creativity,"[25] ordinary Internet users can now easily share a wide variety of amateur content with the public at large though "user-generated media" hubs like YouTube and Flickr, blogging services, and social networking sites like Facebook—greatly contributing to public discourse and dialogue.[26]

With the sudden explosion in user-generated amateur content, a clash between the new folk culture and the traditional mass media was inevitable. That clash came when amateur culture began to appropriate elements of mass culture and incorporate them into its own works.[27] According to Jenkins,

> [I]t should be no surprise that much of what the public creates models itself after, exists in dialogue with, reacts to or against, and/or otherwise repurposes materials drawn from commercial culture. . . . Having buried the old folk culture, this commercial culture becomes the common culture. . . . [T]he modern mass media builds upon borrowings from folk culture; the new convergence culture will be built on borrowings from various media conglomerates.[28]

Nowhere is this conflict more apparent than in the case of "fan-made" media. The Internet has spurred the growth of thousands of fan-based websites and online communities where ardent fans create and share a wide variety of creative works based on popular media, ranging from "fan fiction" in the form of short stories or whole novels, to fan-made films, music videos, and even fan-made virtual worlds and video games.[29] Under current copyright law, all of these forms of creativity are considered "derivative works" of the originals upon which they are based; thus, they are all potentially copyright infringing.[30]

As a result, the entire world of fan-made art exists under a constant cloud of legal ambiguity. Although fan-made works rarely cause any

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[24] *Id.* at 140.

[25] *Id.*

[26] Michael S. Sawyer, *Filters, Fair Use, & Feedback: User-Generated Content Principles and the DMCA*, 24 BERKELEY TECH. L.J., 363, 363–64 (2009).

[27] *See* JENKINS, *supra* note 13, at 141.

[28] *Id.*

[29] *See id.* at 16.

[30] This Note assumes arguendo that fictional characters and settings are copyrightable and that, absent fair use, fan works that incorporate these elements or remix copyrighted video and music satisfy a prima facie case for infringement. *See* Sarah Trombley, *Visions and Revisions: Fanvids and Fair Use*, 25 CARDOZO ARTS & ENT. L.J. 647, 660 (2007).

harm to the market for the original works they are based on,[31] fans frequently find their works threatened by copyright holders and the automated tools they employ in attempting to thwart copyright infringement, which in turn are backed by ambiguous, one-sided copyright laws that inevitably favor large media corporations over private individuals who are not legally trained.[32]

Numerous articles have been written about whether fan-made creations constitute "fair use" under current copyright law, and that attempt to predict how a hypothetical court would rule on the issue.[33] Yet all of this is nothing more than an academic exercise, because no case regarding non-commercial, fan-made media has ever gone to trial, and it is likely that none ever will because, when faced with the overwhelming legal and financial might of modern media empires, individual fan-work creators will inevitably yield.[34] It is a battle they simply cannot win, at least not on their own. Whether fan-made creations are actually legal, copyright law exerts a considerable chilling effect on this valuable new form of cultural creation that must be alleviated if this vibrant new form of cultural expression is to thrive.

II. THE PROBLEM: COPYRIGHT IS STIFLING FOLLOW-ON CREATIVITY BASED ON POPULAR CULTURAL WORKS

A. The Motivation: Consumer Creativity Disrupts the Commercial Mass-Media's Business Model of Top-down, Centralized Control

While the early mass-media culture was able to freely borrow from the pre-existing folk culture without resistance, attempts by the new folk culture to borrow from the mass-media culture have resulted in significant conflict because it is contrary to current copyright regimes and such borrowing is highly disruptive to the traditional business models of modern media empires.[35] Those empires are based on top-down control enabled by copyright rather than bottom-up creativity.[36] As copyright scholar William Patry states, "Copyright owners' extreme reaction to the Internet is based on the role of the Internet in breaking the vertical monopolization business model long favored by the copyright

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[31] Fan-made works are highly unlikely to ever substitute for official works by the original creator; nor do they cause harm to any potential derivative market, as no major media company has shown any interest in licensing for non-commercial amateur use. *See* Tushnet, *supra* note 8, at 672.

[32] *See id.* at 653.

[33] *See, e.g.*, Trombley, *supra* note 30, at 659–60; Tushnet, *supra* note 8, at 664.

[34] JENKINS, *supra* note 13, at 142.

[35] *See* WILLIAM PATRY, MORAL PANICS AND THE COPYRIGHT WARS 5 (2009).

[36] *Id.* at 5–6.

industries."[37] Patry continues, "[T]he copyright industries view the entirety of copyright as unidirectional: the public is a passive participant, whose role is simply to pay copyright owners, or to stop using copyrighted works."[38] In contrast, the amateur culture of the Internet is based on collaboration and is designed to empower people at the periphery (those formerly called "consumers") to become creators themselves, harnessing their creativity to drive innovation and cultural production and rendering vertical monopolization of culture impossible.[39]

This then is the source of the conflict between the two cultures, as they follow completely opposite philosophies. While amateur fan culture has always existed, the Internet makes it available to a mass audience for the first time.[40] This allows it both to directly compete with the commercial culture for people's time spent on entertainment and to influence how people think about mass-media properties. It is therefore not surprising that the traditional mass-media companies would seek to suppress such amateur culture to prevent it from competing with their own products, while simultaneously seeking to control it and to harness it to promote their products and using copyright as their means of control.[41]

Thus far, the media industry's response to fan-made media has been largely confused and inconsistent, as media companies struggle to come to terms with the realities of online fandom.[42] According to Jenkins, mass-media producers have followed a fundamentally conflicted approach to the world of fan culture—simultaneously recognizing the benefits of having a devoted and engaged fan base who will spread the word about their favorite franchises, yet terrified at the prospect of losing control of their media properties and ending up facing wholesale piracy of their works as the recording industry did with Napster.[43]

Jenkins describes two basic camps that have emerged among media producers—the prohibitionists and the collaborators.[44] The prohibitionists view any type of fan creativity built on corporate media properties as dangerous and seek to suppress it at all costs, while collaborators seek to work with active fan communities and harness their enthusiasm to promote their products.[45] As a result, some media companies have simply tried to suppress all types of fan creativity, while

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37 *Id.* at 5.

38 *Id.* at 8.

39 *Id.* at 7.

40 JENKINS, *supra* note 13, at 135–36.

41 *See* PATRY, *supra* note 35, at 10–11.

42 JENKINS, *supra* note 13, at 142.

43 *Id.* at 138.

44 *Id.*

45 *Id.*

others have sought to encourage a limited degree of fan interaction with their properties by keeping it on a short leash and cracking down hard if fan culture veers in undesirable directions.[46]

The consequence of these varying approaches from the fans' perspective has been the creation of a murky gray zone where fans may engage in creativity based on some media properties but not on others and where any fan creator is potentially vulnerable to seemingly arbitrary intervention by copyright holders that can wipe out everything the fan has created.[47] This creates an environment of incredible uncertainty, which is exacerbated by the overwhelming disparity in power between copyright owners and fan creators, who are for the most part wholly ignorant of the limited rights they have under copyright law.[48]

B. The Means: The DMCA Takedown Process and the Dominant Positions of Large Media Companies Allow Easy Censoring of Online Expression with No Accountability or Penalties for Abuse

At the heart of the problem is the notice-and-takedown process established by the DMCA.[49] Under the DMCA, in order to qualify for immunity from secondary liability under the "safe harbor" provision of the act, online service providers that host user-generated content must "respond[] expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity" upon notification by a copyright holder that certain content is alleged to be infringing.[50] The uploader of the allegedly infringing content may then respond with a counter-notification asserting that the content is not infringing, and after counter-notification, the hosting site may restore access to the material "not less than 10, nor more than 14, business days following receipt of the counter notice," unless the hosting site receives notice that the copyright owner has filed a lawsuit seeking an injunction against the alleged infringer.[51]

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[46] *See id.* at 156–59 (discussing Lucasfilm's varying approaches to fan-made media based on the *Star Wars* franchise and its recent attempts to establish its own tightly-controlled online fan communities, by only allowing limited degrees of fan creativity subject to its own rules and conditions).

[47] *See, e.g.*, Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1151–52 (N.D. Cal. 2008) (describing the situation where a woman created a video of her young children dancing in their home to a song by the artist, Prince, and YouTube's subsequent removal of the video).

[48] JENKINS, *supra* note 13, at 172–73.

[49] Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860 (codified at 17 U.S.C. §§ 512, 1201–1205, 1301–1332 (2006)).

[50] 17 U.S.C. § 512(c)(1)(C) (2006).

[51] *Id.* § 512(g)(2)(C).

Functionally, the DMCA takedown process operates as an automatically granted temporary restraining order ("TRO") or preliminary injunction against alleged infringers, which is carried out not by courts, but by private webhosting services.[52] Even though the takedown process has the same effect as a TRO in that web content is disabled pending further action, it has none of the safeguards of judicially granted injunctions, which require courts to consider "(1) the likelihood that plaintiff will prevail on the merits at final hearing; (2) the extent to which plaintiff is being irreparably harmed by the conduct complained of; (3) the extent to which defendant will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest."[53] Under the DMCA, the content is simply taken down immediately upon the mere allegation of infringement with no objective evaluation and no required showing of "irreparable harm."[54] Service providers are then required to keep it offline for a minimum of ten business days (two to three weeks) before it can be restored.[55]

The potential for abuse of such a system is enormous. According to Wendy Seltzer of the Berkman Center for Internet & Society at Harvard Law School, "If this takedown procedure took place through the courts, it would trigger First Amendment scrutiny as a prior restraint—silencing speech before an adjudication of unlawfulness. But because DMCA takedowns are privately administered through service providers, they have not received such constitutional scrutiny despite their high risk of error."[56] Private administration therefore allows the government to accomplish indirectly what it could not accomplish directly in placing a prior restraint on all online speech alleged to infringe copyrights. This raises significant concerns for free speech on the Internet, and baseless DMCA notices have even begun to be used to censor campaign commercials by major political candidates on YouTube with potentially disastrous consequences.[57]

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[52] *See, e.g.*, Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171, 175–76 (2010).

[53] Pappan Enters. v. Hardee's Food Sys., Inc., 143 F.3d 800, 803 (3d Cir. 1998) (citing S & R Corp. v. Jiffy Lube Int'l, Inc., 968 F.2d 371, 374 (3d Cir. 1992) and Opticians Ass'n v. Indep. Opticians, 920 F.2d 187, 191–92 (3d Cir. 1990)).

[54] Seltzer, *supra* note 52, at 173.

[55] 17 U.S.C. § 512(g)(2)(C).

[56] Seltzer, *supra* note 52, at 176.

[57] *See* CTR. FOR DEMOCRACY & TECH., CAMPAIGN TAKEDOWN TROUBLES: HOW MERITLESS COPYRIGHT CLAIMS THREATEN ONLINE POLITICAL SPEECH 4–9 (Sept. 2010), *available at* http://www.cdt.org/files/pdfs/copyright_takedowns.pdf (describing the use of baseless DMCA notices by television networks to take down campaign commercials from YouTube by both major candidates in the 2008 presidential election).

While fan-made speech based on popular fiction may not be as critical to society as political speech by candidates during elections, it is even more vulnerable to baseless takedowns.[58] Unlike political campaigns, legally unsophisticated fans do not have access to legions of experienced attorneys and are often wholly unaware of the principles of fair use or their ability to file a counter-notice and get their content restored. Thus, when a fan-made video is taken down from YouTube, in the vast majority of cases, the uploader will simply accede to the takedown rather than attempt to fight it and risk potentially devastating liability in a copyright lawsuit.[59]

This is even more likely given that, in such situations, copyright owners tend to misrepresent the true nature of copyright protection and "assert much broader control than they could legally defend."[60] As Jenkins observes, in a copyright dispute between a major media company and an ordinary fan creator, "[S]omeone who stands to lose their home or their kid's college funds by going head-to-head with studio attorneys is apt to fold."[61] It is with little wonder that Jenkins further notes, "After three decades of such disputes, there is still no case law that would help determine to what degree fan fiction is protected under fair-use law."[62] Additionally, even though Section 512(f) of the DMCA allows an alleged infringer to collect damages for misrepresentation by a copyright holder that the material was infringing,[63] the naturally disadvantageous position of ordinary Internet users versus large media companies makes it highly unlikely that this provision could ever be effectively used to punish or deter abuse of the takedown process.[64] To date, only one case has ever been brought by a YouTube user under Section 512(f).[65]

Besides formal DMCA notices, corporate copyright holders have another tool at their disposal for blocking online videos that incorporate their content in the form of automated content filters. Sites like YouTube have begun to implement these filters in an attempt to appease copyright holders who regard searching out infringing content and sending takedown notices for every item as too great a burden.[66] Since

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58 Seltzer, *supra* note 52, at 174–75.

59 JENKINS, *supra* note 13, at 142.

60 *Id.*

61 *Id.*

62 *Id.*

63 17 U.S.C. § 512(f) (2006).

64 *See infra* Part III.C.

65 *See* Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1153 (N.D. Cal. 2008).

66 *See* Fred von Lohmann, *YouTube's January Fair Use Massacre,* ELECTRONIC FRONTIER FOUND. (Feb. 3, 2009), https://www.eff.org/deeplinks/2009/01/youtubes-january-fair-use-massacre.

2007, YouTube has implemented its "Content ID" system that scans every video that is uploaded to the site against digital fingerprints of copyrighted files provided by copyright holders.[67] If a video matches the fingerprint, the system automatically applies a policy set by the copyright holder to either "block, track or monetize their content."[68]

If a video is blocked by the Content ID system, users have the option to dispute the match on the basis that the video is (1) misidentified, (2) fair use, or (3) authorized by the copyright owner.[69] While a video is usually immediately restored after a dispute is filed, this triggers review by the copyright holder who may then elect to send a formal DMCA notice and have the video taken down that way, and it also counts as one of three "strikes" against the YouTube user's account that will terminate the account.[70]

Though it is meant to be an easier system than the DMCA takedown process for both copyright owners and YouTube users both to block content and get it restored, the Content ID system provides yet another obstacle for creators of fan-made media and is another tool that large media companies use to indiscriminately block videos that use even the slightest amount of copyrighted content and may very well be fair use.[71] As copyright owners increasingly resort to automated tools such as YouTube's Content ID system or their own systems that send automated DMCA notices, more and more legitimate content is being caught in the takedown net, making these methods for detecting and blocking potentially infringing content a danger to all forms of online speech.[72] As shown below, it is a danger that threatens fan-made media to a disproportionate extent.

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[67] *See id.*; David King, *Latest content ID Tool for YouTube*, THE OFFICIAL GOOGLE BLOG (Oct. 15, 2007, 2:01 PM), http://googleblog.blogspot.com/2007/10/latest-content-id-tool-for-youtube.html.

[68] *What is YouTube's Content ID Tool?*, YOUTUBE, http://www.google.com/support/youtube/bin/answer.py?hl=en&topic=13656&ctx=sibling&answer=83766 (last visited Nov. 27, 2011).

[69] *Learn More About the Dispute Process*, YOUTUBE (on file with author) (non-publically available page generated for videos that are blocked by the Content ID system).

[70] Nate Anderson, *What Fair Use? Three strikes and you're out . . . of YouTube*, ARS TECHNICA (Jan. 15, 2009), http://arstechnica.com/tech-policy/news/2009/01/what-fair-use-three-strikes-and-youre-out-of-youtube.ars.

[71] *See* von Lohmann, *supra* note 66.

[72] *See* Anderson, *supra* note 70.

C. The Consequences: Three Types of Fan-Made Works Being Stifled by Copyright Laws

While fan-made derivative works, such as fan-fiction stories, amateur films, and fan art, have existed for decades,[73] the Internet has made them much more common, more visible, and more sophisticated than ever before.[74] In providing a distribution network for fan-made works, the Internet has given potential fan creators a ready-made audience of other fans not only in their immediate geographical areas but also across the world. As a result, many more fans are motivated to create these works, with technology providing both the means of distribution and the tools for creation.

The history of fan-made works on the Internet is one of a steady progression in both technological and artistic sophistication, beginning with written fan fiction and evolving to include fan-made films and videos, music, graphical art, and more recently videogames and virtual worlds.[75] Amateur creators can now do the same things with an average computer that could previously only be done with thousands of dollars in professional equipment, resulting in a proliferation of fan-made works in media spaces that were formerly the exclusive domain of corporations.[76] As fan-made works become more sophisticated, media companies feel threatened by them, inevitably bringing the media companies into conflict with even their most ardent fans.[77] This Section traces the progress of fan-made media in three areas over the last decade and shows how every new advance in fan-made media has resulted in conflicts with copyright owners that threatened fan expression.

1. Written Fan Fiction

The first type of fan-made media to become common on the Internet was written fan fiction, which became prevalent when previously existing fan clubs and fan-fiction magazines and newsletters moved

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[73] Tushnet, *supra* note 8, at 655 (tracing the advent of organized written fan fiction to 1967, when fan fiction magazines based on *Star Trek* first emerged).

[74] *See* JENKINS, *supra* note 13, at 140 (describing the role of the Web in facilitating and fostering the amateur creative revolution).

[75] *See generally id.* at 140–41 (discussing grassroots creativity and its expansion from print to more technological mediums).

[76] Chris Suellentrop, *To Boldly Go Where No Fan Has Gone Before*, WIRED, Dec. 2005, at 249, 250, *available at* http://www.wired.com/wired/archive/13.12/startrek_pr.html.

[77] *See, e.g.*, Henley v. DeVore, 733 F. Supp. 2d 1144 (C.D. Cal. 2010); Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

online.[78] Specialized sites arose that were devoted to hosting archives of fan fiction from numerous separate fandoms. One of the earliest general-purpose, fan-fiction sites was *FanFiction.net*, which was established in 1998 and is currently the largest online repository of fan-fiction in existence by far.[79] As of January 2011, the site had approximately 3 million registered users[80] and hosted over 3.7 million fan fiction stories based on a wide variety of books, movies, TV shows, videogames, and Japanese anime cartoons.[81] *FanFiction.net* has struggled with copyright issues since its founding, and as a result, over 20,000 user accounts have been deleted for infringement and other violations of the site's terms of service since 1998 (about 1 out of every 100 users).[82]

The reactions of authors to fan fiction vary greatly. Some, like J.K. Rowling and Stephanie Meyer, welcome fan fiction; while others, like Ursula Le Guin and George R.R. Martin, see it as a violation, an unholy hijacking of their work, and a kidnapping of their literary "children."[83] In order to avoid copyright and trademark lawsuits, *FanFiction.net* respects the wishes of twelve authors who have requested to have stories based on their works banned from the site. It currently forbids users from uploading fan fiction based on the works of Anne Rice, Archie Comics, J.R. Ward, and others.[84]

Most copyright clashes over fan fiction, however, come not from authors but from publishers and movie studios. One of the most significant copyright clashes between fan-fiction authors and their favorite franchise's corporate overlords was the incident known as the

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[78] SHEENAGH PUGH, THE DEMOCRATIC GENRE 118–19 (2005) (discussing how fans posted fan fiction on the Internet even before the advent of email or web sites); *see* JENKINS, *supra* note 13, at 140.

[79] Maryanne Murray Buechner, *Families: Learning Corner: Pop Fiction*, TIME (Mar. 4, 2002), http://www.time.com/time/magazine/article/0,9171,1001950,00.html; Leanne Stendell, *Fanfic and Fan Fact: How Current Copyright Law Ignores the Reality of Copyright Owner and Consumer Interests in Fan Fiction*, 58 SMU L. REV. 1551, 1560 (2005).

[80] *Fan Fiction Demographics in 2010: Age, Sex, Country*, FAN FICTION STAT.—FFN RES. BLOG (Mar. 18, 2011), http://ffnresearch.blogspot.com/2011/03/fan-fiction-demographics-in-2010-age.html.

[81] *FanFiction.Net Fandoms: Story and Traffic Statistics*, FAN FICTION STAT.—FFN RES. BLOG (Jan. 11, 2011), http://ffnresearch.blogspot.com/2011/01/fanfictionnet-fandoms-story-and-traffic.html.

[82] *FanFiction.Net Member Statistics*, FAN FICTION STAT.—FFN RES. BLOG (July 18, 2010), http://ffnresearch.blogspot.com/2010/07/fanfictionnet-users.html; *Erased Accounts*, FAN FICTION STAT.—FFN RES. BLOG (Oct. 1, 2010), http://ffnresearch.blogspot.com/2010-_10_01_archive.html.

[83] Lev Grossman, *The Boy Who Lived Forever*, TIME, July 18, 2011, at 45, 46, 50.

[84] *FanFiction.Net Content Guidelines*, FANFICTION.NET (Nov. 20, 2008), http://www.fanfiction.net/guidelines/.

"Potter War" of the early 2000s.[85] The *Harry Potter* series first became popular at the same time the Internet was emerging as a significant social force (the first *Potter* book was released in 1997[86]) and quickly developed the largest online fan community of any other fictional franchise.[87] Currently, *Harry Potter* fan fiction by far outnumbers all other fandoms on *FanFiction.net* with over 400,000 stories ranging from short stories of a few paragraphs to full-length spinoff novels.[88] In the wake of *Harry Potter*'s rapid growth in popularity, numerous other specialized fan websites emerged, including those devoted to fan fiction and general news and discussion of the series.[89]

One of the larger *Harry Potter* fan sites at the time was *The Daily Prophet*, which was based on the fictional newspaper of J.K. Rowling's magical world and ran news articles written by school kids from around the world pretending to be students at Hogwarts.[90] The site was run by Heather Lawver, a teenage homeschool student from Virginia,[91] and had a staff of 102 children from a variety of countries.[92] Fan sites like Lawver's went relatively unnoticed until Warner Bros. bought the film rights to the *Harry Potter* series in 2001.[93] The studio immediately embarked on a campaign to protect its newly acquired intellectual property by sending numerous cease-and-desist letters to *Harry Potter* fan sites and attempting to seize their domain names as trademark infringing.[94] While *The Daily Prophet* itself never received a cease-and-desist letter, Heather made it her cause to defend other fan sites that had been threatened by Warner Bros., particularly a site run by fifteen-year-old Claire Field of Britain who received a cease-and-desist letter from Warner Bros. in December 2000.[95]

In early 2001, Heather launched an initiative through her site called *Defense Against the Dark Arts* and formed an alliance with

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[85] *PotterWar: A Decade Later*, THE HEATHER SHOW (Feb. 22, 2011, 10:25 PM), http://www.heathershow.com/old/20110222/potterwar_a_decade_later/.

[86] J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE, at iv (1997).

[87] *See* Aaron Schwabach, *The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright*, 70 U. PITT. L. REV. 387, 392–93 (2009); *FanFiction.Net Fandoms: Story and Traffic Statistics*, *supra* note 81 (stating that Harry Potter is the largest fandom on *FanFiction.Net*).

[88] *Books—Harry Potter Stories*, FANFICTION.NET, http://www.fanfiction.net/book/Harry_Potter/ (last visited Nov. 27, 2011).

[89] *The Harry Potter Economy*, ECONOMIST, Dec. 19, 2009, at 121, 123.

[90] JENKINS, *supra* note 13, at 178–79.

[91] *All About Me*, THE HEATHER SHOW, http://www.heathershow.com/about/ (last visited Nov. 27, 2011).

[92] JENKINS, *supra* note 13, at 178.

[93] *Id.* at 194–95.

[94] *See id.*

[95] *Id.* at 195.

Alastair Alexander of the British website, *PotterWar.org.uk*.[96] Together, Heather and Alistair led an international movement protesting Warner's actions against *Harry Potter* fan sites.[97] They quickly wrote a petition with over 1,500 signatures, and Heather appeared on MSNBC's *Hardball with Chris Matthews* to debate a Warner Bros. spokesperson.[98] By June 2001, it was all over.[99] Warner Bros. backed down and withdrew their claims against Claire Field's and most other *Harry Potter* fan sites with the exception of one (a site that had already transferred its domain to Warner Bros.).[100]

Both *Defense Against the Dark Arts* and *PotterWar* declared victory, proclaiming that they had successfully exposed Warner's campaign to seize fan sites' domains as "the PR disaster that it is."[101] As Warner Bros. Senior Vice President Diane Nelson told author Henry Jenkins, "We didn't know what we had on our hands early on in dealing with *Harry Potter*. We did what we would normally do in the protection of our intellectual property. As soon as we realized we were causing consternation to children or their parents, we stopped it."[102] Subsequently, Warner Bros. has restricted its actions against derivative works based on the *Harry Potter* series to commercial works, such as the famous *Harry Potter Lexicon*, which Warner Bros. allowed to remain available for free on the Internet, but sued to prevent it from being published commercially.[103]

The Potter War incident was the first of many similar incidents involving fan-made works,[104] and it illustrates the most common reaction of corporate copyright holders to fan-made works. When they first learn of these works, copyright holders fail to understand their importance to fans, have a knee-jerk reaction, and attempt to suppress them. Only after a painful conflict with their fans are copyright holders forced to grudgingly tolerate them or risk enduring their wrath. Most copyright

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[96] *PotterWar: A Decade Later*, *supra* note 85.

[97] *Id.*

[98] JENKINS, *supra* note 13, at 195–96.

[99] Simone Murray, *'Celebrating the Story the Way It Is': Cultural Studies, Corporate Media and the Contested Utility of Fandom*, CONTINUUM: J. OF MEDIA & CULTURAL STUD., Mar. 2004, at 7, 17.

[100] *Claiming Victory*, DEFENSE AGAINST THE DARK ARTS (June 13, 2001) (on file with author).

[101] *It's over*, POTTERWAR.ORG.UK (June 11, 2001), http://web.archive.org/web/20030611102815/http://www.potterwar.org.uk/ (accessed using WAYBACK MACHINE INTERNET ARCHIVE); *see also* Murray, *supra* note 99.

[102] JENKINS, *supra* note 13, at 196.

[103] *See* Warner Bros. Entm't, Inc. v. RDR Books, 575 F. Supp. 2d 513, 522, 524, 554 (S.D.N.Y. 2008) (enjoining publication and awarding statutory damages).

[104] *See, e.g.*, Henley v. DeVore, 733 F. Supp. 2d 1144 (C.D. Cal. 2010); Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

holders come to reluctantly turn a blind eye to fan fiction, although some, such as the twelve authors whose works are banned from *FanFiction.Net*, never accept them.[105] Thus, even when fan fiction is tolerated, it is allowed only at the sufferance of copyright holders who retain the ability to have it shut down at any time.[106]

2. Fan-Made Video

The next innovation in fan-made media came in the mid-2000s, when pervasive broadband Internet and the availability of inexpensive video editing software for the first time enabled the widespread sharing of digital video online. During this time, it became increasingly common for fans to make their own amateur "fan films," which are based on popular media, and distribute them on the Internet.[107] These films are the video equivalent of fan fiction and are typically either new fictional stories based on popular franchises like *Star Wars* or parodies of them.[108] These films range from short films under ten minutes to feature length productions.[109] Some can be highly sophisticated, employing a wide range of special effects and computer generated graphics almost on par with professional films.[110]

Another common type of fan-made video that became popular during this time was the practice of "vidding."[111] Rather than making their own original fan films, "vidders" remix existing video from movies,

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[105] *See generally FanFiction.Net Content Guidelines*, *supra* note 84.

[106] *See, e.g.*, Clive Young, *Max Payne Fan Film Shot Down By Fox*, FAN CINEMA TODAY (May 8, 2008), http://fancinematoday.com/2008/05/08/max-payne-fan-film-shot-down-by-fox/; Clive Young, *MGM Kills Historic James Bond Fan Film*, FAN CINEMA TODAY (June 5, 2008), http://fancinematoday.com/2008/06/05/mgm-kills-historic-james-bond-fan-film/.

[107] *See* Suellentrop, *supra* note 76, at 520.

[108] WILL BROOKER, USING THE FORCE: CREATIVITY, COMMUNITY AND *STAR WARS* FANS 173–74 (2002).

[109] *See, e.g.*, *Batman: Dead End*, THEFORCE.NET, http://download.theforce.net/theater/batman-deadend/Batman_Dead_end.mov (last visited Nov. 27, 2011) (showing a seven minute Batman fanvid); *Star Trek: Phase II*, DIGITAL NEW AGE ENT., http://www.digitalnewage.com/dnapartners/stp2/default.asp?epi=IHW (last visited Nov. 27, 2011) (showing a fifty minute Star Trek fanvid).

[110] For examples of two feature-length *Star Wars* fan films that employ highly sophisticated special effects, see *Star Wars: Revelations*, PANIC STRUCK PRODUCTIONS, http://panicstruckpro.com/revelations/revelations_movie.html (last visited Nov. 27, 2011); *Latest News*, REIGNOFTHEFALLEN.COM, http://www.reignofthefallen.com/ (last visited Nov. 27, 2011).

[111] Logan Hill, *The Vidder*, N.Y. MAG. (Nov. 12, 2007), http://nymag.com/movies/features/videos/40622/index1.html ("Vids are fan-made music videos. We create them using scenes taken from our favorite TV shows and movies, pairing them with a particular piece of music and imposing our own video-editing choices and style. The motivation for a lot of us is to convey something deeply felt about the show." (quoting Luminosity, a popular "vidder")).

TV shows, or videogames, and use that footage to create their own works. The most common type of vidding is the "songvid," in which fan editors combine short video clips from different sources with popular songs to create original music videos.[112] These videos are designed so that the video clips illustrate the song, and the song reflects upon the video footage to emphasize different aspects of the story or the characters or, in some cases, to create entirely new storylines.[113] While there are songvids based on any number of media franchises, by far the most popular subset of these videos are those based on Japanese anime cartoons and video games, which are called Anime Music Videos ("A.M.V.s").[114]

There are many highly developed fan communities dedicated to producing A.M.V.s,[115] and most anime conventions around the world include A.M.V. contests.[116] The largest online community devoted to A.M.V.s is *AnimeMusicVideos.org*, which currently has over 850,000 registered members and hosts a registry of more than 146,000 A.M.V.s, of which over 100,000 are available for download through the site.[117] Once the most popular site for hosting A.M.V.s, *AnimeMusicVideos.org* has since been surpassed by YouTube, on which a search for "anime music video" currently brings up over 420,000 results.[118] Like fan films, fan-made music videos have experienced a steady growth in sophistication and now frequently use high definition footage and employ a wide range of advanced digital effects for an overall quality that in some cases surpasses professionally produced music videos.[119]

Original fan films have largely been tolerated by copyright holders as long as they are not sold for profit, and copyright holders have in some cases even attempted to promote their creation by hosting "official"

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[112] *See* JENKINS, *supra* note 13, at 159–60.

[113] *See* Rebecca Tushnet, *Payment in Credit: Copyright Law and Subcultural Creativity*, 70 LAW & CONTEMP. PROBS. 135, 145 (2007).

[114] *See, e.g.*, DarkLordofDebate, *Final Fantasy 7: Heroes*, YOUTUBE (June 25, 2009), http://www.youtube.com/watch?v=Kma6yeHY9Sc (showing one of my own A.M.V.s using footage from the *Final Fantasy* videogame series).

[115] *See, e.g.*, ANIMEMUSICVIDEOS.ORG, http://www.animemusicvideos.org (last visited Nov. 27, 2011); EVAGEEKS.ORG, http://evageeks.org (last visited Nov. 27, 2011); TRINUT: THE TRIGUN ONLINE FAN COMMUNITY, http://trinut.clicdev.com (last visited Nov. 27, 2011).

[116] *See, e.g.*, *AMV Contest Calendar*, ANIMEMUSICVIDEOS.ORG, http://www.animemusicvideos.org/help/calendar (last visited Nov. 27, 2011).

[117] *Members Main Page—Global Statistics*, ANIMEMUSICVIDEOS.ORG, http://www.animemusicvideos.org/members/members_main.php (requires user account to view) (last visited Jul. 7, 2011).

[118] *Search results for anime music video*, YOUTUBE, http://www.youtube.com/results?search_query=anime+music+video&aq=f (last visited Nov. 27, 2011) (showing search results for "anime music video").

[119] *See, e.g.*, MJMusicVideoRemake, *Michael Jackson—Thriller Music Video Remake*, YOUTUBE (Feb. 14, 2010), http://www.youtube.com/watch?v=9AkgOICCdPM.

fan film sites and video contests.[120] Likewise, the owners of the rights to the video sources of A.M.V.s and other songvids have mostly turned a blind eye to them, recognizing that A.M.V.s provide valuable promotion for the anime on which they are based.[121] Legally, A.M.V.s are most likely fair use at least with respect to the video portion, though the audio portion remains problematic and is the most likely aspect to be challenged.[122]

A.M.V. creators are highly conscious of the fact that their hobby exists only at the sufferance of anime companies and music labels, and the aura of illegality hangs over their work.[123] Even though it hosts thousands of A.M.V.s using a wide variety of copyrighted music, *AnimeMusicVideos.org* has only run into copyright problems once. It received a cease-and-desist letter in November 2005 from Windup Records demanding that the site remove all videos using songs by Evanescence, Creed, and Seether from its archive.[124] Even though the site complied and has since not received any similar demands, many members of the site believe it is only a matter of time before the site gets shut down for copyright infringement.[125]

While *AnimeMusicVideos.org* has not been threatened recently, the battle has merely shifted to YouTube where A.M.V. editors frequently find their videos targeted by DMCA takedown notices and blocked by YouTube's automated Content ID system, both by music labels and

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[120] *See* JENKINS, *supra* note 13, at 153–59, 163–64 (discussing Lucasfilm's efforts to accommodate and encourage *Star Wars* fan films, albeit with certain limitations and restrictions, which some fans still find odious).

[121] *See* B. Dong & S. Pocock, *Chicks on Anime: Copyright Enforcement*, ANIME NEWS NETWORK (May 5, 2009), http://www.animenewsnetwork.com/chicks-on-anime/2009-05-05 (featuring an interview with Evan Flournoy, copyright specialist with the anime production company Funimation).

[122] *See* Trombley, *supra* note 30, at 672, 676 (concluding that because they are non-commercial and only use short, highly edited video clips, the video tracks of songvids are most likely fair use; while because they use complete, unedited songs, the audio tracks are most likely not fair use).

[123] *See, e.g.*, Gotegenks, *What if AMVs were made legal?*, ANIMEMUSICVIDEOS.ORG (May 16, 2010, 10:30 PM), http://www.animemusicvideos.org/forum/viewtopic.php?f=2&t=100023 (showing a forum discussion among A.M.V. editors about the possibility of legalizing A.M.V.s, where most editors simply assume A.M.V.s are copyright infringing).

[124] Phade, *Evanescence, Seether and Creed videos no longer available*, ANIMEMUSICVIDEOS.ORG (Nov. 15, 2005, 10:27 PM), http://www.animemusicvideos.org/forum/viewtopic.php?f=14&t=60255&p=781148 (showing a forum post by the site's administrator).

[125] *See* Kazeatoo, *Wind-up Records? Copyright Infrigement?* [sic], ANIMEMUSICVIDEOS.ORG (Oct. 30, 2009, 8:49 AM), http://www.animemusicvideos.org/forum/viewtopic.php?f=2&t=97075 (discussing whether AnimeMusicVideos.org will survive being taken down for copyright infringement).

increasingly by anime companies as well.[126] Most A.M.V. creators lack a sophisticated knowledge of copyright law and remain ignorant of options for disputing copyright notices and having their videos restored as fair use (a status that is at best legally questionable[127]).[128] YouTube's automated Content ID system poses the greatest threat to these videos, since it is incapable of distinguishing when a video might be fair use.[129] Thousands of A.M.V.s and other songvids were likely among those blocked in December 2008 after a breakdown in licensing negotiations between YouTube and Warner Music Group caused YouTube to block all videos using Warner's music, which ensnared countless videos that were likely fair use.[130] Fan-made videos of all types remain subject to arbitrary takedowns and blocking on YouTube, casting a considerable chilling effect on this potent new art form.

3. Fan-Made Videogames and Virtual Worlds

Just as fan-made media expanded to include video after the development of tools for the easy creation and sharing of digital video, it is now expanding again to include virtual reality. As more fans are growing up versed in the art of computer-generated graphics and three-dimensional design, the more they branch out and begin creating interactive virtual realities based on their favorite fandoms. The two most common ways of doing this are through game "modding" (modifying existing videogames with new levels, environments, and characters)[131] and the creation of themed role-playing environments within virtual worlds such as *Second Life*.[132]

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[126] *See* AceD, *Owned by YouTube*, ANIMEMUSICVIDEOS.ORG (Apr. 5, 2010, 3:35 PM), http://www.animemusicvideos.org/forum/viewtopic.php?f=2&t=99291&hilit=Owned+By+Youtube (discussing experiences of A.M.V. editors with takedowns on YouTube); Patrick McKay, *Square Enix Abuses YouTube DMCA Takedown Process*, THE PRELATOR (Oct. 7, 2009), http://prelator.wordpress.com/2009/10/07/square-enix-abuses-youtube-dmca-takedown-process/ (describing my own experience with one of my A.M.V.s being targeted by a DMCA takedown notice—most likely automatically generated—on YouTube).

[127] *See* Trombley, *supra* note 30, at 659–60.

[128] *See What If AMVs Were Made Legal?*, *supra* note 123.

[129] *See infra* note 166 and accompanying text.

[130] *See* von Lohmann, *supra* note 66.

[131] A good example of this practice is *Battlestar Galactica—Edge of Apocalypse*, a non-commercial total conversion mod for the videogame *Freelancer* (a space combat simulator game) that allows users to engage in simulated space battles with a wide variety of ships from the re-imagined *Battlestar Galactica* TV series. *Battlestar Galactica—Edge of Apocalypse*, FREELANCER, http://www.bsg-galactica.com/ (last visited Nov. 27, 2011).

[132] *Second Life* is a massive-online-multiplayer game in which users navigate a virtual world by means of animated "avatars," using a free software client. The content and environment of the virtual world—including terrain, buildings, vehicles, etc.—are almost entirely created by users, who can rent virtual land and buy and sell virtual goods in a fully integrated virtual economy using a virtual currency that is exchangeable for real-

Since the virtual environments within *Second Life* are entirely created by users,[133] it is not surprising that many of these environments (called "sims"[134]) are based on works of popular culture, especially science fiction and fantasy. There is a quite extensive *Star Wars* role-playing community in *Second Life*, which contains a number of sims containing detailed recreations of *Star Wars* settings like Tatooine and Coruscant.[135] There are also virtual stores that sell *Star Wars* themed items like Jedi costumes, lightsabers for the user's avatar, and even fully flyable spaceships ranging from X-Wing fighters to the Millennium Falcon that have highly detailed interiors and exteriors.[136] There are role-play sims based on *Battlestar Galactica*,[137] complete with virtual recreations of battlestars (the titular capital starships of the series), and there are many others based on *Star Trek*, *Stargate*, and, of course, *Harry Potter* (the latter including full recreations of Hogwarts and the neighboring town of Hogsmeade).[138] In each of these sims, it is common for users to take on the personas of characters from their respective source franchises (typically of their own creation), and users will act out their own stories within these virtual worlds, often in the context of a meta-narrative established by the sim's creators.[139] Virtual worlds therefore take fan-made media one step further and go beyond fan fiction and even fan-made video to literally bring the worlds of literature to life in an interactive and organic fashion.

Fans in *Second Life* have also faced challenges with copyright, though not as often as one might think given the fact that some of these virtual worlds take on a limited commercial character with the selling of virtual goods based on those in the source franchise (though rarely for actual profit[140]). While most copyright holders have seemed to tolerate

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world currency. *See* Yuval Karniel & Stephen Bates, *Copyright in Second Life*, 20 ALB. L.J. SCI. & TECH. 433, 435–36 (2010).

[133] *Id.* at 436.

[134] BRIAN A. WHITE, SECOND LIFE: A GUIDE TO YOUR VIRTUAL WORLD 6 (2008).

[135] *World Map*, SECOND LIFE, http://maps.secondlife.com/ (last visited Oct. 13, 2011) (access requires membership account; search "World Map" for "Tatooine" or "Coruscant").

[136] *Marketplace*, SECOND LIFE, https://marketplace.secondlife.com/ (last visited Nov. 27, 2011) (search for *Star Wars* related items, such as "Jedi Costumes," "Lightsabers," "X-Wing Fighters," or "Millenium Falcon").

[137] *World Map, supra* note 135 (access requires membership account; search "World Map" for "Caprica City," "Battlestar Phoenix").

[138] *Id.* (access requires membership account; search "World Map" for "United Federation Starfleet," "Olympus Project," "Astria Porta," and "Hogsmeade").

[139] REBECCA TAPLEY, DESIGNING YOUR SECOND LIFE 117, 121 (2008).

[140] *See* Wagner James Au, *Enforcers of Dune: Frank Herbert Estate Targets Dune Roleplayers In Second Life*, NEW WORLD NOTES (Apr. 9, 2009), http://nwn.blogs.com/nwn/2009/04/enforcers-of-dune.html (discussing how the *Dune*-based sim in question charged rental fees but never made a profit and in fact was run at a loss).

these unauthorized virtual role-playing communities, some have not.[141] In April, 2009, a *Second Life* role-play sim based on Frank Herbert's *Dune* novels and their corresponding movies received a DMCA takedown notice from Trident Media Group, the literary agency that maintains Herbert's estate.[142] Linden Lab (the company that runs *Second Life*) ordered the sim's administrators to remove all *Dune*-themed items and names from the sim within two days or Linden would remove them itself.[143] They complied and were forced to convert the sim into a "'generic' sci-fi desert planet with spice mining."[144] In a statement on the incident, Linden Lab said the company is "impressed by the creativity of role-playing games in Second Life and believe[s] that they're an important part of the inworld social experience," but when faced with complaints by copyright holders, they "pass these concerns along."[145]

Fan-made videogames have likewise been subject to copyright actions, such as when videogame company Square Enix shut down a non-commercial, fan-made sequel to the game *Chrono Trigger*, which had been five years in development and was almost complete.[146] Likewise, an upcoming online, fan-made alternate reality game (ARG) made in anticipation of the film adaptation of *The Hunger Games* was forced to be taken down by the movie studio, Lionsgate Films.[147] On the other hand, a fan-made update to *Duke Nukem 3D* managed to secure an official license to distribute the game non-commercially, allowing production to continue.[148]

While copyright problems with fan-made videogames and virtual worlds may be relatively rare, that may only be because these things themselves are rare. It is likely that media companies will take greater

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[141] BENJAMIN TYSON DURANSKE, VIRTUAL LAW: NAVIGATING THE LEGAL LANDSCAPE OF VIRTUAL WORLDS 147–48 (2008).

[142] Wagner James Au, *supra* note 140.

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] Earnest Cavalli, *Square Enix Kills Near Complete* Chrono Trigger *Fan Project*, WIRED (May 11, 2009, 4:16 PM), http://www.wired.com/gamelife/2009/05/square-enix-kills-near-complete-chrono-trigger-fan-project/.

[147] Dan Koelsch, *Fan-Made "Hunger Games" ARG Launches*, MOVIEVIRAL.COM (June 14, 2011), http://www.movieviral.com/2011/06/14/fan-made-hunger-games-arg launches/. After unsuccessfully attempting to make further contact with Lionsgate, the game-makers subsequently decided to re-launch their game, called "Panem October," under a different domain name with better disclaimers clarifying its unofficial, fan-made status. Michael Lee, *Panem October Aftermath: Rowan The Gamemaster Speaks Out About Lionsgate Issue*, MOVIEVIRAL.COM (Sept. 22, 2011), http://www.movieviral.com/2011/09/22/panem-october-aftermath-rowan-the-gamemaster-speaks-out-about-lionsgate-issue/.

[148] Ben Kuchera, *Fan-made* Duke 3D *Unreal Engine 3 update is now officially licensed*, ARS TECHNICA (Oct. 17, 2010, 4:00 PM), http://arstechnica.com/gaming/news/2010/10/fan-made-duke-3d-update-is-now-official-blessed-by-creators.ars.

notice of these things in the future, especially as fan-made virtual worlds and games become more sophisticated and could be regarded by companies as competing with their own offerings (though it is unlikely they actually would since fan-made games would likely never offer the same experience as official products[149]). Thus, while the creators of fan-made virtual worlds have not yet faced significant challenges with copyright, it still has the potential to stifle this burgeoning form of creativity, which stands as the next frontier for fan-made derivative works.

Like Kaplan, we must consider the future of these technologies and how copyright law will need to adapt them. How will copyright law deal with the development of the first truly immersive virtual realities, which instead of being accessed with the clunky interfaces and poor graphics of current virtual worlds, like *Second Life*, are experienced via a direct neural link with a computer and allow users to experience virtual worlds as if they were actually real? Given that fans already create virtual worlds based on popular culture, how would copyright law react to fans literally bringing literature to life in this fashion? Would it be encouraged or repressed? Science fiction, long famous for anticipating the social challenges of future technologies, has already begun to deal with such questions. The television show *Caprica*, which aired in 2010, portrayed precisely this type of fully immersive, user-created virtual world, showing how disruptive it could be both to society and copyright law.[150] When reality begins to imitate fiction, as fiction itself takes on [virtual] reality, the law will need to have an answer.

Because the primary purpose of copyright is to promote cultural growth, we must begin to anticipate such technologies now and begin to craft a legal framework capable of dealing with the ways in which people are likely to use them, while preserving the maximum potential for the new forms of cultural creativity they will enable.

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[149] *Cf.* McKinley Noble, *13 Fantastic Fan-Made Game Remakes and Demakes*, GAMEPRO (Dec. 2, 2009, 15:45 PM), http://www.gamepro.com/article/features/213136/13-fantastic-fan-made-game-remakes-demakes/ ("When fans take video games into their own hands, the results are often unpredictable. Artwork, music, and other types of tributes can range from the gut-wrenchingly awful to the eternally awesome, but only the best projects are worth waiting for. That's why fan-made video game remakes can be one of those things that's worth some patience.").

[150] A fully immersive virtual reality called "V-World" is a central element of *Caprica's* premise. The show frequently deals with the societal consequences of this technology, such as addiction and moral decline, and even alludes to copyright difficulties in the form of "hacked sites" created by users without the permission of the corporation that owns the technology. *Caprica: Pilot* (SyFy television broadcast Jan. 22, 2010); *Caprica: There Is Another Sky* (SyFy television broadcast Feb. 26, 2010).

III. THE SOLUTION: PROVIDE EXPLICIT STATUTORY PROTECTIONS FOR NON-COMMERCIAL, TRANSFORMATIVE WORKS AND REAL PENALTIES FOR ABUSE OF THE DMCA TAKEDOWN PROCESS

From the above analysis, it is clear the current system of fair use and the procedures of the DMCA takedown process do not provide adequate protection for fan-made derivative works. As Henry Jenkins says,

> Current copyright law simply doesn't have a category for dealing with amateur creative expression. Where there has been a 'public interest' factored into the legal definition of fair use[,] . . . it has been advanced in terms of legitimated classes of users and not a generalized public right to cultural participation. Our current notion of fair use is an artifact of an era when few people had access to the marketplace of ideas, and those who did fell into certain professional classes. It surely demands close reconsideration as we develop technologies that broaden who may produce and circulate cultural materials.[151]

Because of the legal uncertainty surrounding fan-made works and because large corporate copyright owners hold such a dominant position over ordinary fans and Internet users, there is currently no effective check on rights-holders to prevent them from abusing the discretion that the law gives them and stifling this important form of cultural participation. Accordingly, the law must change to provide specific protections for fan-made media and similar non-commercial derivative works, while also providing real penalties for abuse of copyright power. The following section suggests a number of proposed reforms to accomplish these goals.

A. Add Non-commercial, Transformative Works to the Preamble of Section 107 as an Example of Fair Use

While most scholarly literature on the subject agrees that fan-made works should be considered fair use,[152] the absence of any caselaw involving fan works and the vagueness of current fair use law imposes a high degree of legal uncertainty upon them.[153] For the reasons mentioned above, there is little chance of the issue receiving judicial clarification in the near future since few fans have the resources to bring a case involving non-commercial fan works to trial.[154] In the absence of such judicial guidance, Congress should, at minimum, act to clarify that such uses are indeed fair use. The simplest way to provide this clarification would be to add "*non-commercial, transformative use*" to the

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[151] JENKINS, *supra* note 13, at 198.

[152] *See* Stendell, *supra* note 79, at 1578 (discussing different proposals for protecting fan fiction as fair use).

[153] Tushnet, *supra* note 8, at 664.

[154] *See supra* Parts II.A.–B.

preamble of Section 107 of the Copyright Act, which lists examples of works Congress intends to be considered fair use.[155] If amending the preamble alone proves insufficient to protect non-commercial transformative works, Congress may also wish to amend the Copyright Act to provide a rebuttable presumption that such works are fair use, absent demonstrable harm to a presently existing market.

Both the terms "non-commercial" and "transformative" are already well-defined in copyright law. "Non-commercial" refers to uses where the user does not "stand[] to profit from exploitation of the copyrighted material without paying the customary price."[156] "Transformative" refers to use that does not "merely supersede" the original but "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[157] These definitions would likely be adequate to cover most types of fan-made derivative works, with the possible exceptions of the actual sale of virtual goods in *Second Life* based on copyrighted properties and the use of full songs in songvids, which may require statutory exceptions. Creating a presumption of fair use as mentioned above with definitions crafted to include them would likely be sufficient. Alternatively, Congress could provide for these uses by establishing an easily accessible compulsory licensing system, which amateur creators could use to purchase licenses for a nominal fee.

Since the preamble is only illustrative and in no way alters the courts' discretion when applying the four fair use factors,[158] amending the preamble would be a perfect way to clarify the legal status of fan-made works without effecting a substantive change in the law. The advocacy group, Public Knowledge, recently recommended a similar approach to resolve several other ambiguities in fair use law, calling for Congress to amend the preamble of Section 107 to include "incidental uses, non-consumptive uses, and personal, non-commercial uses."[159]

According to Public Knowledge, amending the preamble is a "limited change," and "[n]othing would prevent courts from continuing to apply fair use to new situations, as they have done since the '76 Act took effect."[160] Furthermore, "including a modernized list of explicitly favored uses adds clarity for courts and diminishes uncertainty for copyright

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[155] 17 U.S.C. § 107 (2006) ("[T]he fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching[,] . . . scholarship, or research, is not an infringement of copyright.").

[156] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 562 (1985).

[157] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).

[158] *Id.* at 581.

[159] JENNIFER M. URBAN, PUBLIC KNOWLEDGE, UPDATING FAIR USE FOR INNOVATORS AND CREATORS IN THE DIGITAL AGE: TWO TARGETED REFORMS 10 (2010), *available at* http://www.publicknowledge.org/pdf/fair-use-report-02132010.pdf.

[160] *Id.* at 11.

holders and follow-on users," by providing guidance for parties in all jurisdictions.[161] Clear guidance from Congress that non-commercial transformative use is a favored fair use could be especially helpful for amateur creators in deciding whether they have grounds to dispute takedown notices on sites such as YouTube and for rights-holders in deciding how to respond to counter-notices. Amending the preamble of Section 107 to include non-commercial transformative use is a crucial but easy first step to provide guidance to courts, rights-holders, and amateur creators regarding the legal status of such works.

B. Make the DMCA Takedown Process Unavailable for Non-commercial Transformative Works and Ban the Use of Automated Filters to Block User Generated Content

As noted above, the DMCA takedown process and automated copyright filters employed by user-generated content sites like YouTube currently pose the greatest threat to fan-made derivative works online. If these works are to have any meaningful protection as fair use, they must not be subject to what amounts to arbitrary prior restraints.[162] These arbitrary restraints place the burden on the fan-creators to justify their uses of copyrighted works, despite the fact that such creators usually lack sufficient knowledge of copyright principles and procedures to do so.

It is therefore crucial that Congress enact legislation specifying that the DMCA takedown process may not be used against non-commercial, transformative works. If a copyright owner is determined to have a non-commercial derivative work taken down, they should be required to either contact the creator directly or sue for an injunction, in which case, they would be required to justify suppressing that creative expression before a court.[163] This would in no way impair copyright holders' ability to use the DMCA takedown process for blatantly infringing direct copies of their work; it would only deprive them of the ability to suppress legitimate creative expression without judicial oversight.[164]

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[161] *Id.*

[162] Seltzer, *supra* note 52, at 173, 175–76.

[163] *Id.* at 229–30.

[164] To mitigate any danger of plagiarism of the author's work without giving due credit or danger of confusion between fan-made and official works and to make this proposal more palatable for copyright holders, Congress may wish to consider granting original creators a right of attribution in cases of non-commercial derivative works. The special protections described above could only extend to works that credit the original author and disclaim any official affiliation with the original. Although currently of no legal effect, this is already common practice among many creators of fan-made media, and would likely be seen by the fan community as a reasonable requirement. *See* Tushnet, *supra* note 113, at 154–55 (describing practices regarding attribution and disclaimers by fan-fiction authors).

Secondly, Congress must also ban the use of automated content filters to automatically block user-generated content on copyright grounds without human intervention. At least one court has held the following:

> [I]n order for a copyright owner to proceed under the DMCA with 'a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law,' the owner *must evaluate whether the material makes fair use of the copyright.*[165]

No matter how useful automated tools may be to identify potentially infringing works, computers are simply incapable of making the requisite legal judgment that a specific work is not fair use, and therefore, cannot satisfy this requirement.[166] Thus, it is likely that copyright owners who use automated systems to send actual DMCA notices without human intervention are already in violation of the statute. It should not matter whether copyright owners are using the formal DMCA process or an informal system of copyright enforcement established by private websites like YouTube; the principle remains the same.

Copyright holders should remain free to use automated systems to *identify* potentially infringing content, but the actual *judgment* that a work is infringing must be made by a human. Accordingly, Congress should explicitly ban actually *blocking access* to online works on copyright grounds by means of private automated systems of copyright enforcement outside the DMCA process without the accountability that process provides. If a copyright owner wishes to have content taken down from a site like YouTube, the law should require individual evaluation of each specific work by a human being trained in the principles of fair use, and a formal DMCA takedown notice should be issued. YouTube could still provide automated tools to *detect* potential copyright infringement and even "monetize" it by showing ads alongside videos and giving copyright owners a portion of the proceeds, but *blocking* that content would require specific notice from the copyright holder. While this may place additional burdens on copyright holders, it is only just that, when copyright owners wish to block online expression

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[165] Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1154 (N.D. Cal. 2008) (emphasis added).

[166] *See* Miriam E. Felsenburg & Laura P. Graham, *A Better Beginnning: Why and How to Help Novice Legal Writers Build a Solid Foundation by Shifting Their Focus from* Product *to* Process, 24 REGENT U. L. REV. 83, 87 (2011) (While it is true that computer software can now assist lawyers in managing documents, producing deposition summaries, and streamlining other data reviewing tasks, these are not the equivalent of legal analysis . . . . For the foreseeable future, it will still take a trained lawyer to identify legal issues, analyze relevant legal authorities, and predict or advocate a certain outcome . . . .").

by accusing users of violating the law, that accusation must be made by a human being rather than a computer.

C. Provide Real Penalties for Abuse of the DMCA Takedown Process Such as Fines and Statutory Damages

Finally, if fan-made derivative works are to enjoy any real protection under the law, including protection from abusive takedown notices and automated filtering, the law must provide real penalties for abuse of the powers the DMCA gives copyright holders to have infringing works removed from the Internet. The current ability of accused infringers to sue copyright holders for misrepresentation of infringement under DMCA Section 512(f)[167] is inadequate to actually prevent abuse by copyright holders for two reasons: (1) the burden of proof is too high;[168] and (2) the damages are inadequate in cases where the material was non-commercial;[169] such that, as a practical matter, ordinary Internet users are unlikely to be able to sue over wrongful takedowns.

First, in *Rossi v. Motion Picture Association of America*, the Ninth Circuit held that the misrepresentation clause of the DMCA imposes a "subjective good faith" standard and only applies to "knowing misrepresentation," which requires "a demonstration of some actual knowledge of misrepresentation on the part of the copyright owner."[170] This burden of proof is simply too high for cases involving non-commercial transformative works since all a copyright holder must show to avoid liability for misrepresentation is that they honestly believed the material was not fair use. Since major copyright holders are in general reluctant to acknowledge that the concept of fair use even exists, it is difficult to imagine a situation in which a copyright holder would *not* believe a use was not fair use. As the court observed in *Lenz v. Universal Music Corp.*, "there are likely to be few [cases] in which a copyright owner's determination that a particular use is not fair use will meet the requisite standard of subjective bad faith required to prevail in an action for misrepresentation."[171]

At minimum, the burden of proof for misrepresentation must be lowered in order to allow such claims to have any chance of succeeding. Public Knowledge suggests a standard of "recklessness," which "should encourage copyright owners to either review notices generated by automated technologies or to design company protocols to reasonably to

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[167] 17 U.S.C. § 512(f) (2006).

[168] DENA CHEN ET AL., PUBLIC KNOWLEDGE, UPDATING 17 U.S.C. § 512'S NOTICE AND TAKEDOWN PROCEDURE FOR INNOVATORS, CREATORS, AND CONSUMERS 9 (2011), *available at* http://www.publicknowledge.org/files/docs/cranoticetakedown.pdf.

[169] *Id.* at 13.

[170] Rossi v. Motion Picture Ass'n, 391 F.3d 1000, 1005 (9th Cir. 2004).

[171] Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150, 1155 (N.D. Cal. 2008).

protect [sic] against erroneous or deficient infringement claims."[172] At the same time, this standard would be high enough to avoid ensnaring legitimate claims.[173]

Second, even if amateur creators could meet the standard of proof for a misrepresentation claim under Section 512(f), because non-commercial works are by definition not for profit, they could rarely ever prove actual damages that resulted from a false claim of infringement.[174] Statutory damages and attorney's fees are not available.[175] Thus, they could rarely hope for more than nominal damages. Without the possibility of significant damages and absent *pro bono* representation, ordinary fans and Internet users lack the resources necessary to bring a successful lawsuit under Section 512(f). Thus, it is unlikely to serve as an effective deterrent against abuse. It is vital that Congress establish a more effective mechanism for penalizing copyright holders who abuse the takedown process and fail to consider fair use for non-commercial, transformative works (or as proposed above, who use the DMCA process against such works at all).[176]

One possibility is to make statutory damages available for misrepresentation[177] since they are for copyright infringement itself; but this still requires Internet users to take the formidable step of hiring a lawyer and filing a lawsuit—something few people are likely to do. While statutory damages should still be available to plaintiffs with the resources to file a lawsuit, they would not offer any real benefit to non-commercial, amateur creators.

A more feasible solution would be to give the Copyright Office the authority to fine copyright owners upon receiving complaints of abuse of the takedown system, similar to the Federal Trade Commission ("FTC")'s complaint process under Section 45 of the FTC Act.[178] User-generated

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[172] CHEN ET AL., *supra* note 168, at 12.

[173] *Id.*

[174] *Cf.* Lenz v. Universal Music Corp., No. C 07-3783 JF, slip op. at 10–16 (N.D. Cal. Feb. 25, 2010) (Order Granting Partial Summary Judgment) (stating that alleged infringers may recover actual damages resulting from the improper takedown, even if nominal, including the cost of filing a counter-notice).

[175] *See id.* (alleged infringers may not recover costs and fees incurred by filing suit).

[176] While Section 512(f) also applies to false counter-notices by alleged infringers, the current system is sufficient for dealing with misrepresentations on that end, as copyright owners still have the option to sue for infringement even if the alleged infringer sends a counter-notice, in addition to actual damages suffered from the misrepresentation.

[177] CHEN ET AL. *supra* note 168, at 13–14 (arguing for the creation of statutory damages for misrepresentation under Section 512(f)).

[178] *See* 15 U.S.C. § 45(b) (2006) (explaining the process by which the Commission requires a person, partnership, or corporation to cease and desist from violating the law so charged in a complaint); 15 U.S.C. § 45(l) (granting the Commission authority to fine a person, partnership, or corporation who violates an order).

content creators who receive illegitimate takedown notices could file a complaint through a web form on the Copyright Office's website. After a brief factual investigation to determine whether the takedown notice was misrepresentative, based on an objective ("recklessness") standard rather than the current subjective ("good faith") standard, the Copyright Office could levy the appropriate fines.[179] These fines should be substantial enough to provide true deterrence against abuse, yet not so high as to deter copyright owners from enforcing their intellectual property rights online altogether. For routine abusers, forfeiture of copyrights might also be in order. Under such a system, the burden on legally unsophisticated Internet users would be minimal, and it would be far more likely to serve as an effective deterrent against copyright abuse than the current statute,[180] which will never be more than a hypothetical deterrent.

CONCLUSION

As described above, fan-made derivative works based on works of popular culture have a growing importance in twenty-first century culture and may in fact represent the rebirth of popular folk culture in America after a century of being submerged beneath commercial mass-media cultural products. The Internet has enabled what scholar Lawrence Lessig calls a "read/write culture"[181] where ordinary Internet users are empowered to become active creators of culture rather than mere passive consumers. Yet, if this exciting trend is to continue, the copyright laws of the twentieth century must adapt to accommodate the possibilities of the twenty-first. This Note demonstrates how amateur fan-made culture is under attack by the creators of the popular works it pays tribute to and how overreaching copyright claims by media companies cast a considerable chilling effect on vibrant new art forms such as fan fiction, fan-made videos, and virtual worlds. In order for these practices to thrive unmolested by the ghosts of the past, the law must change in anticipation of the future. Accordingly, the Copyright Act must be amended to (1) explicitly clarify that non-commercial, transformative works are fair use, (2) ban the use of the DMCA takedown process and automated copyright filters to block this type of content, and (3) provide real penalties to deter copyright owners from abusing copyright law to suppress legitimate follow-on creativity.

While copyright holders will no doubt object that these reforms deprive them of necessary control over their copyrighted works and may

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[179] Alternatively, the FTC could administer this process, if Congress deems it better equipped to act directly on consumer complaints.

[180] *See* 17 U.S.C. § 512(f) (2006).

[181] LESSIG, *supra* note 1, at 28.

result in their works being tarnished by association with offensive fan works, we must remember that the purpose of copyright is neither to allow maximum control over copyrighted content, nor to protect "brands" from negative associations, but to promote the growth of culture. Even if some amateur uses of culture may be objectionable, the overall cultural benefit gained by allowing such uses far outweighs the slight detriment of negative associations in fan-made works, which most people are perfectly capable of distinguishing from officially sanctioned works.

At the heart of copyright is a balance between the rights of creators to benefit from their works and the right of society to benefit from increased cultural production. When the former becomes detrimental to the latter, the time has come to rebalance the equation. If the new twenty-first century folk culture is to survive into the future, and if Kaplan's dream of global networks with unlimited potential for cultural production is to be fully realized, then Congress and the courts must act to protect the rights of amateur creators before it is too late.

Patrick McKay

CHOOSING A LAW TO LIVE BY ONCE THE KING IS GONE

INTRODUCTION

> Law is the expression of the rules by which civilization governs itself, and it must be that in law as elsewhere will be found the fundamental differences of peoples. Here then it may be that we find the underlying cause of the difference between the civil law and the common law.[1]

By virtue of its origin, the American legal profession has always been influenced by sources of law outside the United States. American law schools teach students the common law, and law students come to understand that the common law is different than the civil law, which is prevalent in Europe.[2] Comparative law courses expose law students to the civil law system by comparing American common law with the law of other countries such as France, which has a civil code.[3] A closer look at the history of the American and French Revolutions makes one wonder why the legal systems of the two countries are so different.

Certainly, the American and French Revolutions were drastically different in some ways. For instance, the French Revolution was notoriously violent during a period known as "the Terror."[4] Accounts of the French revolutionary government executing so many French citizens as well as the creation of the Cult of the Supreme Being[5] make the French Revolution a stark contrast to the American Revolution. Despite the differences, the revolutionary French and Americans shared similar goals—liberty and equality for all citizens and an end to tyranny. Both revolutions happened within approximately two decades of each other and were heavily influenced by the Enlightenment. In the early days of the American republic, America and France even had close ties to each other before the French Revolution became excessively violent.[6]

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[1] Peter J. Hamilton, *The Civil Law and the Common Law*, 36 HARV. L. REV. 180, 192 (1923).

[2] Harry W. Jones, *Our Uncommon Common Law*, 42 TENN. L. REV. 443, 447 (1975) [hereinafter Jones, *Uncommon Common Law*].

[3] *Id.* at 447–48.

[4] According to one source, 12,000 people were executed after being tried, and an additional 8,000 were executed without any sort of trial. LEO GERSHOY, THE FRENCH REVOLUTION AND NAPOLEON 276 (1964).

[5] Maximilien Robespierre was the leader of the French government during the Terror. He held a national celebration on June 8, 1794, and officially proclaimed France's new state religion, requiring belief in a "Supreme Being," to replace traditional Roman Catholicism. GERSHOY, *supra* note 4, at 286–87.

[6] *See* BERNARD FAŸ, THE REVOLUTIONARY SPIRIT IN FRANCE AND AMERICA (Ramon Guthrie trans., Cooper Square, 1966) (1927). For instance, the French admired what the Americans had accomplished in the American Revolution and wanted to model their own

Considering the similarities between the two nations and analyzing why each country adopted its particular legal system after its revolution is worthwhile because the study provides an example of what causes a nation to choose one legal system instead of another. Furthermore, an understanding of civil law will help American legal professionals be better positioned to understand and to navigate an increasingly global legal environment. America still operates under a legal system derived originally from English common law over two hundred years after its fight for independence. France, on the other hand, is now a civil law country whose legal system is significantly different from the law under the French monarchy before the revolution. This forms an interesting contrast between two sister republics[7] that begs an important question: Why did Americans keep the common law they brought from England after the American Revolution,[8] while France changed its law considerably by adopting a civil code after the French Revolution? This Note seeks to answer that question by comparing America's and France's adoption of their post-revolutionary legal systems.

One factor in America's decision to retain English common law was that Americans viewed the common law as a protector of freedom—one that could be used against the king. The French, on the other hand, felt that the law under the monarchy was unfair; they wanted reform. England had already reformed its law during the 1600s, allowing Americans to inherit the product of legal reform and a well-developed concept of constitutional liberty. French liberty, however, was not as well advanced as English liberty when the French Revolution began. Secondly, the most important difference between America and France in directing the kind of legal system each country would adopt was France's Emperor, Napoleon Bonaparte, whose rise to power in 1799 ended the French Revolution.[9] He implemented France's new legal system by ordering that a civil code be drafted. America had no comparable authoritarian ruler after the revolution that could force a civil code on

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revolution after the revolution in the United States. Thomas Jefferson even traveled to France as Minister of the United States and assisted the Marquis de La Fayette during the French Revolution. *Id.* at 255, 257.

[7] Technically, France's modern government is not the same as the government that was instituted after the French Revolution. French government has undergone many changes since the French Revolution, including a restoration of the monarchy in the 1800s. Still, the French Revolution was the first time that France had a republican form of government, and the French enjoy a republican form of government today. *See infra* Part II.B.

[8] As one author put it, "We denounced the English sovereign, tarred and feathered English tax collectors, and cried a sturdy colonial pox on English manners and nobilities, but we received the English common law." Jones, *Uncommon Common Law*, *supra* note 2, at 445.

[9] *See* discussion *infra* Part II.B.

the states. Finally, different religious experiences influenced the way Americans and the French viewed the law. While American colonists sought and enjoyed religious liberty, French religious history was characterized by violence and oppression.

This Note is divided into three sections, each devoted to one of the three major factors mentioned above. Part I concerns the liberties of citizens before the revolutions for independence and the impact those liberties had on the legal systems France and America adopted. Part II discusses the early governments of America and France and the process of adopting their respective legal systems. Finally, Part III highlights the impact of the Enlightenment and religion on the American and French post-revolutionary legal systems.

PART I: FREEDOM UNDER THE FORMER LEGAL SYSTEM

A. America

Americans enjoyed a greater degree of constitutional liberty when the American Revolution began than the French at the start of the French Revolution because the Americans had inherited the fruits of the English Revolution[10] during the 1600s.[11] The English Revolution took place from 1640 to 1689 and revived traditional English constitutional freedoms by limiting the monarchy's power.[12] During this time, Parliament changed English law by asserting certain freedoms, and these changes became pillars of the American legal system.[13]

Like other European nations, including France,[14] England was governed by an absolute monarchy before 1640.[15] In such a system, the king or queen is the ultimate governmental authority of a nation.[16] Kings such as Henry Tudor VIII (1509),[17] James Stuart I (1603),[18] and Charles

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[10] The English Revolution is also known as the Glorious Revolution. *See* HAROLD J. BERMAN, LAW AND REVOLUTION II 206 (2003).

[11] As discussed further in this section, Americans felt that the common law was an "inheritance" or "birthright." Richard C. Dale, *The Adoption of the Common Law by the American Colonies*, 21 AM. L. REG. 553, 553 (1882) (quoting State v. Campbell, 1 Ga. 60, 61 (Ga. Super. Ct. 1808)).

[12] *See* BERMAN, *supra* note 10, at 206–07.

[13] *See* Harry W. Jones, *The Common Law in the United States: English Themes and American Variations*, *in* POLITICAL SEPARATION AND LEGAL CONTINUITY 91, 110 (Harry W. Jones ed., 1976) [hereinafter Jones, *Common Law in the United States*]; *see also* MICHAEL S. PAULSEN ET AL., THE CONSTITUTION OF THE UNITED STATES 20 (2010).

[14] R.C. VAN CAENEGEM, AN HISTORICAL INTRODUCTION TO WESTERN CONSTITUTIONAL LAW 91, 94 (1995).

[15] BERMAN, *supra* note 10, at 207.

[16] *See* VAN CAENEGEM, *supra* note 14, at 91–92.

[17] *See* BERMAN, *supra* note 10, at 208–09 (proclaiming himself the head of the Church of England).

Stuart I (1625),[19] abridged the liberties of English subjects.[20] For example, King Charles I did not call Parliament into session for eleven years, taxed the people heavily, and imposed Catholicism on English subjects—even though Catholicism was unpopular in Protestant England at the time.[21] It was Charles's abuses that eventually led to the English Revolution.

In England, common law judges and Parliament resisted absolutism beginning with the reign of King James I.[22] The highest common law courts of England were known as the king's courts; nevertheless, the judges of these courts fought the Stuart kings' abuse of power.[23] Sir Edward Coke, one of England's well-known common law jurists, led the judiciary's battle against the monarchy.[24] These judges fought to preserve the common law because the common law embodied traditional English liberties.[25] Like the judiciary, Parliament fought absolutism by drafting resolutions with measures to defend an English subject's rights against illegal arrests, the denial of habeas corpus, forced quartering of soldiers in private homes, and summary trials under martial law.[26] Eventually, a civil war erupted in England in 1642.[27] A Puritan Member of Parliament named Oliver Cromwell became a leader in the opposition to King Charles.[28] Cromwell led an army against the king and ultimately defeated him.[29] Because Cromwell and his followers wanted to hold the monarchy accountable to the people of England, Charles was tried and executed for his abuses of power.[30]

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[18] *See id.* at 214 (taxing England heavily and sending Parliament Members to prison for opposing him while Parliament was in session). King James even published a book laying out his theory of absolutism in response to Parliament's and the judiciary's challenge to his authority. *Id.* at 213.

[19] *See id.* at 215. Charles I's reign was known as the "Eleven Years' Tyranny." *Id.*

[20] *See id.* at 206. When the Puritans overthrew the government and executed Charles I during the English Revolution, one of their goals was to restore historical English freedoms. *Id.* at 205–06.

[21] *Id.* at 215–16.

[22] *Id.* at 213–15. England was not the only country where the judiciary opposed the absolute monarchy. In other parts of Europe, judges saw themselves as preservers of liberty, custom, and law. VAN CAENEGEM, *supra* note 14, at 95.

[23] BERMAN, *supra* note 10, at 213–14.

[24] *Id.* at 214. Later, when Sir Coke became involved in Parliament, he continued the fight against absolutism from there. *Id.* at 215.

[25] *Id.* at 214.

[26] *Id.* at 215.

[27] *Id.* at 217.

[28] G.E. AYLMER, THE STRUGGLE FOR THE CONSTITUTION: ENGLAND IN THE SEVENTEENTH CENTURY 128 (3d ed. 1971).

[29] *Id.* at 128–29.

[30] *Id.* at 138.

After Cromwell won the civil war and took control of England, the English tried to reform their law.[31] A body of Englishmen known as the Hale Commission made several goals: to eliminate lawyers' monopoly over the law, to codify English law, to institute elections for judges, to provide legal aid to the needy, and to institute civil marriages.[32] The English wanted to simplify the disorganized jumble of common law rules and make the legal system more democratic.[33] Although much of the legal reform did not last after the monarchy was restored, the English made *some* permanent changes in the law.[34] Trials were conducted in plain English;[35] judges became more independent with life tenure;[36] notoriously corrupt courts were abolished; and the common law doctrine of stare decisis developed more fully.[37] Yet the most important legacy of the English Revolution was several documents produced by Parliament—documents that reasserted English constitutional liberties.

Unlike the American Constitution, England did not have a written constitution.[38] Instead, throughout English history, various important documents have contained assertions of English liberty and have become part of the traditional English (unwritten) "constitution."[39] Beginning in 1066 with William of Normandy, the kings of England agreed from time to time to limit their powers in some way to recognize rights held by the English people or by Parliament.[40] One of the most famous of these documents is the Magna Carta (1215), an agreement between King John and his nobles that John would adhere to English law.[41] In response to tyrannical practices by the monarchy, Parliament later added the Petition of Right of 1628, the Habeas Corpus Act of 1679, the English

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[31] For more information about the Hale Commission, see R.C. VAN CAENEGEM, JUDGES, LEGISLATORS AND PROFESSORS: CHAPTERS IN EUROPEAN LEGAL HISTORY 45–46 (1993).

[32] *Id.* at 46, 78. Interestingly, van Caenegem calls the Hale Commission's goals a "foreshadow" of the French legal reforms in the late 1700s and early 1800s. *Id.* at 46.

[33] *Id.* at 77–78.

[34] *Id.* at 79.

[35] *Id.* at 46–47. Before this reform, old French was spoken in court, and only a few legal professionals could understand it. *Id.* One can imagine how difficult it would be for a juror to participate in a trial conducted in a foreign language.

[36] BERMAN, *supra* note 10, at 207.

[37] *Id.* at 207–08. Stare decisis is the common-law method of adhering to prior cases. Jones, *Uncommon Common Law*, *supra* note 2, at 455–56.

[38] PAULSEN, *supra* note 13, at 20. England still does not have a written constitution today. VAN CAENEGEM, *supra* note 31, at 20.

[39] PAULSEN, *supra* note 13, at 20.

[40] *Id.* at 20–21. William of Normandy agreed to recognize English laws and freedoms under the former Anglo-Saxon government. *Id.* Later in 1100, King Henry I put this concept into writing with an important constitutional document called the Charter of Liberties. *Id.* at 20.

[41] *Id.* at 20.

Bill of Rights of 1689, and the Act of Settlement of 1701 to England's magnificent collection of constitutional documents.[42]

With the Petition of Right of 1628, the Parliament asserted some of the rights previously mentioned such as habeas corpus[43] and freedom from illegal arrests.[44] Parliament also preserved a person's right to be released from custody on bail.[45] The Habeas Corpus Act of 1679 denied the monarchy the power to imprison someone without a jury trial.[46] The English Bill of Rights of 1689 was also "rooted in ancient rights and liberties of the English people,"[47] and it established the superiority of the law over the monarchy by prohibiting a king or queen from suspending laws.[48] Finally, the Settlement Act of 1701 ensured that English judges would be independent from the monarchy by giving them life tenure.[49]

English colonists in America naturally brought English law with them.[50] In fact, in 1775, Americans felt they were being denied their legal rights under English law, which partly caused the Revolutionary War.[51] When the time came, Americans used the law to resist the English monarch's abuse of power.[52] Resolves from the First Continental Congress included the "sturdy assertion" that Americans were "*entitled* to the common law of England,"[53] and American colonists thought of the

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[42] *Id.*

[43] A writ of habeas corpus is a petition asking a court to order the person in custody of a prisoner to bring the prisoner before the court in order to inquire into the legality of the prisoner's detention. BLACK'S LAW DICTIONARY 778 (9th ed. 2009).

[44] *See* BERMAN, *supra* note 10, at 215.

[45] *Id.*

[46] PAULSEN, *supra* note 13, at 20.

[47] *See* BERMAN, *supra* note 10, at 226.

[48] PAULSEN, *supra* note 13, at 20.

[49] BERMAN, *supra* note 10, at 227.

[50] Jones, *Common Law in the United States*, *supra* note 13, at 93–94 (quoting Van Ness v. Pacard, 27 U.S. (2 Pet.) 137, 144 (1829)).

[51] *See id.* at 128. Among the grievances listed in the Declaration of Independence are some of the same legal problems addressed by English constitutional documents, such as deprivation of jury trials, dependent judges, and unfair taxation. *See* Jones, *Common Law in the United States*, *supra* note 13, at 122 (pointing out that trial by jury was one of the grievances leading to the Revolution); *see generally* THE DECLARATION OF INDEPENDENCE (U.S. 1776).

[52] Peter R. Teachout, *Light in Ashes: The Problem of "Respect for the Rule of Law" in American Legal History*, *in* LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW 167, 188–89 (Hendrik Hartog ed., 1981). This was possible partly because Americans exercised control over local legal institutions, including jury trials. *Id.* at 181–82, 184. Legislators were also accountable to the colonists. *Id.* at 182–84. Furthermore, in some places like Massachusetts, local law disfavored the British in authority. Hendrik Hartog, *Losing the World of the Massachusetts Whig*, *in* LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN THE LAW 143, 146–47 (Hendrik Hartog ed., 1981).

[53] Jones, *Common Law in the United States*, *supra* note 13, at 110 (emphasis added).

Magna Carta, the Petition of Right, the English Bill of Rights, and the Act of Settlement—all affirming English constitutional liberty—as part of their common-law heritage from England.[54] This common-law heritage was so important that the Founders preserved several of its doctrines in the Constitution—for example, the guarantee of trial by jury.[55]

B. France

Before the French Revolution, French subjects were ruled by a monarch whose power resembled the English absolute monarchy before the English Revolution more than it resembled the reformed English monarchy that later governed the American colonies before America's independence. After a movement known as the *Fronde*[56] rose in opposition to the French monarchy in the mid-1600s, the French monarchy assumed absolute power with kings possessing vast authority.[57] Much like the English Revolution, the *Fronde* was a result of the French monarchy's abuses. Yet, it was unsuccessful, leaving major legal reform to the French Revolution approximately 140 years later.[58]

Before the *Fronde*, France had established royal courts called *parlements*, which were the highest courts within their jurisdictions.[59] The most important of these high courts was the Parlement of Paris, which often opposed the French monarchy.[60] This competition for power produced a tense relationship between the French judiciary and the monarchy.[61] Eventually, the tension grew into the *Fronde* (1648–1652), a movement composed of French nobles and the parlements.[62] The aristocracy and the courts opposed Queen Anne of Austria and Cardinal Jules Mazarin, who were the temporary rulers of France while Anne's son Louis Bourbon XIV was too young to assume the throne.[63]

During the *Fronde*, the Parisian courts proposed reforms to stop illegal arrests, taxes imposed without the approval of the Parlement of Paris, and certain administrative and financial abuses by the

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54 *Id.*

55 *Id.* at 123.

56 The word *fronde* means "sling." During the movement, street children in Paris joined in the opposition by using slings to throw rocks or mud. This is where the movement got its name. GEOFFREY TREASURE, MAZARIN: THE CRISIS OF ABSOLUTISM IN FRANCE 123 (1997).

57 DALE K. VAN KLEY, THE RELIGIOUS ORIGINS OF THE FRENCH REVOLUTION: FROM CALVIN TO THE CIVIL CONSITUTION, 1560–1791, at 47 (1996).

58 *See* GERSHOY, *supra* note 4, at 6.

59 VAN KLEY, *supra* note 57, at 43.

60 *Id.*

61 *Id.* at 45.

62 GERSHOY, *supra* note 4, at 5–6.

63 *Id.*; ARTHUR HASSALL, LOUIS XIV AND THE ZENITH OF THE FRENCH MONARCHY 8–9, 13 (1972).

monarchy.[64] The *Fronde*'s adherents maintained that any monarch loses his or her authority when he or she disobeys the law.[65] According to some, absolute power in a monarchy did not conform to either French tradition or the national religion, Christianity.[66] Unlike the English Revolution, however, the *Fronde* ultimately failed to limit the power of the monarchy.[67] In fact, the *Fronde* resulted in the very thing the parlements had resisted—a strong absolute monarchy instead of a monarchy with more limited power.[68]

After the division and anarchy caused by the *Fronde*, the succeeding French kings used the theory of absolutism to bring stability to France and to unite the people.[69] Young Louis XIV saw the turmoil produced by the *Fronde*, and it made an impression on him.[70] Because of his experience during the *Fronde*, King Louis XIV would not tolerate opposition during his reign.[71] Just as the French people would later accept Napoleon's authoritative rule after the chaos of the French Revolution, the French people were willing to accept a strong monarch in Louis XIV after the chaos of the *Fronde*.[72] Although the *Fronde* failed and an absolute monarchy governed France until its revolution, the judiciary did not cease resisting the monarchy.[73]

Similar to England's unwritten constitution based on ancient tradition, France also had a body of "inalienable" customs and standards derived from tradition that formed a sort of unwritten French "constitution."[74] These vague principles included public law governing

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[64] VAN KLEY, *supra* note 57, at 46. The illegal arrests and king-imposed taxes are some of the same issues that instigated the English Revolution. *See supra* Part I.A.

[65] *Id.* at 46.

[66] *Id.* at 47.

[67] *Id.* For this failure, Van Kley blames the many different groups fighting the king during the *Fronde*. He points to the lack of a religious element to unify the people against the king. *Id.* In England, Cromwell and the Protestant revolutionaries were united in opposition to a monarchy sympathetic to Catholicism. *See* BERMAN, *supra* note 10, at 217–18.

[68] VAN KLEY, *supra* note 57.

[69] *Id.*

[70] HASSALL, *supra* note 63, at 31.

[71] *Id.*

[72] VAN KLEY, *supra* note 57. King Louis XIV became a powerful monarch who ruled France wisely but extravagantly during France's "Golden Age." He watched the French nobility closely in order to ensure that no one opposed him. He became known as the "Sun King." Louis XIV's wars and excesses caused France to suffer financial ruin, and this eventually led to the French Revolution. GERSHOY, *supra* note 4, at 6–8.

[73] VAN KLEY, *supra* note 57, at 45.

[74] VAN CAENEGEM, *supra* note 14, at 99. One historian explains that these unwritten principles were not exactly a constitution, although these principles seem to be the closest thing France had to a constitution before the revolution. FRANÇOIS FURET, THE FRENCH REVOLUTION 1770–1814, at 4 (Antonia Nevill trans., 1996).

the monarchy and its authority.[75] The French "constitution" embraced the concept of "*honnête liberté des Français*," or the idea of regard for French subjects and their property.[76] Philosophically, French laws were divided into two categories: *lois ordinaires* and *lois fondamentales*.[77] *Lois ordinaries* ("ordinary laws") were laws made at the king's will, while *lois fondamentales* ("fundamental laws") were laws of tradition and custom binding even on the king.[78] The significance of this distinction was that a *lois ordinaire* that contradicted the *lois fondamentale* was considered arbitrary.[79] Despite the philosophical limitations placed on a king's power by the *lois fondamentales*, French subjects lacked religious freedom,[80] freedom of the press, and political freedom.[81]

The French monarch's power did not go wholly unchecked, however. The Parlement of Paris and the Estates-General[82] (comparable to England's Parliament) provided minor limits on royal power.[83] The Parlement of Paris tried to prevent the king from enacting laws contrary to French tradition.[84] The king would send his proposed law to the court, and the court would register the law to make the law official.[85] When the court disapproved of the king's law, it refused to register the law and notified the king of any complaints against the king's law.[86] This refusal to register a law, or *droit de remonstrance*,[87] could be overridden by the king, but during the 1700s, the monarchy usually acquiesced to the

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[75] VAN CAENEGEM, *supra* note 14, at 99. Part of the nature of the monarchy was its traditional religion, Roman Catholicism. Protestantism was prevalent in England, but for the most part, France did not tolerate Protestants. *See* VAN KLEY, *supra* note 57, at 7–8 (explaining that the French monarchy was closely aligned with the Catholic Church); VAN CAENEGEM, *supra* note 14, at 100 (noting that religious intolerance in France grew after the revocation of the Edict of Nantes).

[76] VAN CAENEGEM, *supra* note 14, at 99.

[77] *Id.*

[78] *Id.*

[79] *Id.* For the remainder of a king's life, French subjects were required to obey his arbitrary laws, but upon his death, his arbitrary laws were abrogated. Van Caenegem names Louis XVI as a "possible" example of this concept because he annulled some of his father's radical measures against the judiciary after his father's death. *Id.*

[80] Adherents to other faiths, including Protestantism, were persecuted in Roman Catholic France. *Id.* at 100.

[81] For instance, the French were not allowed to form political parties. *Id.*

[82] The Estates-General's function was to appropriate money when it was requested and to counsel the king. *Id.*

[83] *Id.*

[84] *Id.* at 101–02.

[85] *Id.*

[86] *Id.* at 102. It is important to note, however, that the Parlement of Paris did not have an *absolute* right of remonstrance; the monarchy could override the court's refusal to register. *Id.*

[87] *Id.* at 101. *Droit de remonstrance* means "right of remonstrance or protestation." *Id.*

court's refusal to register.[88] By exercising its *droit de remonstrance*, the Parlement of Paris sought to balance the monarchy's power to issue law with the rights of French subjects according to the unwritten French "constitution."[89] Jurists in the parlements even claimed to act on behalf of the French people.[90]

Nevertheless, French judges (called "*councillors*"[91]) in the parlements did not act solely for the people, and this would eventually influence France's adoption of a civil code after the French Revolution.[92] Councillors came from the French nobility and wealthier classes, inheriting their fathers' positions on the parlements or paying to become councillors.[93] When the monarchy tried to reform the law, councillors resisted the reforms because they did not want to lose privileges.[94] Immediately before the French Revolution, Louis XVI tried to reform the country's finances by taxing French subjects equally, but the Parlement of Paris obstructed the reform.[95] The Estates-General assembled, and the Third Estate, which represented the common people of France, took control of the government.[96] With that, the French Revolution began.

When the time came to decide how France would structure its legal system, after the French people had dethroned and executed King Louis XVI, the French distrusted judges and wanted a legal code to restrain the judiciary.[97] Rather than regarding law as an asset or a tool to use against the monarchy, the French considered their former law under the monarchy (the "*ancien régime*"[98]) as a tool the government had used to preserve privilege and power for itself.

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88 *Id.* at 102.

89 *Id.*

90 *See* VAN KLEY, *supra* note 57, at 112–13 (citing a memoir by a French jurist in 1730 challenging the monarchy's authority).

91 VAN CAENEGEM, *supra* note 14, at 101.

92 *Id.* at 102–03. *See infra* Part II.B.

93 *Id.* at 101.

94 *Id.* at 101, 103.

95 *Id.* at 102–03. The Parlement of Paris had often resisted tax reform in the past, causing serious financial consequences for France. *Id.*

96 *Id.*

97 *See* FURET, *supra* note 74, at 230; *see also* Shael Herman, *From Philosophers to Legislators, and Legislators to Gods: The French Civil Code as Secular Scripture*, 1984 U. ILL. L. REV. 597, 598 (1984).

98 *Ancien régime* is a term French revolutionaries used for the former government under the monarchy. *See* FURET, *supra* note 74, at 3.

PART II: A NEW LEGAL SYSTEM FOR THE NEW GOVERNMENT

A. America

The American colonists did not adopt a civil law system after the American Revolution; instead, the states retained the common law system that Americans had brought from England.[99] As mentioned previously in Part I, some common-law principles were written into the Constitution.[100] At the state level, English common law was accepted as American law through a process termed "reception," accomplished by state courts and state legislatures.[101]

American colonists did not systematically plan to make English common law the official law of the United States.[102] In fact, for a period of time after the American Revolution, many Americans disapproved of the common law precisely because it was *English*.[103] In the early years of the American Republic, there was a movement to incorporate more of the civil law into American law.[104] As citizens of a new country, some argued that American lawyers should be familiar with the civil law as well as the common law system, in addition to knowing natural law, admiralty law, and other areas of law.[105] After the Revolution, Americans wanted to create their own system by choosing the best from a variety of legal systems, including the civil law tradition.[106] Judges often compared the virtues of the different systems to decide cases.[107] Despite its early popularity, however, the civil law movement died out.[108]

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[99] Jones, *Uncommon Common Law*, *supra* note 2, at 453. Whether there is such a thing as *federal* common law has not always been certain. According to the Supreme Court in *Erie R.R. v. Tompkins*, 304 U.S. 64, 65 (1938), there is no body of federal common law to apply to diversity cases. Later Supreme Court decisions have recognized federal common law for certain narrow issues such as military defense contractors. *See* PAULSEN, *supra* note 13, at 679. *But see* Jones, *Uncommon Common Law*, *supra* note 2, at 459 ("[F]ederal law is wholly legislative in origin, or virtually so."). Regardless of whether there is or is not federal common law, both state and federal American courts, including the United States Supreme Court, adhere to the common-law doctrine of stare decisis by following precedent—a common-law doctrine distinct from the civil law. *Id.* at 455, 462.

[100] Jones, *Common Law in the United States*, *supra* note 13, at 123.

[101] *Id.* at 92–93, 98–100.

[102] *Id.* at 101–02.

[103] *Id.* at 106; Peter Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 VA. L. REV. 403, 410 (1966).

[104] Stein, *supra* note 103.

[105] *See id.* at 406 (citing advice given to attorney John Adams).

[106] *Id.* at 407; *see also id.* at 419 (quoting Edward Everett's admonition to study civil law, "the richest of these sources").

[107] *Id.* at 409.

[108] *Id.* at 431–32. Stein lists several possible reasons for the failure of the civil law in the United States, including the fact that the main advocates for civil law in the United States were not those who practiced law in everyday life. *Id.* at 431–34.

Before the American Revolution and the movement to adopt the civil law, the common law had already taken deep root in the United States as, out of necessity, American judges sought legal guidance in the only source of law available—English statutes and cases.[109] Even then, judges were choosy[110]—they only used English law that adapted well to the colonial situation.[111] Judges were not the only ones who facilitated the reception of English common law in the United States. State legislatures also created reception statutes that expressly adopted English common law as the law of the state.[112] The states not only received principles from English judicial decisions,[113] they also received English statutory law.[114] States did not want to perpetually adopt new English law as it was enacted or decided in England; therefore, the legislatures set "cut-off dates"[115] to mark a limit for reception.[116]

America's government structure was also a factor in the country not becoming a civil-law country. The Founders created a political system that was both decentralized and centralized at the same time; this novel creation was federalism.[117] After the Articles of Confederation failed to provide a competent national government, the Constitution fixed the problem by implementing a more centralized and stronger national government.[118] Under the new Constitution, the states still retained much of their sovereignty,[119] especially over the law that affected daily

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[109] Jones, *Common Law in the United States*, *supra* note 13, at 92, 103, 107. These judges did not want to make arbitrary decisions or to set policy, although they were forced to at times when they had to choose which English precedent to apply to the situation. *Id.*

[110] Dale, *supra* note 11, at 566–67 ("[T]he whole of the common law of England has been nowhere introduced . . . some states have rejected what others have adopted . . . ." (quoting U.S. v. Worrall, 2 U.S. (2 Dall.) 384, 394 (1798))).

[111] *Id.* at 554. For example, an early American court recognized that the English common-law rule requiring citizens to fence cattle at all times was not suited to America, whose population was much less dense and whose landmass was much larger. Therefore, the court rejected that particular common-law rule. *Id.* at 560–61 (citing Wagner v. Bissell, 3 Iowa 396, 401–02 (1857)).

[112] *Id.* at 572–73. For example, California, Illinois, and North Carolina were among states that expressly adopted English common law by statutory enactment. *Id.* at 573–74.

[113] According to one early American court decision, *Marks v. Morris*, Americans adopted English common law, not English decisions. 14 Va. (4 Hen. & M.) 463, 572 (1809). This means that the common principles as a whole were what the Americans used, rather than treating specific judicial decisions as binding on American courts. *See id.*

[114] Jones, *Common Law in the United States*, *supra* note 13, at 103. The reception of English statutes concerned those acts of Parliament that had become part of the overall English common law. *Id.*

[115] Jones, *Uncommon Common Law*, *supra* note 2, at 454.

[116] Jones, *Common Law in the United States*, *supra* note 13, at 103. After the cut-off date, English law was only persuasive authority. *Id.*

[117] PAULSEN, *supra* note 13, at 681–82.

[118] *Id.* at 19.

[119] *See* U.S. CONST. amend. X.

life. With states being sovereign in their own spheres and with a limited national executive and legislature, it would have been difficult to impose a national code under the Constitution. Individual states were free to adopt a civil law system as long as it was consistent with the Constitution, but as already discussed, every state except Louisiana chose the common law.[120]

The most important things Americans received from English common law—what defines the American legal system today—are common-law doctrines and legal reasoning.[121] This includes the doctrine of stare decisis, which uses judicial precedent to bind subsequent court decisions in cases with similar facts.[122] A good example of the importance of common-law reasoning in America is constitutional interpretation by the United States Supreme Court, which uses "the matching, analysis and distinguishing away of precedents" (the basics of common-law legal method) to decide constitutional cases.[123] Other aspects of the American legal system that came from English common law are trial by jury, the rule of law, and an independent judiciary.[124]

B. France

After the French Revolution, the French people were able to change their legal system and do something they had wanted to do long before the Revolution—codify French law.[125] In fact, the French government was strengthened and unified in great part by adopting a civil code.[126] By virtue of his fascination for law,[127] Napoleon Bonaparte provided the means to accomplish this goal after taking control of France in 1799.

Before the French Revolution, French law was a collection of laws that varied by jurisdiction.[128] French law varied not only by geographical region but also by local code.[129] Customary law, similar to English

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[120] Louisiana followed the civil-law tradition instead of adopting the common law tradition. *See* LA. CONST. of 1812, art. IV, § 11.

[121] Jones, *Common Law in the United States*, *supra* note 13, at 92; *see also* Jones, *Uncommon Common Law*, *supra* note 2, at 454.

[122] Jones, *Uncommon Common Law*, *supra* note 2, at 455–56. The common-law doctrine of stare decisis applies to statutory interpretation as well. *Id.* at 460.

[123] *Id.* at 462.

[124] Jones, *Common Law in the United States*, *supra* note 13, at 110–11.

[125] FURET, *supra* note 74, at 230.

[126] MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 52–54 (2d ed. 1994).

[127] *Id.*

[128] ROBERT B. HOLTMAN, THE NAPOLEONIC REVOLUTION 87 (1967). According to Voltaire, if one were to travel in France at the time, one would change laws as much as one would change horses. GLENDON, *supra* note 126, at 52.

[129] HOLTMAN, *supra* note 128. In fact, 366 different local codes were in place when Napoleon undertook unification of the nation's law. *Id.*

common law, was prevalent in northern France.[130] In southern France, Roman civil law governed.[131] During the Revolution, the French wanted to unify the law, and the Constitution of 1791 provided that the new government of France would create a legal code to accomplish national legal unification.[132] Revolutionaries wanted a legal code because they believed that law from the *ancien régime* would threaten their new ideas.[133] The French also placed a philosophical emphasis on reason, and, as a result, desired to create an organized statement of law for the entire country.[134]

In the past, the French monarchy had tried unsuccessfully to codify French law.[135] Despite being able to centralize the country politically,[136] kings had failed to unify the law because the monarchy was steeped in tradition, privileges for the nobility, and financial troubles.[137] As previously discussed in Part I, the parlements opposed legal reform, making it difficult for the monarchy to change the law. According to one scholar, unification of French law would not have been possible until government *and society itself* was changed.[138] Even the French revolutionary government was unable to accomplish a codification of French law before Napoleon came to power because the new government had too many political problems.[139]

After Napoleon Bonaparte seized control of France at the end of the revolutionary period in 1799, he organized the government and centralized power in order to obtain complete control.[140] As part of this process, he wanted to codify French law, so he appointed a commission to draft a civil code containing a unified set of laws by which the entire country would be governed.[141] In drafting the Code, the commission made a compromise between the ideals of the French Revolution and the French customs and traditions of the *ancien régime*.[142] The French

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130 *Id.*

131 *Id.*

132 *Id.* at 88.

133 *Id.*

134 *Id.*; FURET, *supra* note 74, at 230; *see also infra* Part III.B.

135 FURET, *supra* note 74, at 230.

136 GLENDON, *supra* note 126, at 52. France was the first modern nation on the continent of Europe. *Id.*

137 FURET, *supra* note 74, at 230.

138 HOLTMAN, *supra* note 128, at 88; *see also infra* Part III.B.

139 FURET, *supra* note 74, at 231.

140 HOLTMAN, *supra* note 128, at 27, 88.

141 *Id.* at 88.

142 FURET, *supra* note 74, at 231–32 ("moderating the French Revolution with a pinch of *ancien régime*"). This was possible because the people desired peace and stability after the tumult of revolution. Jean Leclair, *Le Code civil des Français de 1804: une transaction entre revolution et reaction*, 36 REVUE JURIDIQUE THÉMIS 1, 46 (2002) (Can.).

revolutionary government preceding Napoleon had already made great strides in developing a legal code, so the most difficult work was done.[143]

Napoleon was zealous to give France a civil code.[144] In fact, he wanted to be remembered as "a great lawgiver,"[145] and he personally participated in many of the drafting sessions.[146] Napoleon was not legally trained; therefore, he helped influence the creation of a concise and simple code whose text could be understood by those who were not in the legal profession.[147] The Civil Code, originally named the *Code civil des français* (the "civil code of the French people"),[148] was completed on March 21, 1804, and it was the first modern civil code.[149]

One purpose of the French Civil Code was to restrain judges since the judiciary was still associated with the parlements of the *ancien régime*.[150] After the Civil Code was enacted, a school of legal thought developed that believed judges should use only the Code to decide cases and other legal sources should not affect interpretation of the Code.[151] One can understand the French people's mistrust of judges, considering their perception of judicial corruption and self-interest before the Revolution.[152]

When choosing a legal system, neither France nor America completely did away with the past, nor was either nation content to completely accept the former system that had been in place before the revolution. Similar to the American version of the common law system, the French Civil Code was a compromise between the *ancien régime* and

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[143] FURET, *supra* note 74, at 231. Jean-Jacques Regis de Cambacérès was president of the revolutionary government when the bulk of the work on the Code was done, and he repeatedly presented several versions of the Code to the government from 1793 to 1796. *Id.*

[144] *Id.* at 232.

[145] GLENDON, *supra* note 126, at 54.

[146] HOLTMAN, *supra* note 128, at 88.

[147] *Id.* at 28, 89.

[148] GLENDON, *supra* note 126, at 53.

[149] *Id.*; HOLTMAN, *supra* note 128, at 89.

[150] VAN CAENEGEM, *supra* note 31, at 152–53. Even the modern French Constitution places restraints on judicial interpretation. For instance, Article 5 of the French Constitution forbids judges to generally pronounce the law. Claire M. Germain, *Approaches to Statutory Interpretation and Legislative History in France*, 13 DUKE J. COMP. & INT'L L. 195, 196 (2003).

[151] R.C. VAN CAENEGEM, EUROPEAN LAW IN THE PAST AND THE FUTURE: UNITY AND DIVERSITY OVER TWO MILLENNIA 68–69 (2002) (indicating that they wanted to defend the Code, which was a pure product of reason, "against all possible forms of contamination, by Roman law, canon law, ancient customs and particularly natural law."). In fact, Napoleon did not even approve of legal treatises expounding the Code. *Id.* at 69.

[152] GLENDON, *supra* note 126, at 77 (noting that the French judiciary was associated with "feudal oppression . . . [and] retarding even moderate reforms").

the new ideas of the Revolution.[153] The Americans took English common law with its ancient principles and adapted it to address their unique situation in the New World.[154] The French, likewise, took those revolutionary ideas they found most important and tempered them where appropriate with prior French law.[155]

PART III: RELIGION AND PHILOSOPHY'S IMPACT ON LAW

A. America

The Enlightenment had a significant impact on the American Revolution as it did on Europe during the 1700s.[156] Enlightenment philosophy had several characteristics: "belief in Man, individual Man, his Nature, his Reason, his Rights."[157] This philosophy caused American and French revolutionaries to emphasize individualism, rationalism, and nationalism as part of their ideals.[158]

American revolutionary leaders had read the "Moderate Enlightenment" giants such as Charles-Louis Secondat de Montesquieu, William Blackstone, John Locke, and David Hume.[159] One can hardly think of Jean-Jacques Rousseau's[160] theory of the sovereignty of the people without thinking of the United States Constitution's Preamble: "WE THE PEOPLE of the United States."[161] Enlightenment ideas that

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[153] Leclair, *supra* note 142, at 6–7. Two examples of the revolutionary ideals found in the Civil Code are freedom to own land and use it as one wishes and freedom to trade. Herman, *supra* note 97, at 606.

[154] Dale, *supra* note 11, at 559–60 ("It has been repeatedly determined by the courts of this state that they will adopt the principles of the common law as the rules of decision, so far only as these principles are adapted to our circumstances, state of society and form of government." (quoting Lindsley v. Coats, 1 Ohio 243 (1823))).

[155] *See* HOLTMAN, *supra* note 128, at 89–90. Notably, one French revolutionary idea that was tempered was women's equality. Equality did not extend to women under Napoleon's Code; in fact, the Code hardly gave married women rights at all. Leclair, *supra* note 142, at 75.

[156] HOLTMAN, *supra* note 128, at 22; *see generally* NORMAN HAMPSON, THE FIRST EUROPEAN REVOLUTION 1776–1815, at 9–40 (1969) (containing Chapter One entitled "The Intellectual Climate").

[157] HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 32 (1983).

[158] *Id.*

[159] HENRY F. MAY, *The Constitution and the Enlightened Consensus*, *in* THE DIVIDED HEART: ESSAYS ON PROTESTANTISM AND THE ENLIGHTENMENT IN AMERICA 147, 153 (1991) [hereinafter MAY, *The Constitution*]. According to May, the men who wrote the Constitution adhered to a set of beliefs that were mostly English and more conservative than those of later periods of the Enlightenment. *Id.* at 149.

[160] Rousseau was another philosopher whose ideas played an important role in the Enlightenment. *See* HAMPSON, *supra* note 156, at 9, 36–37.

[161] U.S. CONST. pmbl. The Constitution was not the only important document that espoused Enlightenment principles. In fact, one author says that Europeans were interested in America's Declaration of Independence because they saw it as a "creative and

were prominent in America included a belief in natural rights,[162] emphasis on virtue and morality, belief in the imperfection of humanity, emphasis on reason rather than "revelation or mystical illumination,"[163] and a belief that the purpose of government is to protect liberty.[164]

In America and France, secular religions emerged during the revolutions and joined the two traditional branches of Christianity—Protestantism and Roman Catholicism—that had been prevalent until the revolutions.[165] Despite the emergence of secular religions in America, the religious landscape of the American colonies was different than the landscape of Enlightenment France, and this contributed to the retention of English common law in the United States. The country was not unified nationally under a single religion as France had been before the French Revolution. In fact, different religious groups came to America in order to find religious freedom and tolerance.[166] It is true that certain religious sects, such as the Quakers and the Baptists, experienced religious persecution in the colonies,[167] but unlike France, widespread hostility to religion as a whole was not prevalent in America.[168] In short, Americans did not have an equivalent to France's Catholic Church.[169] Followers of a variety of religious denominations lived in the colonies, including Puritans, Anglicans, Catholics, Baptists, and Quakers.[170] The American colonies had many different denominations and sects partly because the colonies were individual

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unique contribution . . . to the Enlightenment vision of popular sovereignty." The Americans put the Enlightenment principles into practice. David Thelen, *Reception of the Declaration of Independence*, *in* THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT 191, 194 (Scott Douglas Gerber ed., 2002).

[162] Garrett Ward Sheldon, *The Political Theory of the Declaration of Independence*, *in* THE DECLARATION OF INDEPENDENCE: ORIGINS AND IMPACT 16, 16 (Scott Douglas Garber ed., 2002).

[163] MAY, *The Constitution*, *supra* note 159, at 152. HENRY F. MAY, *The Enlightenment and America: The Jeffersonian Moment*, *in* THE DIVIDED HEART: ESSAYS ON PROTESTANTISM AND THE ENLIGHTENMENT IN AMERICA 161, 162 (1991) [hereinafter MAY, *Jeffersonian Moment*].

[164] *See* MAY, *The Constitution*, *supra* note 159, at 156.

[165] BERMAN, *supra* note 157, at 31.

[166] *See* EDWIN S. GAUSTAD & LEIGH E. SCHMIDT, THE RELIGIOUS HISTORY OF AMERICA 65, 74, 85 (2002); CLIFTON E. OLMSTEAD, RELIGION IN AMERICA PAST AND PRESENT 19–20, 29 (1961).

[167] WILLIAM WARREN SWEET, RELIGION IN COLONIAL AMERICA 131–32, 144 (1965).

[168] *See* discussion *infra* Part III.B.

[169] *See* BERMAN, *supra* note 157, at 24 (noting that the American Revolution was exceptional in this respect among the great revolutions in Europe and Russia); *see* discussion on religion in France *infra* Part III.B.

[170] *See generally* SWEET, *supra* note 167, at 98, 131–32, 143–44, 176 (giving a historical analysis of the origins and development of several religious groups in colonial America).

units instead of a unified nation before the Revolution.[171] As a result, American colonists did not feel the same urgency to reject religion along with the English monarchy.[172] Instead, after the American Revolution, the newly-formed states recognized God in legal documents such as their constitutions, but avoided establishing state religions.[173]

Another religious influence on the adoption and formation of America's legal system after the Revolution was the Great Awakening, a religious revival that took place in America in the 1730s and 1740s.[174] At least some of the religious influence of this revival was still present when the Constitution was adopted, and it helped preserve Christianity's place in America.[175] Similarly, another "force" in society that limited the Enlightenment's influence in America was evangelical Protestantism itself, according to one author.[176] In fact, Protestantism's emphasis on the individual coincided with the Enlightenment's emphasis on the individual.[177] Consequently, although Americans retained a high respect for law, they had no need to elevate their law to a practically religious status.[178]

Lastly, Americans had a different philosophical view of judges due to the American legal profession's common-law training. In the common-law tradition, the belief persisted that judges did not make law, they found it.[179] In addition, the common law doctrine of stare decisis meant that the common-law tradition placed its own internal restraints on

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[171] For example, Virginia's established religion was Anglicanism, but William Penn founded Pennsylvania on Quaker principles. Maryland, on the other hand, was founded with a largely Catholic population. *Id.* at 29, 33, 160–61.

[172] One scholar maintains that both American and French societies were entirely transformed during their respective revolutions. According to him, the law, social characteristics, economics, beliefs, values, and historical perspectives were all "revamped." BERMAN, *supra* note 157, at 20. Still, there is a stark contrast between France's and America's societal "transformation.'" France went further in its purposeful secularization of government. *See also* HOLTMAN, *supra* note 128, at 122–23 (discussing the revolutionaries' distrust of organized religion).

[173] MARVIN OLASKY, FIGHTING FOR LIBERTY AND VIRTUE: POLITICAL AND CULTURAL WARS IN EIGHTEENTH-CENTURY AMERICA 172 (1995) ("Most new state constitutions displayed the libertarian/Christian consensus: no state church, but an honoring of the scriptural God whom virtually all either revered or thought useful.").

[174] MAY, *The Constitution*, *supra* note 159, at 148.

[175] *See Introduction* to COLONIAL AMERICA: INTERPRETING PRIMARY DOCUMENTS 24 (Karin Coddon ed., 2003) (referring to the Great Awakening as a probable "counterresponse" to the Enlightenment).

[176] MAY, *Jeffersonian Moment*, *supra* note 163, at 162.

[177] *See* COLONIAL AMERICA, *supra* note 175, at 24–25.

[178] *See infra* Part III.B. for discussion on France's reverence of the law.

[179] Jones, *Common Law in the United States*, *supra* note 13, at 101. The theory that judges "find" the law was exemplified in the writings of William Blackstone, whose *Commentaries* were studied by American lawyers and judges. *Id.*

judges in the form of binding precedent.[180] With the judiciary so controlled by basic philosophical limits, Americans did not feel as great of a need to reign in corrupt judges.[181]

B. France

Before the French Revolution, France did not enjoy the religious freedom that the American colonies had enjoyed before the American Revolution. The French monarchy, and consequently France, was traditionally Roman Catholic,[182] and religion played a major part in French politics.[183] In 1598, King Henry IV issued the Edict of Nantes, giving French Protestants (called *Huguenots*) certain religious and civil rights, such as the freedom to worship in public in certain areas of the country, the right to a fair trial in royal courts, and financial provision for Huguenot pastors and military units.[184] Religious toleration did not even last for a full century, however, before Louis XIV revoked the edict in 1685 in his quest to bring France back under Roman Catholicism.[185] Because Catholicism was the religion of the French monarchy, when the monarchy was opposed by the parlements, religious dissenters joined the courts to oppose the monarchy.[186]

Not only was the French monarchy deeply connected to Catholicism, the Catholic Church was a powerful force in French society as a whole.[187] Unfortunately, it failed to fulfill the religious and physical needs of the French people.[188] In addition to the French government's tax on the people and the rent owed to French nobles owning the land on which the peasants worked, the Church required the French people to pay a tithe.[189] The Catholic Church owned a significant amount of land from which it earned income with the upper clergy primarily gaining from the income.[190] The Church maintained its own ecclesiastical courts with

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[180] Jones, *Uncommon Common Law*, *supra* note 2, at 455–56.

[181] *Id.*

[182] FURET, *supra* note 74, at 4. This was part of France's unwritten "constitution," or tradition, that the French monarchy would be Catholic. *Id.*; *see also* VAN KLEY, *supra* note 57, at 3 ("For to be French was to be Catholic until the very eve of the Revolution.").

[183] VAN KLEY, *supra* note 57, at 7.

[184] *Id.* at 38.

[185] *Id.* at 38–39.

[186] *Id.* at 7.

[187] In France, the social classes as represented in the Estates-General were called "estates." GERSHOY, *supra* note 4, at 28. The first class, or the First Estate, was comprised of the clergy. The nobility made up the Second Estate, and everyone else, i.e., the commoners, comprised the Third Estate. *See id.* at 35, 101, 104.

[188] JULES MICHELET, HISTORY OF THE FRENCH REVOLUTION 248–49 (Gordon Wright ed., Charles Cocks trans., 1967).

[189] GERSHOY, *supra* note 4, at 29, 43.

[190] *Id.* at 28–29; HOLTMAN, *supra* note 128, at 16.

limited jurisdiction, and it also kept the public records of marriages, births, and deaths.[191]

Not only did the French revolutionaries want to rid society of the monarchy and the nobility, they also wanted to free society from the Catholic Church.[192] For a period of time during the French Revolution, France underwent a "dechristianization," which included replacing the traditional Christian calendar with a secular one, instituting the Cult of the Supreme Being as the national religion, and converting churches into "temples of reason."[193] By the time France adopted the Civil Code in 1804, some of the revolution's radical elements had subsided, and the Code's drafters were more moderate than some of the earlier French revolutionaries.[194] Still, the drafters retained an aversion to mixing religion with government, and this aversion was manifested in the secular Civil Code.[195]

Another important influence on the adoption of the Civil Code in France was the Enlightenment.[196] Reason replaced custom and tradition.[197] The philosopher Montesquieu had written that the law should be clear, simple, concise, and direct.[198] The importance of reason, Montesquieu's ideas, and a philosophical shift from regarding God as the ultimate authority to regarding the individual human as more authoritative[199] resulted in the popularity of a legal code that was the product of human reasoning.[200]

In addition, the writings of another French Enlightenment thinker, Jean-Jacques Rousseau, profoundly impacted the drafting of the French Civil Code.[201] Rousseau proposed the theory of a "social contract,"[202] an idea Napoleon adopted.[203] Instead of sovereignty being deposited by God

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[191] BERMAN, *supra* note 157, at 267–68. During the English Revolution, the English relegated many matters formerly handled by English ecclesiastical courts to secular courts (common law and chancery courts). *Id.*; GERSHOY, *supra* note 4, at 28–29.

[192] GERSHOY, *supra* note 4, at 286–87 ("One object of the [revolutionaries] was to commemorate the triumphs of the Republic; another, and the more important, to destroy the influence of Christianity and the Catholic Church.").

[193] *Id.* at 286–87; *see also* HOLTMAN, *supra* note 128, at 16–17.

[194] FURET, *supra* note 74, at 231–32.

[195] HOLTMAN, *supra* note 128, at 90–91. To this day, France is a self-declared "secular" nation.

[196] BERMAN, *supra* note 157, at 24; HOLTMAN, *supra* note 128, at 15, 88–89.

[197] Leclair, *supra* note 142, at 26.

[198] *Id.* at 26 n.88. The drafters tried to make the French Civil Code precisely that—clear, concise, and simple. HOLTMAN, *supra* note 128, at 89.

[199] Leclair, *supra* note 142, at 25.

[200] BERMAN, *supra* note 157, at 32.

[201] Herman, *supra* note 97, at 598–99.

[202] GERSHOY, *supra* note 4, at 74.

[203] Herman, *supra* note 97, at 598.

in an earthly king, individuals are their own masters.[204] In Rousseau's theory of social contract, the individual gives up certain natural rights in order to submit to a government that will promote the good of everyone in society.[205] This "general will of the community" is a combination of all the individuals in society.[206] The French Civil Code was a manifestation of the general will of the French community, and the legislator (Napoleon Bonaparte) was "unlike an earthly mortal, mystically embodied in [that] general will."[207] After the French secularized society,[208] law filled part of the hole left by religion.[209]

CONCLUSION

Many complicated and intricate details contribute to a country's adoption of its legal system, let alone the eruption of a country into revolution. In an effort to pinpoint the reasons for the different legal systems in America and France, this Note has only skimmed the surface of the history of two revolutions that changed the world. Taking a broad view of the legal situations in each country before and after the revolutions, the most important factors that led these countries to adopt their particular legal systems may be summarized by the following: constitutional freedom, Napoleon, and religion.

Expounding upon and comparing the relative advantages and disadvantages of common law and civil law is beyond the scope of this Note. Nonetheless, American lawyers will benefit from understanding civil law, particularly as international issues become more important to the American legal profession. This does not mean, however, that the common law is somehow outdated or incompetent in dealing with modern legal issues. As English subjects and early Americans recognized, the common law embodies America's most treasured legal traditions. James Kent, author of *Commentaries on American Law* and one of the early advocates for incorporating more civil law into American law, recognized the importance of common law in preserving liberty.[210] To this effect he wrote, "In every thing which concerns civil and political liberty, [the civil law] cannot be compared with the free spirit of the

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[204] Leclair, *supra* note 142, at 25, 27.

[205] GERSHOY, *supra* note 4, at 74.

[206] *Id.*

[207] *See* Herman, *supra* note 97, at 598–99.

[208] BERMAN, *supra* note 157, at 267.

[209] Herman, *supra* note 97, at 620.

[210] Stein, *supra* note 103, at 427.

English and American common law."[211] After considering American and French legal history, I concur.

Kathleen A. Keffer

[211] 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 507 (photo. reprint 1984) (1826).

THE NEW TEMPORAL PRIME DIRECTIVE: *ORTIZ* & THE DEATH OF POST-TRIAL APPEALS FROM PRE-TRIAL SUMMARY JUDGMENT DENIALS

INTRODUCTION

On January 24, 2011, a legal mandate was issued that now prohibits federal practitioners from reaching back in time and challenging certain pre-trial judgments once a trial has concluded.[1] In effect, federal trials are now afforded greater protection against procedural action that would otherwise serve to circumvent a trial's entire timeline. While easily mistaken for some new protocol in accordance with Starfleet's temporal prime directive,[2] this mandate emanates instead from the U.S. Supreme Court's recent decision in *Ortiz v. Jordan*, ruling that a party may not appeal an order denying summary judgment "after a full trial on the merits."[3]

Prior to the Court's ruling, *Ortiz* had been on the legal community's radar for some time. This was due in part to the unique nature of Petitioner's counsel (young up-and-coming solo appellate practitioner David E. Mills), the events surrounding Petitioner's filing for certiorari, and the remarkableness of the Court's subsequent granting of the petition.[4] Yet, despite the incredible circumstances leading to its review by the U.S. Supreme Court, *Ortiz* will most likely be remembered for its impact on appeals from summary judgment denials, a procedural matter that had split at least eight federal circuit courts on two separate sub-issues.[5]

This Note explores *Ortiz*'s impact in three sections. Part I outlines *Ortiz*'s relevant procedural history in order to provide a context for the Court's ruling regarding Respondents' failure to preserve properly their qualified immunity defense for appellate review. Part II examines the basic function, purpose, and policy behind motions for summary judgment, followed by an analysis concerning some of the nuances that accompany interlocutory appeals from court orders denying summary

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1 Ortiz v. Jordan, 131 S. Ct. 884, 887 (2011).

2 *See* MICHAEL OKUDA & DENISE OKUDA, THE STAR TREK ENCYCLOPEDIA: A REFERENCE GUIDE TO THE FUTURE 502 (1999) (stating that the temporal prime directive is a mandate prohibiting the interference of the past or future by time travelers).

3 *Ortiz*, 131 S. Ct. at 888–89.

4 *See generally* Mark Curriden, *The Long Shot*, A.B.A. J., Nov. 2010, at 52; ABAJournal, *Profile: David Mills, Solo Practitioner*, YOUTUBE (Oct. 19, 2010), http://www.youtube.com/watch?v=MtfF6S1-0lQ (exploring the nature of Mr. Mills's career path and explaining how Mr. Mills was retained as Petitioner's counsel).

5 *See* discussion *infra* Parts II.D., III.B.

judgment. Part III concludes by explaining *Ortiz*'s impact on federal practitioners: first, pointing to specific procedural steps that lawyers must now take in order to preserve arguments emanating from summary judgment motions if interlocutory appeals from the denial of such motions are not otherwise available, and second, discussing how some circuits have stretched the holding in *Ortiz*.

I. *ORTIZ V. JORDAN*: RELEVANT PROCEDURAL HISTORY

On October 8, 1998,[6] Petitioner Michelle Ortiz brought a civil action in the United States District Court for the Southern District of Ohio[7] raising "claims for damages against superintending prison officers"[8] who failed to provide reasonable protection from sexual assault by a male corrections officer[9] during Ortiz's sentence as an inmate at the Ohio Reformatory for Women.[10] Respondents Paula Jordan and Rebecca Bright, the "[p]rincipal defendants in the suit,"[11] filed a motion for summary judgment with the district court on March 2, 2001,[12] raising pleas of qualified immunity.[13] On March 29, 2002,[14] finding that the qualified immunity defense raised by Respondents "turned on material facts genuinely in dispute," the district court issued an order denying summary judgment.[15] Appropriately,[16] Respondents did not seek immediate appellate review through interlocutory appeal.[17] Instead, the case proceeded to a jury trial on September 12, 2005.[18] Following the conclusion of Petitioner's case-in-chief, Respondents moved for judgment as a matter of law pursuant to Federal Rule of Civil Procedure ("Rule") 50(a)[19] on September 14, 2005.[20] While Respondents' motion was ultimately denied, the short yet belabored exchange between the district

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[6] Trial Brief of Defendants Bright and Jordan at 1, Ortiz v. Voinovich, 211 F. Supp. 2d 917 (S.D. Ohio 2002) (No. C-2-98-1031).

[7] Ortiz v. Jordan, 316 F. App'x 449, 450 (6th Cir. 2009).

[8] *Ortiz*, 131 S. Ct. at 888.

[9] *See* Petition for Writ of Certiorari at 2–3, *Ortiz*, 131 S. Ct. 884 (No. 09-737).

[10] *Ortiz*, 131 S. Ct. at 888.

[11] *Id.*

[12] Ortiz v. Voinovich, 211 F. Supp. 2d 917, 920–21 (S.D. Ohio 2002).

[13] *Ortiz*, 131 S. Ct. at 888.

[14] Petition for Writ of Certiorari, *supra* note 9, at 3.

[15] *Ortiz*, 131 S. Ct. at 888.

[16] *See id.* at 891.

[17] Petition for Writ of Certiorari, *supra* note 9, at 3.

[18] Final Brief of Defendants-Appellants at 15, Ortiz v. Jordan, 316 F. App'x 449 (6th Cir. 2009) (No. 06-3627).

[19] *Ortiz*, 131 S. Ct. at 890.

[20] Joint Appendix at 3, *Ortiz*, 131 S. Ct. 884 (No. 09-737).

court and Respondents' trial counsel concerning this motion captures, in retrospect, the suit's overall fitful vibe. Indeed, after "years of pre-trial proceedings"[21] and with at least five more years of litigation before review by the U.S. Supreme Court,[22] the text from the trial transcript accompanying Respondents' first Rule 50(a) motion is perhaps indicative of the suit's entire frustrated existence. (In the following exchange, the transcript identifies Ms. Reese as Respondents' trial counsel.)

> THE COURT: Here is what happened, Ms. Reese.
>
> And, again, this is a Rule 50. So, I am not -- it is not whether you can disbelieve something, that's not the point. The point is, Ms. Bright testified that people are put in segregation for violating prison rules. Ms. Bright further testified --
>
> MS. REESE: That's not the only reason.
>
> THE COURT: If you will let the Court finish?
>
> MS. REESE: I'm sorry, Your Honor. I apologize.
>
> THE COURT: I am just the one making the decision here. Forgive me for interrupting.
>
> . . . .
>
> MS. REESE: Your Honor, simply to protect my own record here --
>
> THE COURT: The record is protected. Once you made your motion and once you set forth your bases, your record is protected.
>
> MS. REESE: But the Court interrupted me in setting forth my bases.
>
> THE COURT: No. Ms. Reese, I have to make decisions based upon the record before me. You gave your argument. I heard your argument. I asked you questions. You answered them.
>
> MS. REESE: And Your Honor, you did not let me finish. You interrupted my argument, and I have a few -- a couple of more sentences that I would like to have in there in case this is reviewed.
>
> THE COURT: Ms. Reese, please make your couple of more sentences.
>
> . . . .
>
> THE COURT: Is there an affirmative duty for the plaintiff to undertake security measures herself?
>
> MS. REESE: When she -- according to Ms. Jordan, she was not told the name of the officer.
>
> THE COURT: That wasn't my question. That wasn't my question. Is there an affirmative duty for Ms. Ortiz to protect herself under the law? As a matter of law?
>
> MS. REESE: Your Honor, as a matter of fact, you would do anything possible -- \ [sic]

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[21] Petition for Writ of Certiorari, *supra* note 9, at 3.

[22] *See Ortiz*, 131 S. Ct. at 884 (noting that the Supreme Court heard oral arguments in November 2010); Petition for Writ of Certiorari, *supra* note 9, at 3 (noting that the trial occurred in September 2005).

> THE COURT: I didn't ask you that, Ms. Reese. I asked you as a matter of law, does she have an affirmative duty to protect herself in a prison institution? Yes or no?
>
> MS. REESE: Yes.
>
> . . . .
>
> THE COURT: I find that a reasonable juror could believe that there was retaliation involved. . . .
>
> . . . .
>
> MS. REESE: Your Honor, may I be heard in two sentences?
>
> THE COURT: No, because I am not finished.
>
> MS. REESE: I'm sorry.
>
> THE COURT: . . . . [Y]our motion is denied.
>
> MS. REESE: Your Honor, you have made several misstatements in your characterization here. And if you would give me an opportunity to correct them?
>
> THE COURT: No, no. This is not moot court. If I have made misstatements or if you disagree with my rationale, then the record is clear as to what the true facts were and your record is preserved because you presented -- I allowed you to finish -- you presented the arguments that you wanted to present, and this motion is concluded.
>
> Now, are you ready to proceed with your case-in-chief?
>
> MS. REESE: Yes, we are, Your Honor.
>
> THE COURT: Bring in the jury.[23]

Respondents renewed their motion for judgment as a matter of law at the end of their case-in-chief, but the court again denied Respondents' motion.[24]

After four days of deliberation, the jury found Respondents Jordan and Bright liable, awarding Petitioner Ortiz "$250,000 in compensatory damages and $100,000 in punitive damages against Jordan; . . . [and] $25,000 in compensatory damages and $250,000 in punitive damages against Bright."[25] In accordance with the jury's verdicts, the district court entered judgment in Petitioner's favor[26] on September 20, 2005.[27] Respondents "did not contest the jury's liability finding by renewing, under Rule 50(b), their request for judgment as a matter of law,"[28] but instead appealed the district court's "2002 pre-trial order denying summary judgment" to the United States Court of Appeals for the Sixth Circuit.[29]

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[23] Joint Appendix, *supra* note 20, at 6, 8–10, 14–16.

[24] *Ortiz*, 131 S. Ct. at 890–91.

[25] Petition for Writ of Certiorari, *supra* note 9, at 3.

[26] *Id.*

[27] Final Brief of Defendants-Appellants, *supra* note 18, at 1.

[28] *Ortiz*, 131 S. Ct. at 890–91.

[29] Petition for Writ of Certiorari, *supra* note 9, at 4.

The Sixth Circuit, believing it had appellate jurisdiction to hear the case,[30] concluded that the district court should have granted Respondents' motion for summary judgment and, in accordance with this conclusion, "'reverse[d] the denial of qualified immunity to both Bright and Jordan'"[31] on March 12, 2009.[32] Petitioner Ortiz "filed a timely petition for rehearing and rehearing *en banc* on July 21, 2009," and both were subsequently denied.[33] Following the Sixth Circuit's denial for rehearing, Petitioner was forced to seek new counsel, a search that would bring Petitioner dangerously close to the deadline for appealing to the U.S. Supreme Court.[34] Upon retaining Mills as willing counsel, Petitioner "had four hours to get the petition for an extension [of time to file a petition for certiorari] prepared and to the post office."[35] Ten days later, on October 19, 2009, Justice Stevens granted the extension.[36] Petitioner submitted a timely petition for writ of certiorari to the Court by December 18, 2009.[37] The following is a description of what occurred approximately four months later:

> On the morning of April 26, [2010], Mills sat down at his computer and logged on to the Supreme Court's website. There were about 170 cases up for consideration. All but two were denied. He took a deep breath, picked up the phone and called his client. "I have very, very good news," he told Ortiz, who started crying immediately. "We are in at the Supreme Court."[38]

Such is the procedural history that led to *Ortiz*'s review by the U.S. Supreme Court, and in the Court's own words, certiorari was specifically granted "to resolve the conflict among the Circuits as to whether a party may appeal a denial of summary judgment after a district court has conducted a full trial on the merits."[39] In order to appreciate the full impact of the Court's ruling with respect to the pre-*Ortiz* circuit split, the following section provides a review of the fundamental nature behind summary judgment motions and the requisite methods for appealing the denials of such motions.

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30 *See* Ortiz v. Jordan, 316 F. App'x 449, 453 (6th Cir. 2009).

31 *Ortiz*, 131 S. Ct. at 891 (quoting *Ortiz*, 316 F. App'x at 455).

32 *Ortiz*, 316 F. App'x at 449.

33 Petition for Writ of Certiorari, *supra* note 9, at 1, 4.

34 *See* Curriden, *supra* note 4, at 56–57; *see also Corrections*, A.B.A. J., Dec. 2010, at 7 (explaining that the November issue "mistakenly stated that David Mills called potential client Michelle Ortiz. She called him after another attorney approached Mills about her case.").

35 Curriden, *supra* note 4, at 56–57.

36 Petition for Writ of Certiorari, *supra* note 9, at 1; Curriden, *supra* note 4, at 57.

37 *See* Petition for Writ of Certiorari, *supra* note 9, at 1.

38 Curriden, *supra* note 4, at 58.

39 Ortiz v. Jordan, 131 S. Ct. 884, 891 (2011).

II. SUMMARY JUDGMENT

A. Essence, Purpose, and Policy

Summary judgment takes the form of a pre-trial motion under Rule 56, which provides in part that parties to an action may seek an entry of judgment in their favor by the trial court as to "each claim or defense—or the part of each claim or defense"—raised.[40] When a party moves for summary judgment, she is challenging the opposing party's ability to procure a satisfactory showing that some "genuine dispute as to any material fact"[41] exists for what may otherwise constitute a legally sufficient claim. Thus, summary judgment "distinguishes the merely formal existence of a dispute as framed in the pleadings from the actual substantive existence of a controversy requiring trial."[42] A motion for summary judgment forces the non-moving party "to come forward with at least one sworn averment of fact essential to that opponent's claims or defenses, before the time-consuming process of litigation will continue."[43] As the Third Circuit has stated, summary judgment is "essentially 'put up or shut up' time for the non-moving party."[44] The non-moving party must present facts, not assertions, in order to rebut a motion for summary judgment.[45]

The challenge asserted by a Rule 56 motion for summary judgment, and the burden it places on the non-moving party, serves to "isolate, and then terminate, claims and defenses that are factually unsupported."[46] Unlike other rules of civil procedure, many of which are instituted primarily for regulating the litigation process, Rule 56 motions for summary judgment are made in order to "resolve cases or significant segments of cases."[47] The Rule empowers a moving party to seek a dispositive decision[48] by the trial judge in order to eliminate claims or defenses that are found to be truly undisputed, potentially forgoing the

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[40] FED. R. CIV. P. 56(a); *see also* 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.02[1] (3d ed. 2011) ("A summary judgment is a judgment entered without a trial or specific fact finding by the court.").

[41] FED. R. CIV. P. 56(a).

[42] MOORE ET AL., *supra* note 40.

[43] STEVEN BAICKER-MCKEE ET AL., FEDERAL CIVIL RULES HANDBOOK 2010, at 1063 (2009).

[44] Berckeley Inv. Grp., Ltd. v. Colkitt, 455 F.3d 195, 201 (3d Cir. 2006).

[45] *Id.*

[46] BAICKER-MCKEE ET AL., *supra* note 43.

[47] MOORE ET AL., *supra* note 40.

[48] *Id.*

need for a trial altogether.[49] Echoing this sentiment, the Second Circuit has asserted that "[o]n a motion for summary judgment the court must pierce through the pleadings and their adroit craftsmanship to get at the substance of the claim."[50] Likewise, the First Circuit has asserted that "[i]n operation, summary judgment's role is to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required."[51] Thus, a motion for summary judgment pursuant to Rule 56 functions as a procedural check by balancing the relative ease of raising claims or defenses with an opportunity to evaluate their substantive merit before proceeding to trial.[52] Similarly, summary judgment functions as a tool for the prudent management of judicial time and resources,[53] a function that renders it favorable for efficiency and docket clearing.[54]

B. Summary Judgment Distinguished

Contrasting Rule 56 with other procedural rules that serve a similar purpose or that render the same effect if granted helps to distinguish the true nature of summary judgment while placing it in context of the overall litigation process.

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[49] *See* 1 JAMES WM. MOORE & KEVIN SHIREY, MOORE'S FEDERAL RULES PAMPHLET § 56.3[1] (2010).

[50] United Nat'l Ins. Co. v. Tunnel, Inc., 988 F.2d 351, 354 (2d Cir. 1993).

[51] Wynne v. Tufts Univ. Sch. of Med., 976 F.2d 791, 794 (1st Cir. 1992).

[52] Raynor v. Richardson-Merrell, Inc., 643 F. Supp. 238, 245 (D.D.C. 1986) ("[S]ummary judgment is given significant procedural strength, and is raised as a bulwark against claims based on speculation and inference. Litigants are provided a panoply of pre-trial procedures, intended to uncover evidence and streamline the presentation of a case to the jury. Summary judgment is a necessary complement to the liberal rules of pleading and discovery available in federal court.").

[53] Prof'l Managers, Inc. v. Fawer, Brian, Hardy & Zatzkis, 799 F.2d 218, 222 (5th Cir. 1986) ("As Judge William W. Schwarzer has pointed out, 'Summary adjudication of claims or defenses is one of the means for implementing the fundamental policy of the Federal Rules stated in Rule 1: to secure the just, speedy and inexpensive determination of every action.'" (internal quotation marks omitted) (quoting William W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 465 (1984))).

[54] Gonzalez v. Torres, 915 F. Supp. 511, 515 (D.P.R. 1996) ("The device allows courts and litigants to avoid full-blown trials in unwinnable cases, thus conserving the parties' time and money and permitting courts to husband scarce judicial resources." (quoting McCarthy v. Nw. Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995))); Gray v. Laws, 915 F. Supp. 762, 763 (E.D.N.C. 1994) ("[T]he purpose of summary judgment motion is to avoid the expense and time of an unnecessary trial . . . ."); Edward Brunet, *The Use and Misuse of Expert Testimony in Summary Judgment*, 22 U.C. DAVIS L. REV. 93, 94 (1988) ("Today's courts, facing more complex cases and an increasing caseload, are simply more receptive to docket clearing devices such as summary judgment."); William W. Schwarzer et al., *The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure*, 139 F.R.D. 441, 445 (1992).

A motion for summary judgment pursuant to Rule 56 is distinct from a motion for dismissal pursuant to Rule 12(b)(6), a motion for judgment on the pleadings pursuant to Rule 12(c), and a motion for judgment as a matter of law pursuant to Rule 50. Parties who move for a dismissal pursuant to Rule 12(b)(6) or a judgment on the pleadings pursuant to Rule 12(c) seek a judgment against the *legal sufficiency* of "the averments of law and fact" raised by the opposing party.[55] In order to reach a ruling on such motions, a trial judge will generally examine "only the allegations contained in the pleadings."[56] A motion for summary judgment pursuant to Rule 56 is distinguishable in that it "permits the district judge to consult not only the pleadings, but also any affidavits, discovery, and other evidence to determine whether any true factual dispute exists between the parties."[57]

There is, however, a certain amount of potential interplay between these rules insofar as motions pursuant to Rule 12(b)(6) and Rule 12(c) "will be converted into a Rule 56 motion for summary judgment if the court considers matters outside the pleadings in ruling on the motion."[58] Likewise, a motion for directed verdict pursuant to Rule 50, while possessing an even stronger similarity to Rule 56 than either Rule 12(b)(6) or Rule 12(c), is distinguishable from summary judgment. In practice, Rule 56 is mirrored by Rule 50: "The prerequisites for and effects of summary judgments are much the same as judgments as a matter of law, entered under Rule 50 (the federal equivalent of a 'directed verdict')."[59] Indeed, "Both motions test for whether, on the evidence then before the court, a reasonable jury could return a verdict in the non-moving party's favor. Both motions, if granted, will result in a 'judgment' in the movant's favor."[60] Rule 50's mirrored effect of Rule 56 occurs, however, in a particularized temporal context.[61]

A motion for summary judgment pursuant to Rule 56 is pre-trial in nature, supported by "pleadings, discovery, affidavits, and other 'cold' evidence."[62] In contrast, a motion for directed verdict pursuant to Rule 50 is made once a trial has commenced, "after the close of the plaintiff's case (and, possibly, the defendant's case), with the trial judge having listened

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55 BAICKER-MCKEE ET AL., *supra* note 43, at 1060.

56 *Id.*

57 *Id.*

58 *Id.* at 1061.

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.*

to a full, live evidentiary presentation."[63] Thus, Rule 56 motions for summary judgment challenge the need for a trial before a trial ever begins, whereas Rule 50 motions for judgment as a matter of law "challenge whether there is any need for the trial—then underway—to reach the jury deliberation stage."[64]

Yet, despite this difference, the Court majority in *Ortiz* established that a stronger interface between Rule 56 and Rule 50 exists at the macro-procedural level, especially when it comes to appealing the denial of a Rule 56 motion.[65] Indeed, Justice Ginsburg's statements during oral arguments concerning the sub-categorical interrelationship between Rule 50(a) (governing initial motions for directed verdict) and Rule 50(b) (governing renewed motions for directed verdict) was prophetic of the Court's ruling in *Ortiz* with respect to sufficiently preserving a Rule 56 summary judgment denial for appeal.[66] Justice Ginsburg emphasized that "every first year Procedure student learns 50(a), 50(b) go together, and there is an historic reason why you must back up a 50(a) motion with a 50(b) motion."[67] Part II.D. explains and develops the importance of this relationship in the context of appealing summary judgment denials.[68] But first, it is helpful to address some of the fundamental principles behind summary judgment appeals.

C. A Focused Look at the Fundamentals of Appealing Summary Judgment

An order by the district court granting summary judgment as to all pending claims in an action is considered final, representing the "complete disposition of the case" at the district court level.[69] The U.S. Supreme Court has explained that a final judgment is one, "which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[70] Once a final judgment has been entered by the district court, appellate jurisdiction is triggered under federal law.[71] Thus, when summary judgment results in a final judgment, the order by the district court is usually subject to immediate appeal.[72] Conversely,

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63 *Id.*

64 *Id.*

65 *See* discussion *infra* Part III.

66 Transcript of Oral Argument at 34–36, Ortiz v. Jordan, 131 S. Ct. 884 (2011) (No. 09-737); *Ortiz*, 131 S. Ct. at 890–92.

67 Transcript of Oral Argument, *supra* note 66, at 34.

68 *See* discussion *infra* Parts II.D., III.

69 MOORE ET AL., *supra* note 40, at § 56.130[1].

70 Catlin v. United States, 324 U.S. 229, 233 (1945).

71 28 U.S.C. § 1291 (2006) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .").

72 BAICKER-MCKEE ET AL., *supra* note 43, at 1081.

an order denying a motion for summary judgment is not ordinarily considered final, but instead assumes an interlocutory status.[73] The denial order is, by its nature, "interim" to the proceedings such that it fails to provide "a final resolution of the whole controversy."[74] For this reason, denial of summary judgment normally does not permit "immediate appellate review."[75]

However, there are some exceptions that allow a party to appeal a denial of summary judgment despite its interlocutory status.[76] Appropriately, such an appeal is known as an interlocutory appeal, "[a]n appeal that occurs before the trial court's final ruling on the entire case."[77] In *Johnson v. Jones* (arguably the Court's greatest lodestar concerning the nature and procedural relevance of interlocutory appeals), it was emphasized that, because appellate jurisdiction rests on final decisions from district courts, interlocutory appeals "are the exception, not the rule."[78] Given the Court's analysis in *Johnson*, it has been observed,

> The most frequent bases for permitting interlocutory appeal are (1) the collateral order doctrine; (2) directed entry of final judgment as to fewer than all claims or parties; (3) review of summary judgment granting injunctive relief; (4) discretionary certification of controlling and doubtful questions of law to facilitate efficient resolution of the case; and (5) mandamus.[79]

Generally, an interlocutory appeal involves either "legal points necessary to the determination of the case," or "collateral orders that are wholly separate from the merits of the action."[80] The collateral order doctrine comes into play with respect to the latter category of interlocutory appeals because "[t]o qualify as a collateral order, a decision must: (i) 'conclusively determine the disputed question'; (ii) 'resolve an important issue completely separate from the merits of the action'; and (iii) 'be effectively unreviewable on appeal from a final

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[73] *See id.*

[74] BLACK'S LAW DICTIONARY 889 (9th ed. 2009).

[75] MOORE ET AL., *supra* note 40, at § 56.130[3][a]; Johnson v. Jones, 515 U.S. 304, 313 (1995) ("[T]he District Court's determination that the summary judgment record in this case raised a genuine issue of fact concerning petitioner's involvement in the alleged beating of respondent was not a 'final decision' within the meaning of the relevant statute.").

[76] MOORE ET AL., *supra* note 40, at § 56.130[3][a].

[77] BLACK'S LAW DICTIONARY 113 (9th ed. 2009).

[78] 515 U.S. 304, 309 (1995).

[79] 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 56.41[2][b] (3d ed. 2002).

[80] BLACK'S LAW DICTIONARY 113 (9th ed. 2009).

judgment."'[81] When the district court issues an interlocutory order conclusively resolving "an important question that is completely separate from the merits of the case," the collateral order doctrine will permit an interlocutory appeal of the order if the resolved question "cannot be adequately reviewed after entry of final judgment."[82] Thus, an interlocutory order is treated as "final" under the collateral order doctrine, and becomes "immediately appealable . . . even though the district court may have entered [the interlocutory order] before (perhaps long before) the case has ended."[83]

The Court has expressly recognized that a denial of summary judgment is an interlocutory order that can qualify for immediate appeal under the collateral order doctrine if the denial resolves a question outside the merits of the action.[84] The question in *Johnson* that prompted an interlocutory appeal from the district court's denial of summary judgment emanated from a plea of qualified immunity.[85] This is the same defense that was raised by Respondents in *Ortiz*.[86] Qualified immunity serves as a form of "[i]mmunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights."[87] The purpose behind the qualified immunity defense is to ensure that public officials can perform their duties with a certain amount of impunity in light of circumstantial exigencies and honest mistakes. For example, the respondent in *Johnson* brought suit after police officers forcibly arrested and unintentionally injured him upon the mistaken belief that he was inappropriately drunk when, in fact, he was suffering from an insulin seizure.[88] The officers, entitled to raise a qualified immunity defense, moved for summary judgment.[89] While the officers in *Johnson* ultimately lost to the respondent given the nature of the denial order they were attempting to appeal[90] (a certain caveat to the qualified immunity defense that will be discussed shortly), qualified immunity will protect the actions of a public official unless, in committing the

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[81] Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 375 (1987) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)).

[82] MOORE ET AL., *supra* note 40, at § 56.130[4][a].

[83] Johnson v. Jones, 515 U.S. 304, 310 (1995) (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)).

[84] *Id.* at 311.

[85] *Id.* at 307.

[86] Ortiz v. Jordan, 131 S. Ct. 884, 888 (2011).

[87] BLACK'S LAW DICTIONARY 818 (9th ed. 2009).

[88] *Johnson*, 515 U.S. at 307.

[89] *See id.*

[90] *See id.* at 313.

actions in question, the officer violated "'clearly established statutory or constitutional rights of which a reasonable person would have known.'"[91]

Qualified immunity serves not only to protect public officials from a certain amount of civil liability, but also to protect public officials from having to stand trial.[92] In *Johnson*, the Court observed that this separate but "important purpose" behind qualified immunity "would come too late to vindicate" if appealed following a full trial.[93] Thus, the motivating interests behind qualified immunity warrant a plea's immediate review as a truly collateral matter when the plea is resolved by a denial of summary judgment. To a certain extent, this reasoning can be seen as an inverted reflection of why summary judgment exists in the first place. Granting summary judgment preserves judicial time and resources by forgoing unnecessary litigation.[94] Granting immediate appeal for the denial of a qualified immunity defense can potentially accomplish the same thing by forgoing the need to hear an additional issue at trial or, if the defense was erroneously rejected, by forgoing the need to even have a trial. Yet, in order for these objectives to hold true (as opposed to wasting the appellate court's time with an issue that may well return after a full trial on the merits[95]), a certain caveat must accompany a successful appeal from a district court's summary judgment denial based on qualified immunity. As explained below, it is this caveat that guarantees a true separation from the merits of the action.

In order to be reviewed on interlocutory appeal, the rejected qualified immunity defense must present a "'purely legal issue.'"[96] The *Johnson* Court explained that despite the difficulty in determining whether qualified immunity issues are "completely separate from the merits of the action" in question, "it follows from the recognition that qualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct that a claim of immunity is *conceptually distinct* from the merits of the plaintiff's claim that his rights have been violated."[97] Requiring that an immunity appeal present

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[91] Pearson v. Callahan, 555 U.S. 223, 231 (2009) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

[92] *Johnson*, 515 U.S. at 312 (citing Mitchell v. Forsyth, 472 U.S. 511, 525–27 (1985)).

[93] *Id.*

[94] *See* discussion *supra* Part II.A.

[95] *Johnson*, 515 U.S. at 316–17 (explaining that an interlocutory appeal of this kind may result in "unwise use of appellate courts' time, by forcing them to decide in the context of a less developed record, an issue very similar to one they may well decide anyway later, on a record that will permit a better decision").

[96] Ortiz v. Jordan, 131 S. Ct. 884, 891 (2011) (quoting *Johnson*, 515 U.S. at 313).

[97] *Johnson*, 515 U.S. at 312 (citing *Mitchell*, 472 U.S. at 527–28).

only a purely legal issue in order to receive immediate review ensures that there will be a true separation from the merits of an action. This is possible because the very nature of the qualified immunity defense is supposed to take the focus away from the merits of the suit and place it on the specific actions of the defendant as against the alleged rights of the plaintiff. The only question to be determined is whether the conduct, for which a defendant seeks immunity, "violated clearly established law" or, stated another way, "whether the law clearly proscribed the actions the defendant claims he took."[98] For this reason, the Court articulated its holding in *Johnson* by stating that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial."[99]

To clarify further, the figures located in Appendix A represent three different conceptual approaches to the type of interlocutory appeal at issue. The first (Figure 1.1) provides a simplified taxonomical approach, outlining the nature of a qualified immunity appeal from generalness to specificity. The second (Figure 1.2) provides a procedural approach, depicting the temporal progression of a qualified immunity appeal from a defendant's motion for summary judgment to review by an appellate court. The third (Figure 1.3) provides a syllogistic approach, articulating the necessary rule-based conditions that follow a successful qualified immunity appeal in light of a summary judgment denial.

*D. The Pre-*Ortiz *Circuit Split*

There can be no doubt that immediate appeal from an interlocutory order is inherently advantageous, especially when it comes to qualified immunity. Yet, despite the advantages of immediate appeal, a question remains: Can a party wait until the completion of a full trial on the merits to appeal a court's order denying summary judgment based on qualified immunity? Even then, another and perhaps more important question remains: Can a party appeal a court's order denying summary judgment based on qualified immunity after a full trial on the merits if interlocutory appeal was unavailable due to the inability to preserve a purely legal issue for review? Prior to *Ortiz*, the federal circuit courts were at odds concerning these questions (and recent decisions by some of the circuits may serve to perpetuate this legacy).[100]

Analysis conducted by Petitioner's counsel in *Ortiz* reveals that there were at least two major "independent splits" among the circuits

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[98] *Mitchell*, 472 U.S. at 528.

[99] *Johnson*, 515 U.S. at 319–20.

[100] *See* discussion *infra* Part III.B.

"regarding the conditions, if any, under which a party may appeal the denial of summary judgment after trial."[101] First, the circuits were divided as to whether post-trial summary judgment appeals were permissible "if the party raise[d] a question of law."[102] Second, the circuits were divided as to whether post-trial summary judgment appeals were permissible if, "even when raising a question of law," a party "chose not to immediately appeal the denial of summary judgment."[103]

Under the first major split, Petitioner's counsel identified "[a]t least three circuits (the Sixth, Seventh, and Ninth)," that endorsed a "'legal-question' exception" to a general policy prohibiting post-trial summary judgment appeals.[104] It was similarly observed that the Fifth Circuit had "implied approval of the exception."[105] The justification for permitting this legal-question exception rested on the assertion that "it would be unfair to allow a judgment to stand where the appellant can show that the district court erroneously denied summary judgment as a matter of law."[106] On the other side of the legal-question exception split, Petitioner's counsel identified the Fourth and Eighth Circuits as having "held that there is no such exception for questions of law."[107] Likewise, it was observed that the Eleventh Circuit "appears to reject the exception."[108] Reasoning that any deviation from the general prohibition against post-trial appeals from summary judgment denials would undermine the purpose behind other procedural rules, these circuits considered the legal-question exception to be an unjustified way of circumventing motions for judgments as a matter of law pursuant to Rules 50(a) and 50(b).[109]

Ideally, if it becomes impossible to commence an interlocutory appeal from a denial of summary judgment, a party will raise summary judgment arguments in the form of a motion for judgment as a matter of law under Rule 50(a) "before the case reaches the jury."[110] The moving

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[101] Petition for Writ of Certiorari, *supra* note 9, at 4 (citing Larson v. Benediktsson, 152 P.3d 1159, 1166–68 (Alaska 2007)).

[102] *Id.*

[103] *Id.* at 4–5.

[104] *Id.* at 10.

[105] *Id.*

[106] *Id.* at 11.

[107] *Id.* at 11–12 (citing EEOC v. Sw. Bell Tel., L.P., 550 F.3d 704, 708 (8th Cir. 2008); Varghese v. Honeywell Int'l, Inc., 424 F.3d 411, 422 (4th Cir. 2005)).

[108] *Id.* at 12 (citing Lind v. United Parcel Serv., Inc., 254 F.3d 1281, 1286 (11th Cir. 2001)).

[109] *Id.* (citing Eaddy v. Yancey, 317 F.3d 914, 916 (8th Cir. 2003)).

[110] *Id.* at 7–8 (citing FED. R. CIV. P. 50(a)).

party "may further preserve those arguments" by renewing the motion for judgment as a matter of law (after an entry of judgment) under Rule 50(b).[111] Accordingly, if these motions under Rules 50(a) and 50(b) are denied, the moving party may then appeal.[112] Procedurally, this means that the appellant "does not appeal the district court's order denying summary judgment in its favor; rather, it asserts that the district court relied on the same erroneous reasoning to deny its summary judgment motion as it used to deny its motion for judgment as a matter of law."[113] As counsel for the Petitioner in *Ortiz* noted, this reflects the principle that, at the end of the day, "the trial supersedes the summary-judgment proceedings."[114]

In light of this principle, circuits refusing to recognize the legal-question exception further reasoned that it would be inappropriate to "reward litigants who fail, either inadvertently or intentionally, to exercise their rights under the Federal Rules of Civil Procedure."[115] Additionally, these circuits countered the fairness argument raised by their sister circuits by explaining that "overturning verdicts in this context is unfair to the party who obtained the verdict after a full trial."[116]

Under the second major split, Petitioner's counsel identified the Ninth and Fourth Circuits as unwilling to review legal questions raised in a post-trial appeal from summary judgment denial "where the appellant could have raised the issue before trial in an interlocutory appeal but failed to do so."[117] The rationale for refusing to accept summary judgment appeals under such circumstances rests on two conceptual prongs: the principle of acting on one's procedural prerogative and the nature of procedural timing.[118] Specifically, the Ninth Circuit not only declared that there is "even less reason to permit a post-trial appeal of a pretrial denial of qualified immunity" given that "a denial of a motion for qualified immunity as a matter of law is appealable as of right on an interlocutory basis," but similarly reasoned that a post-trial

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[111] *Id.* at 8 (citing FED. R. CIV. P. 50(b)).

[112] *Id.*

[113] First United Pentecostal Church v. GuideOne Specialty Mut. Ins. Co., 189 F. App'x 852, 855 n.6 (11th Cir. 2006).

[114] Petition for Writ of Certiorari, *supra* note 9, at 8 (citing Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co., 19 F.3d 431, 434 (8th Cir. 1994)).

[115] Eaddy v. Yancey, 317 F.3d 914, 916 (8th Cir. 2003).

[116] Petition for Writ of Certiorari, *supra* note 9, at 12–13 (citing Larson v. Benediktsson, 152 P.3d 1159, 1167 (Alaska 2007)).

[117] *Id.* at 13 (citing Price v. Kramer, 200 F.3d 1237, 1243–44 (9th Cir. 2000)).

[118] *Price*, 200 F.3d at 1244; *see also* Petition for Writ of Certiorari, *supra* note 9, at 14.

realization that the defendant "should have been immune from suit at the time of the pretrial order is long past due and unreviewable on . . . appeal."[119] In contrast, the Sixth, Seventh, Eighth, and Tenth Circuits allowed post-trial appeals from summary judgment denials under circumstances where such appeals could have qualified for interlocutory review.[120] The rationale offered for permitting post-trial appeals under such circumstances consisted of the general explanation that "the qualified-immunity question is reviewable because parties can wait to appeal 'nonmoot interlocutory rulings.'"[121]

Before addressing *Ortiz*'s impact on these circuit splits, two important considerations must be noted concerning the analysis conducted by Petitioner's counsel. First, Petitioner's counsel includes the Eighth Circuit in the group of circuits rejecting the legal-question exception as well as in the group of circuits allowing post-trial appeals that could have been raised before trial.[122] At first glance, this categorization of the Eighth Circuit seems contradictory. Indeed, how can a circuit maintain a general policy prohibiting post-trial summary judgment appeals and yet permit post-trial appeals by parties who chose not to pursue an interlocutory appeal? However, given the precedent cited by Petitioner's counsel, it would appear that the Eighth Circuit, although having generally rejected the legal-question exception, made a very particular exception to hear post-trial appeals from summary judgment denials that could have been raised before trial on the basis of qualified immunity and on that basis alone.[123]

Second, Petitioner's counsel argues that the Sixth Circuit, in its review of *Ortiz*, followed the Eighth Circuit's particularized approach to post-trial appeals because the Sixth Circuit acknowledged "Jordan and Bright's failure to bring an interlocutory appeal" while "reversing the

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[119] *Price*, 200 F.3d at 1244.

[120] Ortiz v. Jordan, 316 F. App'x 449, 453 (6th Cir. 2009); Medina v. Bruning, 56 F. App'x 454, 455 (10th Cir. 2003); Pearson v. Ramos, 237 F.3d 881, 883 (7th Cir. 2001); Goff v. Bise, 173 F.3d 1068, 1072 (8th Cir. 1999).

[121] Petition for Writ of Certiorari, *supra* note 9, at 15 (quoting *Pearson*, 237 F.3d at 883).

[122] *Id.* at 11–12, 15.

[123] *Compare Goff*, 173 F.3d at 1072 ("Normally this Court will not review the denial of a motion for summary judgment after a trial on the merits. However, a district court's denial of summary judgment based on qualified immunity is an exception, and is reviewable after a trial on the merits." (internal citations omitted)), *with* Eaddy v. Yancey, 317 F.3d 914, 916 (8th Cir. 2003) ("Even a cursory review of precedent in this Circuit reveals that we do not review a denial of a summary judgment motion after a full trial on the merits."). The Eighth Circuit's assertion in *Eaddy* was made without any contrary reference or citation to *Goff*, a case decided prior to *Eaddy*. There is nothing to suggest that *Eaddy* expressly overruled *Goff*'s exceptional treatment of qualified immunity.

trial verdict based on qualified-immunity arguments not appealed before trial."[124] However, it should be noted that the U.S. Supreme Court found it "unsurprising" that Jordan and Bright refrained from seeking immediate appeal prior to trial given the Court's precedent in *Johnson*.[125] This statement by the Court suggests that any attempt on the part of Jordan and Bright to have engaged in an interlocutory appeal would have proven futile, which is quite different from asserting that Jordan and Bright were entitled to, but chose not to take, an interlocutory appeal. Indeed, that the interlocutory appeal would have proven futile is only strengthened by the fact that the Court acknowledged that the district court's summary judgment denial of qualified immunity turned on an issue of material fact genuinely in dispute. [126] While it is possible that the Sixth Circuit was mistaken as to the nature of the district court's summary judgment dismissal,[127] this is a far cry from being able to legitimately include the Sixth Circuit in a category of circuits that, prior to *Ortiz*, expressly permitted post-trial appeals from summary judgment denials under circumstances where such appeals could have qualified for interlocutory review. When reviewing *Ortiz* on appeal, the Sixth Circuit did not expressly indicate whether this was truly its practice.[128]

The three figures located in Appendix B depict the two major splits that existed among the federal circuit courts concerning post-trial appeals from summary judgment denials as identified by Petitioner's counsel in *Ortiz*.[129] The first (Figure 2.1) reflects the split among circuits as to whether appeal was permissible if a party raised a legal question. The second (Figure 2.2) reflects the split among circuits as to whether appeal was permissible if a party chose not to pursue an interlocutory appeal. The third (Figure 2.3) combines data from the first two figures into a chart.

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[124] Petition for Writ of Certiorari, *supra* note 9, at 15.

[125] Ortiz v. Jordan, 131 S. Ct. 884, 891 (2011).

[126] *Id.* at 888 (citing Ortiz v. Voinovich, 211 F. Supp. 2d 917, 923–30 (S.D. Ohio 2002)).

[127] Ortiz v. Jordan, 316 F. App'x 449, 452 (6th Cir. 2009) (stating that the district court denied summary judgment on the Eighth Amendment and due process claims).

[128] *See generally id.* Nowhere does the Circuit emphatically say whether it was its policy to permit post-trial appeals from summary judgment denials under circumstances where such appeals could have qualified for interlocutory review.

[129] Petition for Writ of Certiorari, *supra* note 9, at 10–15.

III. *ORTIZ* & THE DEATH OF POST-TRIAL APPEALS FROM SUMMARY JUDGMENT DENIALS: CONSEQUENCES AND LESSONS

Notwithstanding analysis to the contrary,[130] the Court's holding in *Ortiz* resolved both sub-issue splits among the federal circuits by eliminating the possibility to engage in any post-trial appeals from summary judgment denials whatsoever.[131] Federal practitioners should not only be aware of the consequences that follow in the wake of the Court's unqualified holding, but should also note that a few circuit courts have reinterpreted the Court's holding as being limited in nature.

A. You Snooze, You Lose: The Impact of Ortiz *on the Federal Practitioner*

As a consequence of the *Ortiz* holding, federal practitioners should take careful note of two accompanying principles outlined by the Court in its critique of the procedural actions taken by Respondents Jordan and Bright. First, it is crucial that a party file an appealable interlocutory order in a timely fashion. The Court observed that, "even had instant appellate review been open to [Jordan and Bright], the time to seek that review expired well in advance of trial."[132] This language reflects, at least in part, the motivating rationale behind those circuit courts that have traditionally refused to hear post-trial appeals from summary judgment denials where the party chose not to take advantage of an interlocutory appeal.[133] *Ortiz* makes it perfectly clear that, regardless of circuit jurisdiction, a party now has but a single opportunity to take advantage of an interlocutory appeal once summary judgment has been denied. If a party fails to make a timely interlocutory appeal from a denial of summary judgment, then the opportunity to appeal from the denial will be lost.

Second, parties should, at the very least, avail themselves of Rule 50(b) by seeking an entry, "postverdict, of judgment for the verdict loser if the court finds that the evidence was legally insufficient to sustain the verdict."[134] The Court quoted Respondents' own acknowledgment that "questions going to the sufficiency of the evidence are *not* preserved for appellate review by a summary judgment motion alone," but such

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[130] *See* discussion *supra* Part III.B.

[131] *See* Ortiz v. Jordan, 131 S. Ct. 884, 888–89, 893 (2011).

[132] *Id.* at 891; FED. R. APP. P. 4(a)(1)(A) (establishing that notice of appeal must generally be filed "with the district clerk within 30 days after the judgment or order appealed from is entered").

[133] Price v. Kramer, 200 F.3d 1237, 1244 (9th Cir. 2000).

[134] *Ortiz*, 131 S. Ct. at 891–92.

challenges "must be renewed post-trial under Rule 50."[135] Of course, Jordan and Bright were not operating under the assumption that sufficiency of the evidence was what was at stake, but instead insisted that "[a] qualified immunity plea raising an issue of a 'purely legal nature,' . . . is preserved for appeal by an unsuccessful motion for summary judgment, and need not be brought up again under Rule 50(b)."[136] The Court, however, found that Respondents' claims of qualified immunity "hardly present[ed] 'purely legal' issues capable of resolution 'with reference only to undisputed facts.'"[137]

Hypothetically, had the qualified immunity defenses asserted by Jordan and Bright presented "neat abstract issues of law," they would have been entitled to interlocutory appeal immediately following the district court's denial of summary judgment.[138] Instead, the Court concluded that, "[t]o the extent that [Jordan and Bright] urge Ortiz has not proved her case, they were, by their own account, obliged to raise that sufficiency-of-the-evidence issue by postverdict motion for judgment as a matter of law under Rule 50(b)."[139] As a result of having failed to do this, "The Court of Appeals . . . had no warrant to upset the jury's decision on the officials' liability."[140] The crux of the problem, procedurally, had to do with the unfulfilled, yet necessary, interplay between Rule 50(a) and Rule 50(b).[141]

> Jordan and Bright sought judgment as a matter of law, pursuant to Rule 50(a), both at the close of Ortiz's evidence and at the close of their own presentation. But they did not contest the jury's liability finding [against them] by renewing, under Rule 50(b), their request for judgment as a matter of law.[142]

The Court's observation highlights the importance of Justice Ginsburg's prophetic comment from oral arguments concerning the relationship between Rule 50(a) and Rule 50(b).[143] If interlocutory appeal for a qualified immunity defense is not available, the essence of a defendant's argument for summary judgment can only make it to appellate review if

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[135] Brief of Respondents at 11, *Ortiz*, 131 S. Ct. 884 (No. 09-737) (internal quotation marks omitted).

[136] *Ortiz*, 131 S. Ct. at 892 (quoting Brief of Respondents at 11–12, *Ortiz*, 131 S. Ct. 884 (No. 09-737)).

[137] *Id.*

[138] *Id.* at 893 (citing Johnson v. Jones, 515 U.S. 304, 317 (1995)).

[139] *Id.*

[140] *Id.*

[141] *See id.* at 891–92 (citing Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc., 546 U.S. 394, 405 (2006)). *But see id.* at 894–95 (Thomas, J., concurring) (concurring with the opinion yet finding it unnecessary to address the Rule 50 issue either in whole or in part).

[142] *Id.* at 890–91.

[143] *See* discussion *supra* Part II.B.

it is enshrined within the substance of a Rule 50(a) motion for judgment as a matter of law; but if a defendant's Rule 50(a) motion is denied and the defendant is ultimately found to be liable, the motion must be renewed pursuant to Rule 50(b) in order to preserve the contested liability finding for appellate review.[144] According to the Court, failure to accompany a Rule 50(a) motion (if denied) with a subsequent Rule 50(b) motion is fatal.[145]

B. But Are All Post-trial Appeals from Pre-trial Summary Judgment Denials Truly Dead?

Yet, despite the majority opinion's unqualified holding against post-trial appeals from pre-trial summary judgment denials,[146] a number of authorities have seen fit to carve out an exception to *Ortiz*'s rule. Thus far, at least three federal circuit courts[147] and one treatise[148] expressly posit that *Ortiz* does not preclude post-trial appeals from pre-trial summary judgment denials that raise purely legal issues of law. Support for this exception is based on dicta emanating from the Court's refusal to address an argument raised by Respondents due to the argument's irrelevance.[149]

In *Ortiz*, Respondents argued that "[a] qualified immunity plea raising an issue of a 'purely legal nature,' . . . is preserved for appeal by an unsuccessful motion for summary judgment, and need not be brought up again under Rule 50(b)."[150] They reasoned that "[u]nlike an 'evidence sufficiency' claim that necessarily 'hinge[s] on the facts adduced at trial,' . . . a purely legal issue can be resolved 'with reference only to undisputed facts.'"[151] The Court declared that it "need not address this argument, for the officials' claims of qualified immunity hardly present 'purely legal' issues capable of resolution 'with reference only to undisputed facts.'"[152]

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[144] *See Ortiz*, 131 S. Ct. at 890–92; Petition for Writ of Certiorari, *supra* note 9, at 7–8 (citing FED. R. CIV. P. 50(a), (b)).

[145] *See Ortiz*, 131 S. Ct. at 890–92.

[146] *Id.* at 888–89.

[147] Fireman's Fund Ins. Co. v. N. Pac. Ins. Co., Nos. 10-35414, 10-35814, 10-35908, slip op. at 3 (9th Cir. Aug. 11, 2011); Doherty v. City of Maryville, No. 09-5217, slip op. at 8–9 (6th Cir. June 13, 2011); Copar Pumice Co. v. Morris, 639 F.3d 1025, 1031 (10th Cir. 2011).

[148] MOORE ET AL., *supra* note 40, at § 56.130[3][c][II].

[149] *See Ortiz*, 131 S. Ct. at 892.

[150] Brief of Respondents, *supra* note 135, at 11–12.

[151] *Ortiz*, 131 S. Ct. at 892 (quoting Brief of Respondents, *supra* note 135, at 16).

[152] *Id.*

Based on this express refusal to address Respondents' argument, it is alleged that the Court purposefully reserved from holding on "whether a qualified immunity plea that raises a purely legal issue is preserved for appeal after final judgment by an unsuccessful motion for summary judgment and need not be raised in a postverdict Rule 50(b) motion."[153] Thus, under this reasoning, *Ortiz* does not stand as a total bar against post-trial appeals from pre-trial summary judgment denials because "the Court stopped short of announcing a categorical rule."[154] Likewise, because a denial of summary judgment concerning purely legal issues is immediately appealable, the alleged exception also raises the ancillary issue of "whether the availability of an interlocutory appeal not taken could bar a later appeal from the final judgment."[155]

While it is certainly possible to read such an exception into the majority's holding, it cannot be reconciled with the opinion in its entirety. For this reason, it appears that those authorities claiming an exception to *Ortiz*'s rule have erred. Such an accusation is not made lightly. Indeed, one must tread carefully when challenging the analysis of federal circuit courts and well-respected treatises. Nonetheless, a charitable and contextual reading of *Ortiz* precludes any such exception to its general rule. At best, the analysis used to justify the posited exception is misguided; at worst, it is woefully cursory.

Four aspects concerning the majority's opinion preclude an exception to *Ortiz*'s rule. First, the Court enumerated the issue presented in *Ortiz* without qualification. "We granted review to decide a threshold question on which the Circuits are split: May a party . . . appeal an order denying summary judgment after a full trial on the merits?"[156] This was done not only once, but twice. "We granted certiorari to resolve the conflict among the Circuits as to whether a party may appeal a denial of summary judgment after a district court has conducted a full trial on the merits."[157] On neither occasion did the majority distinguish *between* the kinds of issues that can be raised by pre-trial summary judgment denials.[158] Likewise, the Court enumerated its holding without qualification: "Our answer is no."[159]

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[153] 19 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 205.08[2] (3d ed. 2011).

[154] Copar Pumice Co. v. Morris, 639 F.3d 1025, 1031 (10th Cir. 2011).

[155] MOORE ET AL., *supra* note 40, at § 56.130[3][c][II].

[156] *Ortiz*, 131 S. Ct. at 888–89 (citation omitted).

[157] *Id.* at 891.

[158] *Id.* at 888–89, 891.

[159] *Id.* at 889.

The scope of the Court's holding and the issue it addressed in *Ortiz* make it extremely difficult, if not impossible, to reconcile the opinion with the alleged exception. First, if a party may no longer appeal an order denying summary judgment after a full trial on the merits (a prohibition against an entire genus of appeals), then one is necessarily precluded from appealing denials of summary judgment that raise purely legal issues (a species of appeal under the prohibited genus). Furthermore, common sense demands that one look to the authoritative weight of the Court's broad holding in *Ortiz* as necessarily overshadowing the mere dicta from which the alleged exception is said to emanate.[160]

Second, the majority opinion prevented the possibility of any special exception to its rule in *Ortiz* when it observed that, "even had instant appellate review been open to [Respondents], the time to seek that review expired well in advance of trial."[161] This is significant because only pre-trial denials of summary judgment motions that raise purely legal issues can be immediately appealed.[162] Thus, the Court strongly suggested, if not actually indicated, that Respondents would have still been precluded from post-trial appeal even if they had raised purely legal issues in their summary judgment motion because the timeframe in which they could have appealed before trial had expired.

This mirrors the strict "you snooze you lose" policy advocated by the concurring opinion.[163] When the majority opinion's statement about the expiration of Respondents' failure to appeal timely (based on their hypothetical ability to have done so) is juxtaposed with the Court's later refusal to address Respondents' argument concerning purely legal issues, it is evident that the refusal is justified, at least in part, because the Court had already concluded that a party must timely appeal if they have the ability to do so.[164] Accordingly, the Court's decision in *Ortiz* provides only two means for a party to appeal a denial of summary judgment. If a party has an immediate right to appeal, they should do so,

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[160] *See* MOORE ET AL., *supra* note 40, at § 56.130[3][c][II] (acknowledging that the alleged exception emanates from dicta).

[161] *Ortiz*, 131 S. Ct. at 891.

[162] *Id.* at 891 (citing Johnson v. Jones, 515 U.S. 304, 313 (1995)).

[163] *Id.* at 894 (Thomas, J., concurring).

[164] *Compare id.* at 891 (majority opinion) (explaining that it is not surprising Respondents did not seek immediate appeal after their summary judgment motion was denied in light of the Court's ruling in *Johnson*, thus recognizing that Respondents' motion did not present purely legal issues so as to warrant immediate appeal), *with id.* at 892 (refusing to address Respondents' argument concerning purely legal issues raised by summary judgment motions because the Court had already established that Respondents did not, in fact, raise such issues when they moved for summary judgment before trial).

and within the permitted timeframe.[165] If no such right exists, then it is necessary to preserve summary judgment arguments through Rule 50 motions.[166] No other alternative exists under the Court's opinion.

Third, while at least one of the authorities that look to the legal-issue exception in *Ortiz* charitably acknowledges the factors in *Ortiz* that clearly preclude the possibility of any such exception to its rule,[167] none of these authorities have yet analyzed, much less mentioned, the exact nature of the federal circuit split the Court was seeking to resolve in *Ortiz*.[168] Indeed, the Court made no secret as to what it was trying to accomplish.

The nature of the "conflict among the Circuits"[169] that the Court sought to resolve was described in a footnote, contrasting circuit cases that prohibited post-trial appeals from those that permitted such appeals.[170] The Court's characterization of the cases did not distinguish between post-trial appeals based on the kinds of issues that could be raised.[171] Additionally, the cited cases themselves either refused to distinguish on the basis of appeals raising purely legal issues, or they created a categorical exception for appeals raising qualified immunity defenses without mentioning whether the nature of the issues raised were either legal or factual.[172]

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[165] *See id.* at 891 ("Moreover, even had instant appellate review been open to them, the time to seek that review expired well in advance of trial.").

[166] *See id.* at 893 ("[T]he qualified immunity defenses asserted by Jordan and Bright do not present 'neat abstract issues of law.' To the extent that the officials urge Ortiz has not proved her case, they were, by their own account, obliged to raise that sufficiency-of-the-evidence issue by postverdict motion for judgment as a matter of law under Rule 50(b)." (citations omitted)).

[167] Copar Pumice Co. v. Morris, 639 F.3d 1025, 1031 (10th Cir. 2011) ("Some language in *Ortiz* appears to undermine *Haberman* [*v. Hartford Insurance Group*, 443 F.3d 1257 (10th Cir. 2006)]. As to direct review of the denial of summary judgment, the Court noted that 'the time to seek that review expired well in advance of trial.' The Court further cited its repeated holdings that 'an appellate court is powerless to review the sufficiency of the evidence after trial' absent a Rule 50(b) motion." (citations omitted)).

[168] *See* Fireman's Fund Ins. Co. v. N. Pac. Ins. Co., Nos. 10-35414, 10-35814, 10-35908, slip op. at 3 (9th Cir. Aug. 11, 2011) (failing to mention that *Ortiz* set out to resolve the circuit conflict); Doherty v. City of Maryville, No. 09-5217, slip op. at 6–9 (6th Cir. June 13, 2011) (failing to mention the Court's goal to resolve the circuit split through its *Ortiz* decision); *Copar Pumice*, 639 F.3d at 1031 (quoting *Ortiz* concerning its objective to resolve the conflict among the circuits, but failing to discuss the nature of the circuit split); MOORE ET AL., *supra* note 40, at § 56.130[3][c][II] (discussing the circuit split concerning the legal issue question, but failing to account for the Court's approach and understanding of the circuit split).

[169] *Ortiz*, 131 S. Ct. at 891.

[170] *Id.* at 889 n.1.

[171] *Id.*

[172] *See infra* text accompanying notes 173–184.

In the first case cited by the Court,[173] the Fifth Circuit "declin[ed] to review [a] denial of summary judgment after trial"[174] and refused to make special exceptions for appeals raising purely legal issues because doing so would be unnecessary and overly burdensome.[175] The second case cited by the Court was issued by the Ninth Circuit,[176] and, having held that there was "no exception where summary judgment rejected [an] assertion of qualified immunity,"[177] addressed the legal-issue question in context of timely appeal. According to this case, immediate appeal of a qualified immunity defense is only possible if a summary judgment motion raises abstract issues of law.[178] A party is afforded a specific timeframe to make such an immediate appeal. If an appeal is not made within the afforded timeframe, then the party forfeits their ability to make such an appeal.[179]

The third[180] and fourth[181] cases cited by the majority opinion both held that a "denial of summary judgment based on qualified immunity [is] reviewable after [a] trial on the merits."[182] However, neither decision justified this exception on the basis of whether an appeal raises issues of law or fact. The Eighth Circuit granted an exception without regard to whether the party could have, but failed to, raise an immediate appeal,[183] whereas the Sixth Circuit decision appears to have simply made a blanket exception for qualified immunity defenses.[184]

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[173] Black v. J.I. Case Co., 22 F.3d 568 (5th Cir. 1994).

[174] *Ortiz*, 131 S. Ct. at 889 n.1.

[175] *See Black*, 22 F.3d at 571 n.5.

[176] Price v. Kramer, 200 F.3d 1237 (9th Cir. 2000).

[177] *Ortiz*, 131 S. Ct. at 889 n.1.

[178] *Price*, 200 F.3d at 1244 ("Of course, 'determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case . . . [S]ummary judgment determinations are appealable when they resolve a dispute concerning an 'abstract issue of law' relating to qualified immunity.'" (omission and alteration in original) (citing Behrens v. Pelletier, 516 U.S. 299, 313 (1996))).

[179] *Id.* ("In the present case, the defendants did not avail themselves of their right to an interlocutory appeal of the pre-trial ruling, if indeed they had one. Having failed to take whatever timely opportunity existed, they now ask us to review the pre-trial qualified immunity order as though the subsequent trial and jury verdict had never transpired. Notably, during oral argument, defense counsel could not provide the court with a reason for their not having filed such an interlocutory appeal, aside from the fact that the time for doing so eventually elapsed. The defendants' complaint to us now—that in retrospect the officers should have been immune from suit at the time of the pretrial order—is long past due and unreviewable on this appeal.").

[180] Goff v. Bise, 173 F.3d 1068 (8th Cir. 1999).

[181] Ortiz v. Jordan, 316 F. App'x 449 (6th Cir. 2009).

[182] *Ortiz*, 131 S. Ct. at 889 n.1.

[183] *Goff*, 173 F.3d at 1072.

[184] *Ortiz*, 316 F. App'x at 453.

In resolving the circuit split, the Court clearly sided with those circuits that refused to allow any post-trial appeal from pre-trial summary judgment denials.[185] By citing the first two circuit cases that refused to make any exception for such appeals, the Court provided a context for the nature of its holding. Thus, the Court left no exception to its general rule when it announced its holding because the Court resolved the circuit split in favor of those circuits that supported a total bar against post-trial appeals from pre-trial summary judgment denials.

Fourth, it appears that the circuit court relied upon by Respondents in support of their "purely-legal-issues" argument now acknowledges *Ortiz* to be a total bar against all post-trial appeals from pre-trial summary judgment denials. In their brief, Respondents asserted that "[t]he Seventh Circuit has held repeatedly that '[d]efenses are not extinguished merely because presented and denied at the summary judgment stage. If the plaintiff goes on to win, the defendant can reassert the defense on appeal.'"[186] The Court referenced this section of Respondents' brief before refusing to address their argument.[187] Following the Court's decision in *Ortiz*, however, the Seventh Circuit has handed down at least two opinions that appear to recognize no exception to *Ortiz*'s holding.

First, in *Rubin v. Islamic Republic of Iran*, the Seventh Circuit distinguished the holding in *Ortiz* from a party's attempt to resurrect a summary judgment appeal before trial.[188] In distinguishing *Ortiz*, the Seventh Circuit acknowledged that *Ortiz* only provides two avenues for defendants who seek to appeal an immunity summary judgment denial: immediate interlocutory appeal or a Rule 50(b) motion.[189] Shortly after its decision in *Rubin*, the Seventh Circuit reemphasized the nature of *Ortiz*'s holding in *Elusta v. Rubio*.[190] In that case, the Seventh Circuit summarily rejected a party's attempt to appeal his summary judgment denial after a full trial on the merits.[191] Without addressing the legal or factual nature of the issues raised by the party's summary judgment

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[185] *See Ortiz*, 131 S. Ct. at 888–89.

[186] Brief of Respondents, *supra* note 135, at 11 (second alteration in original) (quoting Rekhi v. Wildwood Indus., 61 F.3d 1313, 1318 (7th Cir. 1995)).

[187] *Ortiz*, 131 S. Ct. at 892.

[188] 637 F.3d 783, 792 n.9 (7th Cir. 2011).

[189] *Id.* ("The Court held in *Ortiz* that the failure to take an immediate appeal of the denial of immunity on summary judgment precludes review of that order following a trial on the merits; to obtain review of an immunity claim in that situation, the defendant must preserve it at trial in a motion for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure.").

[190] 418 F. App'x 552, 554–55 (7th Cir. 2011).

[191] *Id.* at 554.

claim, the Seventh Circuit reasoned that it was precluded from reviewing the merits of the summary judgment appeal due to the Court's holding in *Ortiz*.[192] Thus, the Seventh Circuit, once acknowledging the right to appeal a summary judgment denial after a full trial on the merits,[193] now appears to interpret *Ortiz* as a total bar against such conduct.[194] Likewise, at least one scholarly article may be said to join in the Seventh Circuit's apparent interpretation of *Ortiz*.[195]

Taken together, these considerations make it highly improbable that the Court created a special exception to its rule in *Ortiz* by refusing to address Respondents' argument concerning summary judgment motions that raise purely legal issues. It is not difficult to see why the Court refused to address the argument when Respondents acted appropriately in not seeking immediate appeal after denial of their summary judgment motion.[196] In light of *Johnson*, it is clear that the Respondents were not raising purely legal issues,[197] but only contested on appeal that they had raised purely legal issues so as to have been entitled to immediate appeal.[198] It is probable that the Court refused to address Respondents' argument because it spawned from the inherent inconsistency between Respondents' actions and their appellate pleadings. Thus, the Court was not seeking to reserve judgment on the specific category of summary judgment motions that raise purely legal issues; instead, the Court was refusing to waste time by responding to a meritless argument.

CONCLUSION

The Court's ruling in *Ortiz* is perhaps best in keeping with the ultimate purpose behind summary judgment. Despite the evolving difference in treatment that surrounded interlocutory appeals from summary judgment denials prior to *Ortiz*, the Court's blanket prohibition against appealing an order denying summary judgment after a full trial on the merits reemphasizes the overall notion that interlocutory appeals "are the exception, not the rule."[199] In a world where justice and judicial efficiency must walk hand-in-hand, the

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[192] *Id.* at 553–54.

[193] Rekhi v. Wildwood Indus., 61 F.3d 1313, 1318 (7th Cir. 1995).

[194] *Rubin*, 637 F.3d at 792 n.9; *Elusta*, 418 F. App'x at 553–54.

[195] *See* Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 FORDHAM L. REV. 1643, 1692 (2011).

[196] Ortiz v. Jordan, 131 S. Ct. 884, 891 (2011).

[197] *Id.* at 891–92.

[198] *See id.* at 892.

[199] Johnson v. Jones, 515 U.S. 304, 309 (1995).

Court's new holding *promised* reinvigorating support for a continued and happy marriage between these two objectives.

Yet, from a practical standpoint, any attempt to salvage the true intent and effect of the Court's holding in *Ortiz* may already be moot. Federal practitioners in the Sixth, Ninth, and Tenth Circuits are now entitled to appeal pre-trial summary judgment denials raising purely legal issues of law after a full trial on the merits, and they can probably do so without having to jump through the extra hoop of making the appropriate number of Rule 50 motions emphasized by the *Ortiz* decision.[200] It is perhaps a sad irony that the Court's attempt to provide a categorical resolution has so quickly transformed into the genesis of what will likely result in another circuit split.

Paul S. Morin[201]

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[200] Fireman's Fund Ins. Co. v. N. Pac. Ins. Co., Nos. 10-35414, 10-35814, 10-35908, slip op. at 3 (9th Cir. Aug. 11, 2011); Doherty v. City of Maryville, No. 09-5217, slip op. at 9 (6th Cir. June 13, 2011); Copar Pumice Co. v. Morris, 639 F.3d 1025, 1031 (10th Cir. 2011). By arguing for an exception to the Court's holding with respect to summary judgment motions that raise purely legal issues, these authorities are essentially claiming that Rule 50 motions are not necessary in order to preserve a denial of summary judgment for post-trial appeal.

[201] The Author expresses his thanks to colleague Andrew J. Hull for his suggestions and encouragement, Professor William E. Magee for his research assistance, the staff of the Norfolk Law Library for providing access to their collection, the members of the *Regent University Law Review* for their hard work, and especially the Author's parents, Phillip and Christine Morin, for their unceasing love, commitment, and support.

APPENDIX A

Figure (1.1)

Taxonomical Approach: Interlocutory Appeal Genus-Species Conceptual Model

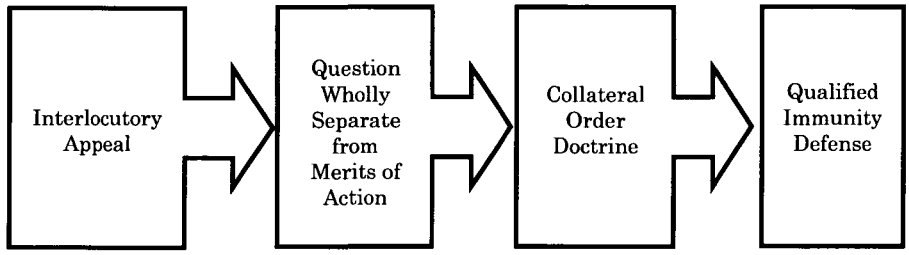


Figure (1.2)

Procedural Approach: Interlocutory Appeal Temporal Progression Model

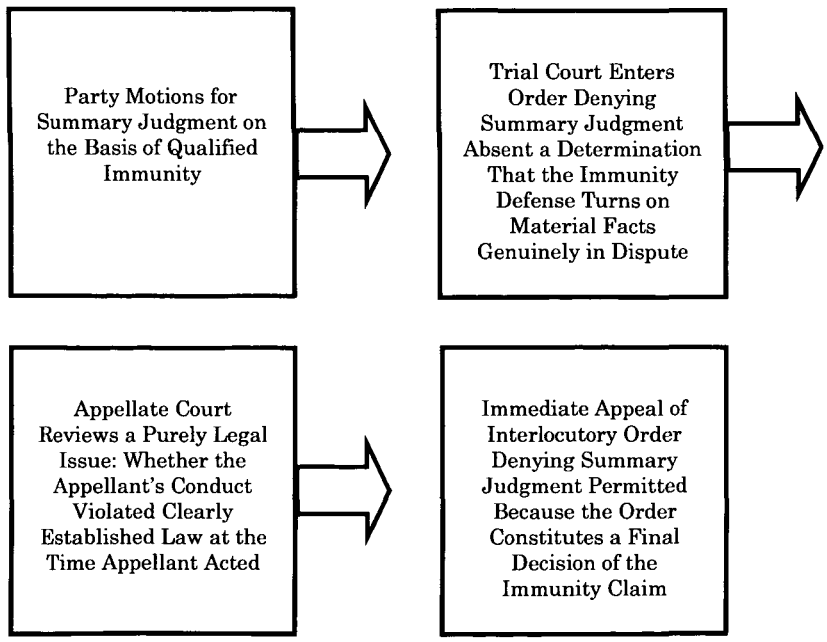
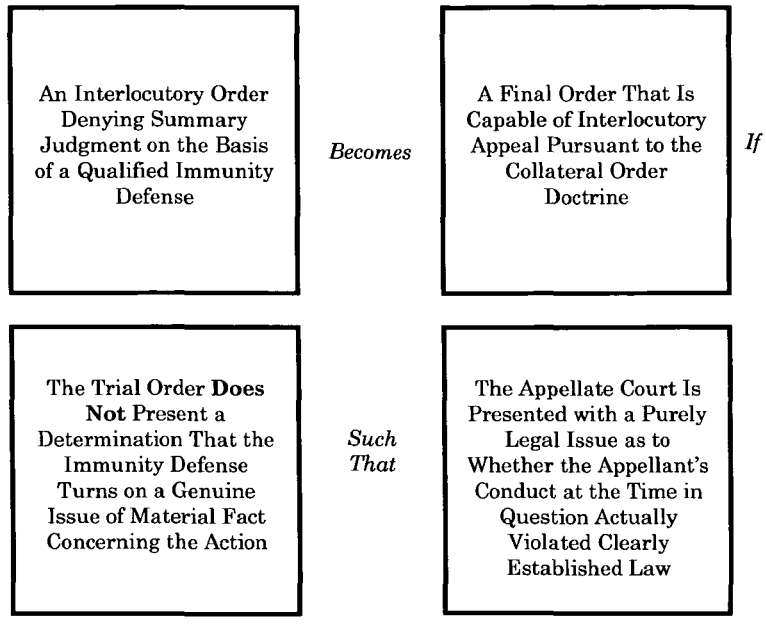


Figure (1.3)

Syllogistic Approach: Interlocutory Appeal Rule Model



APPENDIX B

Figure (2.1)

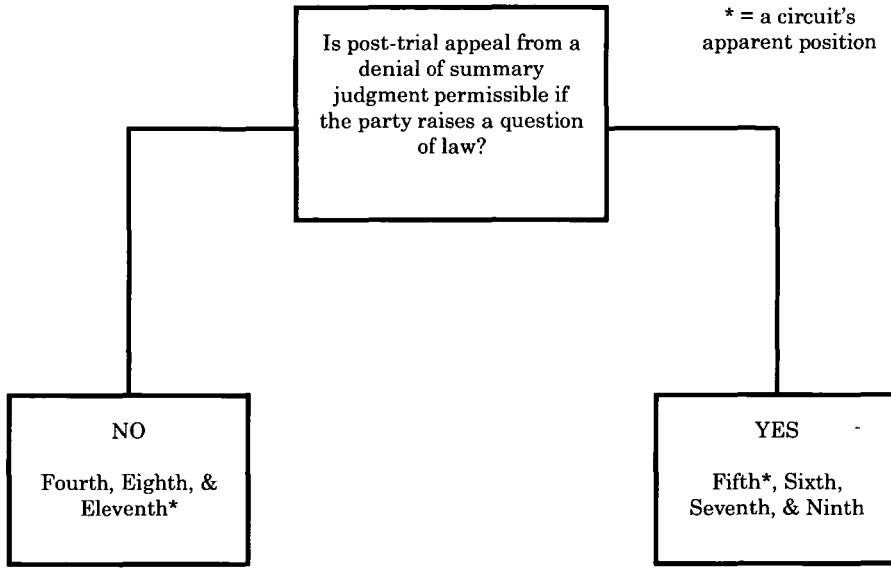


Figure (2.2)

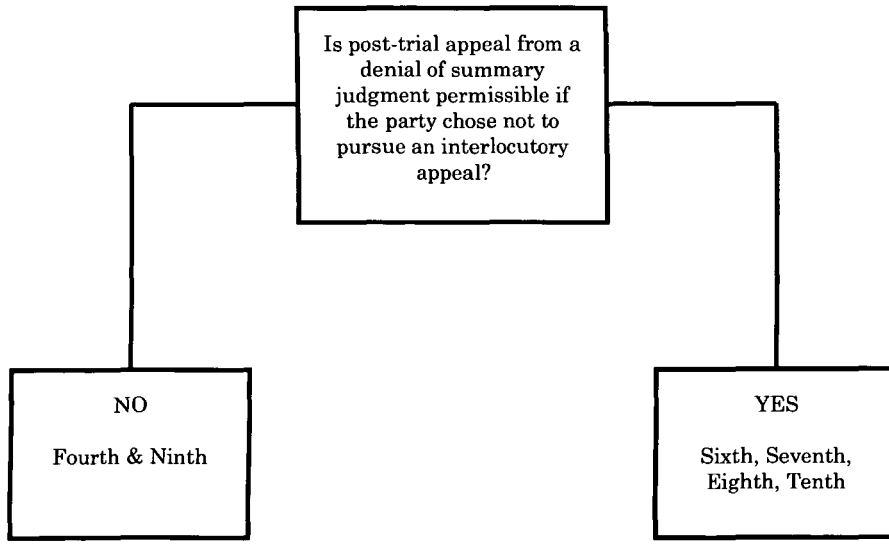


Figure (2.3)

Circuits	Post-trial Appeal from Denial of Summary Judgment: Legal Question Exception	Post-trial Appeal from Denial of Summary Judgment: Chose Not to Pursue Interlocutory Appeal	Post-trial Appeal from Denial of Summary Judgment Never Available
Fourth	No	No	Yes
Fifth	Yes*	-	No
Sixth	Yes	Yes	No
Seventh	Yes	Yes	No
Eighth	No	Yes	No
Ninth	Yes	No	No
Tenth	-	Yes	No
Eleventh	No*	-	-

WHO HAS A WILL TO LIVE?: WHY STATE REQUIREMENTS FOR ADVANCE DIRECTIVES SHOULD BE UNIFORM(LY REVISED)

INTRODUCTION

In 2002, the U.S. Department of Health and Human Services's Centers for Medicare and Medicaid Services ("CMS") published a booklet titled *Own Your Future*.[1] The title is telling as it reflects not only its content and CMS's attempt to help the elderly plan for their futures, but also a fundamental value of American society.[2] Americans want to be autonomous and exercise control over their futures.[3] This value permeates every area of American life, including decisions about health care.

Specifically, end-of-life care often presents the most critical of these medical decisions. To aid in making challenging end-of-life care decisions, advance directives offer individuals a concrete method for ensuring that end-of-life care agrees with their wishes. Yet, the majority of Americans have not taken advantage of advance directives and the opportunity to own their futures.[4] This is the unfortunate reality despite federal and state advance directive legislation that has been in place since the early 1990s, despite an ever-aging population, despite imminent shortages in the supply of health care, and despite changes in the administration of the United States healthcare system.

Although advance directives are by no means a total cure for the difficult end-of-life discussions that families inevitably must face in the emergency room,[5] advance directives can provide a means by which patients may effectively protect their interests. This Note challenges

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1 CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUMAN SERVS., PUB. NO. 05-E004-1, OWN YOUR FUTURE (2002).

2 *Id.* at 7 (encouraging Americans to take their futures into their own hands by making long-term health decisions ahead of time).

3 In the words of the Supreme Court, "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891).

4 ASSISTANT SEC'Y FOR PLANNING & EVALUATION, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADVANCE DIRECTIVES AND ADVANCE CARE PLANNING: REPORT TO CONGRESS 13 (2008) [hereinafter 2008 REPORT TO CONGRESS] (reporting that only a small percentage of American adults have completed advance care planning and advance directives).

5 While advanced planning does not necessarily improve patient outcomes, it at least serves the important objective of improving communication between patients and family members. *See* K. LORENZ ET AL., AGENCY FOR HEALTHCARE RESEARCH & QUALITY, END-OF-LIFE CARE AND OUTCOMES: SUMMARY 5 (2004). The foundational question, however, is whether the patient's interests are protected.

states to act *now* to develop legislation that will encourage their residents to own their healthcare futures. While working together on a national level, states should create and implement uniform requirements and a national registry for advance directives.

This Note argues that states should do three things. First, states should reevaluate existing legislation for advance directives. Second, they should adopt uniform standards for durable powers of attorney, living wills, dispute resolution, and registration that apply to healthcare providers. Finally, states should include the disabled and elderly population in the legislative process.

Part I of this Note provides a survey of contrasting views on advance directives, a comparison of state advance directive legislation, and an overview of previous efforts to achieve uniformity among state advance directive laws. Part II discusses, first, how changes in population and in the national healthcare system may affect advance directives and end-of-life treatment, and second, how the inefficiencies of the status quo create problems with enforcing and honoring advance directives. Part III argues that a uniform approach to advance directives should be addressed on a state level. Part IV considers possible models for a uniform advance directive law. Finally, Part V summarizes why states must act now to reform advance directive legislation.

I. HISTORY AND CURRENT USAGE OF ADVANCE DIRECTIVES

Grounded in the principle of patient autonomy, an "advance directive" is an individual's written expression of his wishes for health care if he becomes incapacitated.[6] Advance directives also give patients a means to have those wishes protected and respected.[7] An advance directive may include a living will, a durable power of attorney for health care, or both.[8] An advance directive may also include specific instructions for medical procedures, including artificial nutrition and hydration ("ANH"), general life-sustaining treatment, do not resuscitate orders ("DNR"), or even the use of particular antibiotics.[9] Advance directives also commonly include guidelines for medical care in the event of a

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[6] 42 U.S.C. § 1395cc(f)(3) (2006); *see also* Barbara L. Kass-Bartelmes & Ronda Hughes, *Advance Care Planning: Preferences for Care at the End of Life*, RES. IN ACTION, Mar. 2003, at 2.

[7] 2008 REPORT TO CONGRESS, *supra* note 4, at 1.

[8] 42 U.S.C. § 1395cc(f)(3); *see also* Gail Gunter-Hunt et al., *A Comparison of State Advance Directive Documents*, 42 GERONTOLOGIST 51, 51 (2002). The durable power of attorney is a document that a patient may use to designate a surrogate or proxy to make medical care decisions on the patient's behalf. Kass-Bartelmes & Hughes, *supra* note 6, at 2.

[9] AM. HOSP. ASS'N, PUT IT IN WRITING: QUESTIONS AND ANSWERS ON ADVANCE DIRECTIVES 2–9 (rev. 2005); Gunter-Hunt et al., *supra* note 8, at 54.

persistent vegetative state ("PVS"), terminal illness, or commitment to a long-term care facility.[10]

As discussed in-depth in Part II, existing state laws vary in what must and may be included in advance directive documents.[11] The decision making standard for proxies also varies. While the "substituted judgment" standard attempts to adopt the patient's "subjective views," including his personal beliefs and values when he was well, the "best interest" standard is based on the best medical treatment or option available.[12] The Uniform Health Care Decisions Act ("UHCDA") and state laws modeled after the UHCDA apply a combination of both of these standards.[13]

Developed largely in response to litigation surrounding the so-called "right to die,"[14] the Patient Self Determination Act ("PSDA") requires that healthcare providers in every state respect patients' wishes regarding their end-of-life care.[15] Under the PSDA, states retain the discretion to determine advance directive provisions and the specific requirements for them to be effective.[16] The PSDA also mandates that Medicare and Medicaid providers ask patients upon admission whether they already have an advance directive and offer information about how

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[10] Gunter-Hunt et al., *supra* note 8, at 54.

[11] *See* discussion *infra* Part II.

[12] ALLEN E. BUCHANAN & DAN W. BROCK, DECIDING FOR OTHERS: THE ETHICS OF SURROGATE DECISION MAKING 112, 122–23 (1989); *see also* Andrew Trew, *Regulating Life and Death: The Modification and Commodification of Nature*, 29 U. TOL. L. REV. 271, 288–89 (1998).

[13] UNIF. HEALTH-CARE DECISIONS ACT prefatory note (Proposed Official Draft 1993) ("A health-care provider or institution must comply with an instruction of the patient and with a reasonable interpretation of that instruction or other health-care decision made by a person then authorized to make health-care decisions for the patient. . . . A health-care provider or institution may decline to honor an instruction or decision for reasons of conscience or if the instruction or decision requires the provision of medically ineffective care or care contrary to applicable health-care standards.") (reflecting both the "subjective judgment" and "best interest" standards in the proposed model legislation's prefatory note). In adopting the UHCDA, Maine also explicitly recognized the subjective judgment and best interest standards in the prefatory note to its state legislation: "The intent and philosophy of the Act is to recognize the authority of the patient and the patient's designated agent, surrogates, or guardians to make health-care decisions based on the patient's directions and values or, if unknown, on the patient's best interest without the necessity of seeking court approval." ME. REV. STAT. ANN. tit. 18–A, §§ 5-801 to 5-817 prefatory note (1998).

[14] *See, e.g.*, Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261 (1990); *In re* Jobes, 529 A.2d 434 (N.J. 1987); *In re* Storar, 420 N.E.2d 64 (N.Y. 1981); Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E. 2d 417 (Mass. 1977); *In re* Quinlan, 355 A.2d 647 (N.J. 1976).

[15] *See* Patient Self-Determination Act, Pub. L. No. 101-508, § 4206, 104 Stat. 1388-115 to -116 (codified at 42 U.S.C. § 1395cc(f) (2006)).

[16] *Id.* § 1395cc(f)(3).

to establish one.[17] In addition, all Medicare and Medicaid providers must provide staff training and public education about advance directives.[18] Finally, the PSDA prohibits healthcare providers from discriminating against patients who have an advance directive.[19]

While all states have adopted advance directive legislation, they vary in form, requirements, and even in what provisions the state must honor.[20] To add further complication, states have developed and codified their own protocols for determining the default healthcare decision proxy in the absence of an advance directive.[21] While there are a substantial number of differences among states' laws,[22] the low rate of adoption of advance directives is a *nationwide* problem.[23] In fact, despite federal and state laws that have been in place for nearly two decades, only eighteen to thirty-six percent of American adults actually have an advance directive, according to statistics by the U.S. Department of Health and Human Services.[24] Such a low rate of adoption reflects patients' unwillingness to put their final decisions regarding end-of-life care into writing.[25] As explained in further detail below, this unwillingness may also result from extreme views regarding the power and purpose of advance directives.

A. Diverging Views on the Purpose and Utility of Advance Directives

Polarized views on the purpose and utility of advance directives suggest that they are both misunderstood and misused. While some groups promote advance directives as a tool to ensure a less painful, less

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[17] *Id.* § 1395cc(f)(1)(A)–(B).

[18] *Id.* § 1395cc(f)(1)(E).

[19] *Id.* § 1395cc(f)(1)(C).

[20] Gunter-Hunt et al., *supra* note 8, at 52.

[21] ALAN MEISEL & KATHY L. CERMINARA, THE RIGHT TO DIE: THE LAW OF END-OF-LIFE DECISIONMAKING § 8.01 (3d ed. Supp. 2006).

[22] *See infra* Table 1.

[23] In 2003, the Agency for Health Research and Quality reported that "[l]ess than 50 percent of the severely or terminally ill patients studied had an advance directive in their medical record." Kass-Bartelmes & Hughes, *supra* note 6, at 2. More recent statistics confirm the same troubling figures. *See* ADRIENNE L. JONES ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., PUB. NO. 2011-1209, USE OF ADVANCE DIRECTIVES IN LONG-TERM CARE POPULATIONS 1 (2011); KIRSTEN J. COLELLO ET AL., CONG. RESEARCH SERV., R40235, END-OF-LIFE CARE: SERVICES, COSTS, ETHICS, AND QUALITY OF CARE 17–18 (2009).

[24] 2008 REPORT TO CONGRESS, *supra* note 4, at 13.

[25] Helena Temkin-Greener et al., *Advance Care Planning in a Frail Older Population: Patient Versus Program Influences*, 27 RES. ON AGING 659, 684 (2005) ("[A]lthough participants may be comfortable and willing to discuss advance directives, they are often unwilling to put their wishes in writing, even if they understand that they may change these directives at any time. 'Many people will not sign ADS [advance directives] because it's too concrete, it's like increasing the likelihood [that they will come true], but they're willing to discuss their wishes.'").

expensive, and less burdensome death ("dying well"),[26] other groups caution that advance directives are often ignored and may even be abused to withhold lifesaving treatment.[27] For example, Derek Humphry, founder of the National Hemlock Society and President of the Euthanasia Research and Guidance Organization, encourages individuals who want to end their life to use an advance directive as a litmus test in shopping for doctors who support passive euthanasia.[28] In contrast, organizations like National Right to Life ("NRL") caution individuals against adopting living wills and against trusting that physicians will honor their wishes.[29] NRL argues that instead of protecting patient autonomy, healthcare providers can use advance directives to withhold end-of-life treatment against a patient's wishes.[30]

The American public also seems reluctant to have such advance directive documents in place, perhaps fearing that a living will may wrongfully be used as an excuse to withhold life-saving treatment.[31] Certain communities seem especially reluctant to adopt advance directives. For example, the disabled community is sensitive to how advance directives are constructed and the treatments they contain.[32]

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[26] *See, e.g.*, AM. HOSP. ASS'N, *supra* note 9, at 1.

[27] ROBERT POWELL CTR. FOR MED. ETHICS, NAT'L RIGHT TO LIFE, WILL YOUR ADVANCE DIRECTIVE BE FOLLOWED? 3 (rev. ed. 2011) ("Increasingly, however, doctors and hospitals, often working through ethics committees, are asserting the authority to deny life-preserving measures against the will of patients and families – and implementing that authority in a growing number of cases."), *available at* http://www.nrlc.org/euthanasia/AdvancedDirectives/WillYourAdvanceDirectiveBeFollowed.pdf.

[28] DEREK HUMPHRY, FINAL EXIT: THE PRACTICALITIES OF SELF-DELIVERANCE AND ASSISTED SUICIDE FOR THE DYING 10 (Delta 3d ed. 2010) (1991) ("The perfect opening gambit to test views on passive euthanasia . . . is to arrive at the doctor's office with your completed Living Will and Durable Power of Attorney for Health Care. Present these documents and candidly ask if they will be respected when the time comes for you to die.").

[29] WILL YOUR ADVANCE DIRECTIVE BE FOLLOWED?, *supra* note 27, at 1, 3.

[30] *Id.* at 3; *see also Why the Need for a "Will to Live"?*, NAT'L RIGHT TO LIFE, http://www.nrlc.org/euthanasia/willtolive/Whyneedwtl.html (last visited Nov. 27, 2011) ("Just as pro-life groups predicted, the adoption of living will legislation helped achieve a sea change in public opinion--and in the practices of the medical profession. We now see open advocacy - and implementation - of both direct killing and *involuntary* denial of lifesaving treatment against the express desires of the patient. Especially among health care providers, but also among many in the general public, the 'quality of life' ethic has largely replaced the 'equality of life' one.").

[31] Charlotte F. Allen, *Back Off! I'm Not Dead Yet. I Don't Want a Living Will. Why Should I?*, WASH. POST, Oct. 14, 2007, at B4 ("So I say: Go ahead and sign a living will if you want. Have your doctor pull out your feeding tube or inject you with cyanide or do whatever fulfills your idea of death with dignity. But count me out. I don't want to 'die well'; I just want to die in peace.").

[32] 2008 REPORT TO CONGRESS, *supra* note 4, at 21 ("If the 'voice' of the disability community was stronger in the initial development of advance directives, the focus would not be about treatments and modalities and treatment choices, but about what do people

Also notably, African Americans are only one-third as likely as whites to have a living will.[33] This reluctance to adopt an advance directive may simply result from a natural fear of talking about dying,[34] or from a desire to let someone else make the decision.[35] Advance directives are often fundamentally misunderstood as documents that ensure a certain type of *death* instead of documents that ensure a certain type of *life*. When properly understood and implemented, advance directives may be a sound way for end-of-life patients to guarantee that desired treatments are not withheld and to control who makes decisions for them—not just to limit "aggressive medical care" near death.[36]

B. Survey of State Approaches to Advance Directive Legislation

Not only do the American people differ in their understandings of the fundamental nature and purpose of advance directives, but states also vary in their approaches to regulating advance directives. Two decades after the passage of the PSDA, state statutes regulating advance directives still vary tremendously in provision and scope. For instance, while some states combine a living will and durable power of attorney for health care, others provide for only one or the other, or separate them into two documents.[37] Some states' advance directive forms do not even address admission to long-term care facilities.[38]

A brief comparison of just Virginia, Missouri, and Oregon laws on advance directives illuminates several notable differences.[39] Virginia recognizes a patient's oral advance statement if made in the presence of an attending physician and two witnesses,[40] but Missouri requires that a living will be in writing, signed, and dated in the presence of two witnesses (unless the document is wholly in the person's handwriting).[41] Likewise, Oregon requires that an advance directive be in writing and executed in the presence of witnesses.[42]

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want in their lives as they are dying. What are their values and goals? What capacities do they want to maintain?").

33 JONES ET AL., *supra* note 23, at 4; *see also* Allen, *supra* note 31, at B4.

34 *See* Temkin-Greener et al., *supra* note 25, at 684.

35 *See* 2008 REPORT TO CONGRESS, *supra* note 4, at 25–26.

36 COLELLO ET AL., *supra* note 23, at 14, 24. At least one longitudinal study found that "less aggressive medical care and earlier hospice referrals were associated with better patient quality of life near death." *Id.* at 24.

37 Gunter-Hunt et al., *supra* note 8, at 54–55.

38 *Id.* at 56.

39 *See infra* Table 1.

40 VA. CODE ANN. § 54.1-2983 (2009 & Supp. 2011).

41 MO. ANN. STAT. § 459.015 (2007 & Supp. 2011).

42 OR. REV. STAT. ANN. § 127.515 (West 2003 & Supp. 2011).

State laws are also inconsistent in terms of who may serve as a proxy for a patient and what decisions a proxy may make on behalf of a patient. Virginia limits the power of proxies by not permitting them to make decisions regarding admission to mental health facilities, psychosurgery, sterilization, abortion, and visitation.[43] However, Virginia does give proxies the power to make certain decisions contrary to a patient's express wishes as outlined in the code.[44] In Missouri, a physician or healthcare facility employee may act as a proxy for a family member or for a patient who is from the same religious community,[45] while in Oregon a doctor or healthcare facility employee may only serve as a proxy if he is a family member of the patient.[46]

The registry of advance directives has also created a divergence among states. Although Virginia has established by statute an online registry for advance directives for health care,[47] Missouri has no such registry for streamlining advance directives.[48] Thus, a patient who registered an advance directive in Virginia cannot be guaranteed that his directive will be discovered or enforced if he is hospitalized while in another state, such as Missouri.

In addition, even though Virginia and Missouri have somewhat similar definitions of treatments that prolong life, they differ in several respects. Missouri defines a "death-prolonging procedure" using a situational definition that includes an attending physician's subjective determination that "death will occur within a short time," with or without intervention.[49] Virginia's definition, while still situational, does not explicitly take into consideration the attending physician's subjective assessment of the futility of a procedure.[50] On the contrary, Virginia broadly defines such a treatment as one that does not give a patient a "reasonable expectation of recovery from a terminal condition."[51] Interestingly, Virginia frames such procedures as "life-prolonging,"[52] whereas Missouri fatalistically labels them "death-prolonging."[53] More than semantics, these definitional differences and their respective

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43 VA. CODE ANN. § 54.1-2983.3 (2009 & Supp. 2011).

44 *Id.*

45 MO. ANN. STAT. § 404.815 (2011).

46 OR. REV. STAT. ANN. § 127.520 (West 2003).

47 VA. CODE ANN. § 54.1-2994 (2008 & Supp. 2011).

48 *See generally* MO. ANN. STAT. §§ 190.600–621, 404.800–872 (2011); MO. ANN. STAT. §§ 459.010–055 (2007 & Supp. 2011).

49 MO. ANN. STAT. § 459.010 (2007 & Supp. 2011).

50 VA. CODE ANN. § 54.1-2982 (2009 & Supp. 2011).

51 *Id.*

52 *Id.*

53 MO. ANN. STAT. § 459.010 (2007 & Supp. 2011).

connotations could make a world of difference to patients whose lives hinge on how such statutes are interpreted.

State codes also vary in their respective preconditions for allowing withdrawal of life-sustaining treatment. Oregon, for example, prohibits a proxy from authorizing the withholding or withdrawing of a life-sustaining procedure unless the patient has a terminal condition, is permanently unconscious, has a condition "which administration of life-sustaining procedures would not benefit the principal's medical condition and would cause permanent or severe pain," or suffers a "progressive, debilitating illness that will be fatal and is in its advanced stages, and the [patient] is consistently and permanently unable to communicate, swallow food and water safely, care for [himself], and recognize [his] family and other people, and there is no reasonable chance that [his] underlying condition will improve."[54] Missouri, however, requires that, before a proxy or physician may authorize the withdrawal of life-sustaining support, the proxy must seek information about the medical diagnosis or prognosis.[55] In addition, if the proxy or physician decides to withdraw ANH, the physician must attempt to explain the intention to do so to the patient as well as the consequences, and give the patient the chance to refuse the withdrawal of the ANH.[56] If the physician is unable to do so, because the patient is comatose, for example, a certification of the patient's inability to understand must be placed in the patient's file.[57]

As a result of these discrepancies in states' end-of-life care statutes, patients cannot be sure what to expect from state to state. Worse, yet, individuals who do have advance care directives cannot be sure how those directives may be interpreted from one state to another.

C. Early Efforts to Adopt Uniform Advance Directive Legislation

In 1993, the Uniform Law Commissioners attempted to systemize the fragmented state approaches to regulating advance directives through the UHCDA.[58] If adopted, the UHCDA allows states to cover living wills, powers of attorney, and decision making standards within one statute, using consistent language, forms, and enforcement standards, and eliminating "cumbersome execution requirements."[59]

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[54] OR. REV. STAT. ANN. § 127.540 (West 2003 & Supp. 2011).

[55] MO. REV. STAT. § 404.822 (2011).

[56] *Id.* § 404.820.

[57] *Id.*

[58] UNIF. HEALTH-CARE DECISIONS ACT (Proposed Official Draft 1993); Charles P. Sabatino, *The New Uniform Health Care Decisions Act: Paving a Health Care Decisions Superhighway?*, 53 MD. L. REV. 1238, 1238–39 (1994).

[59] *See* David M. English, *The Uniform Health-Care Decisions Act and its Progress in the States*, A.B.A. PROBATE & PROPERTY MAGAZINE (MAY–JUNE 2001), http://www.

Furthermore, the UHCDA allows states to modify provisions based on constituents' demands.[60] Unfortunately, only a few states have taken advantage of the uniform approach by basing their advance directive legislation on the UHCDA.[61] While the differences between states may seem minor at first glance, they complicate already difficult end-of-life decisions for non-residents. First, even if a patient has an advance directive, the medical care provider may have no way of knowing that there is an advance directive on file or of accessing the document.[62] Even though Medicare and Medicaid healthcare providers must ask if a patient has an advance directive, more than sixty-five percent of the time the physician is not aware that the patient has an advance directive, and more than thirty-five percent of the time cannot find the document.[63] While some states have created registries that store patients' advance directives for ready access by healthcare providers, states still differ in how their registries store and access this information.[64]

In addition, the differences and fragmentation in state legislation are problematic for America's geographically mobile population. As one researcher noted, "Ethical and treatment dilemmas may arise for individuals who become incapacitated in a state other than the state in which their [advance directive] was completed. Some states may mandate that certain provisions for care be specifically mentioned for the agent to make a decision."[65] While standardizing state requirements for advance directives does not ensure that an incapacitated patient's wishes will be honored, it will certainly increase such a likelihood.[66]

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americanbar.org/publications/probate_property_magazine_home/probate_2001_index/probate_may_june_2001_index/rppt_publications_magazine_2001_01mj_01mjenglish.html.

60 *Id.*

61 *See Legislative Fact Sheet - Health-Care Decisions Act*, UNIF. LAW COMM'N, http://www.nccusl.org/LegislativeFactSheet.aspx?title=Health-Care Decisions Act (last visited Nov. 27, 2011) (noting that only Alaska, Hawaii, Maine, Mississippi, New Mexico, and Wyoming have enacted the UHCDA).

62 People have been known to store their advance directives in safety deposit boxes, shoeboxes, and any number of other locations that render them inaccessible and useless to physicians in emergency situations. *See* Allison Hughes, *State Advance Directive Registries: A Survey and Assessment*, BIFOCAL, Nov.–Dec. 2009, at 23, 36.

63 *Id.*

64 *Id.* at 38–39. While Louisiana maintains a registry of physical documents, an online database of registrants, and makes copies of the documents accessible only to registrants, family members, or attending healthcare providers, other states make electronic copies of the documents available online. *Id.* Some of these states, however, only allow access with the individual's code, and others allow access through the patient's name, date of birth, or social security number. *Id.*

65 Gunter-Hunt et al., *supra* note 8, at 55.

66 *Id.*

II. WHY IS IT IMPORTANT TO ESTABLISH A UNIFORM STANDARD AMONG STATES *NOW*?

A. Available Treatments Will Be Limited—by Default or by Design

In light of these issues, states should act now to adopt a uniform standard for advance directives, especially considering the intertwined factors of the aging population, the crisis in healthcare supply, and changes in healthcare funding. Not only is it likely that the number of Medicare beneficiaries will substantially increase in the near future,[67] but this aging population is highly mobile and presents challenges of long-term care related to chronic illnesses.

First, it is the population over age sixty-five that most needs to deal with end-of-life care decisions. Statistics show that Medicare beneficiaries represent over eighty percent of deaths.[68] Second, the majority of these patients suffer from chronic illnesses like heart disease, diabetes, and cerebrovascular disease.[69] Patients suffering from a chronic illness decline steadily, suffering multiple "health crises" as a result. It is in one of these health crises that a patient may suddenly have to make an important end-of-life care decision. As the Department of Health and Human Services has observed, "At any one of these crises the patient may be close to death, yet there often is no clearly recognizable threshold between being very ill and actually dying."[70] Although a steady decline in health is anticipated in the chronically ill, severe health crises may not be anticipated, and the patient may suddenly become incapable of making decisions.[71] Having an advance directive in place during these health crises is crucial. Third, it has been reported that "the number of Medicare beneficiaries more than doubled between 1966 and 2004, and is projected to double in size again by 2030 to 78 million."[72] These statistics reveal that future healthcare funding will necessarily be stretched thin. Moreover, the increased mobility of the aging population makes it even more necessary that individuals have a portable advance directive document, especially given the variance in state requirements and registries for advance directives.

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[67] A 2004 study by the Agency for Healthcare Research and Quality of the U.S. Department of Health and Human Services found that more than seventy-five percent of Americans currently live past age sixty-five, that eighty-three percent die while covered by Medicare, and that by 2050 the life expectancy for women and men will likely rise to eighty-four and eighty, respectively. LORENZ ET AL., *supra* note 5, at 1.

[68] 2008 REPORT TO CONGRESS, *supra* note 4, at 1; Kass-Bartelmes & Hughes, *supra* note 6, at 3.

[69] Kass-Bartelmes & Hughes, *supra* note 6, at 3.

[70] *Id.*

[71] *Id.*

[72] 2008 REPORT TO CONGRESS, *supra* note 4, at 1.

Perhaps the greatest challenge for the elderly population is the growing demand for access to health care that is increasingly limited in delivery. While analysts disagree as to whether the increasing demand will increase costs and decrease treatments, most at least agree that the availability of healthcare providers will be limited.[73] Professor Joseph White argues that the two critical issues in access to health care are the organization of the healthcare system and the availability of healthcare providers.[74] White asserts that the increase in longevity would not necessarily reduce health care provided to the elderly, but it would affect the availability of healthcare providers.[75] Others assert that the increase in demand on Medicare as well as a national focus on reducing costs will also limit the availability of treatments.[76] Regardless of which group is correct, the limited availability of healthcare providers will also limit access to healthcare treatments.

While recent federal healthcare legislation, such as the Patient Protection and Affordable Care Act ("PPACA"), attempts to address the looming increase in costs and imminent shortage of healthcare services,[77] it does so in a way that is arguably ineffective. In fact, it may only increase patient reluctance to adopt an advance directive. This controversial new legislation attempts to cut costs and eliminate waste by focusing on comparative effectiveness research ("CER")[78] and

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[73] CTR. FOR HEALTH WORKFORCE STUDIES, THE IMPACT OF THE AGING POPULATION ON THE HEALTH WORKFORCE IN THE UNITED STATES: SUMMARY OF KEY FINDINGS 2–3 (2006).

[74] Joseph White, *(How) Is Aging a Health Policy Problem?*, 4 YALE J. HEALTH POL'Y L. & ETHICS 47, 48–49, 68 (2004).

[75] *Id.* at 53–54, 57–59, 67–68.

[76] *See* Anirban Basu & Tomas J. Philipson, *The Impact of Comparative Effectiveness Research on Health and Health Care Spending* 8 (Nat'l Bureau of Econ. Research, Working Paper No. 15633, 2010), *available at* http://www.nber.org/papers/w15633.

[77] *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of Titles 21, 25, 26, 29, and 42 of the U.S.C.). Federal courts are currently split on the issue of the constitutionality of the PPACA, and after much anticipation, the Supreme Court finally announced on November 14, 2011 that it would hear arguments brought on appeal by twenty-six states and several private parties challenging the controversial legislation. *See* Mike Sacks, *Obama Health Care Law Reaches Supreme Court, With Over Five Hours of Oral Argument Planned*, HUFFINGTON POST (Nov. 15, 2011, 11:15 AM), http://www.huffingtonpost.com/2011/11/14/obama-health-care-law_n_1092387.html.

[78] Comparative effectiveness research is intended to help patients and physicians make healthcare decisions "by providing evidence on the effectiveness, benefits, and harms of different treatment options," with "[t]he evidence [being] generated from research studies that compare drugs, medical devices, tests, surgeries, or ways to deliver health care." *What Is Comparative Effectiveness Research*, AGENCY FOR HEALTHCARE RES. & QUALITY, U.S. DEP'T HEALTH & HUMAN SERVS. http://www.effectivehealthcare.ahrq.gov/index.cfm/what-is-comparative-effectiveness-research1/ (last visited Nov. 27, 2011).

technology.[79] The law created the Patient-Centered Outcomes Research Institute to conduct CER research.[80] While some fear that the PPACA combined with attempts to control increasing costs will result in the dreaded "death panels,"[81] according to the American Enterprise Institute for Public Policy Research, the PPACA does not provide for death panels because "[t]hese initiatives neither cut existing benefits nor threaten entrenched interests."[82] Yet, not only is it unlikely that CER will decrease costs, but its simplistic application may lead to ineffective treatment and increased costs when applied to a heterogeneous population.[83] Furthermore, CER does not take into consideration other factors that affect spending and health such as changes in supply and demand for certain treatments.[84] CER also errs in assuming healthcare treatments can be assessed on a "one size fits all" basis.[85]

Even if CER were a true reflection of the most effective treatment for a patient, it may be applied in a way that limits patients' autonomy

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[79] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 6301, 124 Stat. 119, 727 (2010) (codified as amended in scattered sections of Titles 21, 25, 26, 29, and 42 of the U.S.C.); TOMAS J. PHILIPSON & ERIC SUN, PUB. NO. 4, BLUE BILL OR RED PILL: THE LIMITS OF COMPARATIVE EFFECTIVENESS RESEARCH 1–2 (2011).

[80] PHILIPSON & SUN, *supra* note 79, at 2; Kathryn Nix, *Medicare Chief Favors Rationing*, HERITAGE FOUND. (July 11, 2010), http://www.heritage.org/Research/Commentary/2010/07/Medicare-Chief-Favors-Rationing.

[81] *See, e.g.*, David Catron, *IPAB Is an Acronym for 'Death Panel,'* AM. SPECTATOR (Apr. 22, 2011, 6:09 AM), http://spectator.org/archives/2011/04/22/ipab-is-an-acronym-for-death-p ("[President Obama] no doubt sees PPACA's death panels as a feature rather than a bug. This sentiment is shared of most advocates of socialized medicine. In a piece titled, 'Why "death panels" are a necessary evil,' columnist Jay Bookman captured this progressive consensus when he wrote that 'Death panels exist, they will exist in any conceivable system of health-care delivery, and we all know they are necessary but prefer to ignore it.' For these people, it's either us or Granny . . . .").

[82] Scott Gottlieb & Elizabeth DuPre, *The Living Truth about "Death Panels,"* AEI HEALTH POL'Y OUTLOOK, Oct. 2009, at 2, *available at* http://www.aei.org/outlook/100073.

[83] Basu & Philipson, *supra* note 76, at 20–21.

[84] *See id.*

[85] *Id.* at 21 ("Our analysis of the impact of CER-responsive subsidies suggests that a better understanding is needed as to how CER should be stratified towards obtaining the right treatments for the right subpopulations rather than focused on a 'best' treatment for all patients. It is recognized that 'one size fits all' treatment evaluations may be harmful and the main remedy proposed has been sub-population analysis. However, simply doing a sub-population analysis for many demographic groups neither solves the problem (given within-group heterogeneity) nor is practical in terms of bureaucratic decision-making . . . . When heterogeneity clouds the applicability of centralized studies to individual patients, the 'make or buy'-decision of generating evidence on person-specific treatment effects needs to be better understood. An individual ultimately cares about her own treatment effect, the question is how costly it is to learn that effect through personal consumption versus publicly funded CER."); *see also* CONG. BUDGET OFFICE., RESEARCH ON THE COMPARATIVE EFFECTIVENESS OF MEDICAL TREATMENTS: ISSUES AND OPTIONS FOR AN EXPANDED FEDERAL ROLE 21 (2007).

in choosing or even accessing healthcare treatments.[86] In its March 2010 report on the cost of the PPACA, the Congressional Budget Office ("CBO") cautioned that reducing costs through "payment reductions may not be sustainable in the long term, and could possibly result in diminished quality of care and/or reduce access to needed services."[87]

Dr. Donald Berwick, the interim director of CMS, recommended three steps to guide medical decision-making—three steps that could result in diminished access to services. First, consider whether health intervention is even effective.[88] Second, consider whether the treatment is more or less effective than comparable treatments.[89] Third, assess whether the more effective treatment merits the additional cost.[90] Berwick applied this reasoning in his initial refusal to let Medicare cover the prostate drug Provenge.[91] Prostate cancer patients treated with Provenge were 40% more likely to be alive in three years than those who did not receive it—at a cost of $90,000 per treatment.[92] Provenge was finally approved for Medicare coverage in late June 2011.[93] Despite Berwick's later assurances that he "abhors rationing," a group of forty-two senators called for Berwick's removal,[94] concerned that such a

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[86] Nix, *supra* note 80 ("[Dr. Donald Berwick] has gone on the record -- several times -- as a passionate supporter of socialized medicine, including the cost-containment decisions that come with it. Whether to allow the government to ration or allow individuals to make their health choices isn't even a question for Berwick -- he claims that 'the decision is not whether or not we will ration care -- the decision is whether we will ration with our eyes open.").

[87] PATRICIA A. DAVIS ET AL., CONG. RESEARCH SERV., R41196, MEDICARE PROVISIONS IN THE PATIENT PROTECTION AND AFFORDABLE CARE ACT (PPACA): SUMMARY AND TIMELINE 17 (2010). CBO was unable "to determine whether the reduction in the growth rate would be achieved through greater efficiencies in the delivery of health care or if the payment reductions would lead to lower quality of care." *Id.* at 4.

[88] Terence P. Jeffrey, *Obama Names Rationing Czar to Run Medicare*, CNSNEWS.COM (May 26, 2010), http://cnsnews.com/node/66655.

[89] *Id.*

[90] *Id.*

[91] Robert M. Goldberg, *Don Berwick's Death Panel?*, AM. SPECTATOR (Nov. 16, 2010, 6:08 AM), http://spectator.org/archives/2010/11/16/don-berwicks-death-panel. Despite approval by oncology experts at the FDA, the Medicare Coverage Advisory Committee planned to base its decision on an evaluation by the Agency for Health Research and Quality. *Id.* AHRQ's expert opinion, derived from a master's degree in statistics, a Ph.D. in sociology, and a degree in nursing, "determined the FDA data used to approve Provenge was 'adequate' but not entirely convincing." *Id.*

[92] *Id.*

[93] Marissa Cevallos, *Prostate cancer treatment Provenge to be covered by Medicare, as is Avastin*, L.A. TIMES (July 1, 2011), http://articles.latimes.com/2011/jul/01/news/la-heb-prostate-cancer-provenge-medicare-20110701.

[94] Robert Pear, *Rising Calls to Replace Top Man at Medicare*, N.Y. TIMES, Mar. 8, 2011, at A12.

contentious choice to lead CMS would only further undermine the trust of the American people in the healthcare system.[95]

Elected officials have joined various nonprofit groups in the concern that the PPACA will force healthcare providers to ration health care. For example, after holding a hearing to determine whether the law's Independent Payment Advisory Board would interfere with the doctor-patient relationship, Chairman Pitts of the House Health Subcommittee stated that Health and Human Services Secretary Kathleen Sebelius failed "to convince hundreds of medical experts who object to the board on the grounds that it will have the power to slash or completely eliminate coverage for certain treatments."[96] Likewise, National Right to Life became alarmed by provisions for healthcare rationing in the PPACA, warning the public against the impending, bureaucratic takeover of healthcare decision-making.[97] Increasing anger and distrust of the federal government's control over health care is evident locally and in Washington.[98]

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[95] Press Release, U.S. Senate Comm. on Fin., Hatch, Enzi Spearhead Letter to President Urging Him to Withdraw Berwick Nomination to Head CMS (Mar. 3, 2011), *available at* http://finance.senate.gov/newsroom/ranking/release/?id=862493f5-d9d7-418e-b47a-17b23142c0b6 ("'[T]here are just too many questions about what Dr. Berwick and CMS are doing or will do with the unprecedented power they have been given to reshape our health care system . . . . Withdrawing Dr. Berwick's nomination would be a positive first step in rebuilding the trust of the American people. The occupant of this important position, which affects the health care of so many Americans on a daily basis, requires an individual with the appropriate experience and management ability. Our seniors and those who rely on Medicaid deserve no less.'").

[96] Joe Pitts, *Health care reform's poor prognosis*, POLITICO (July 31, 2011, 9:45 PM), http://politico.com/news/stories/0711/60255.html.

[97] ROBERT POWELL CTR. FOR MED. ETHICS, NAT'L RIGHT TO LIFE, LIFE AT RISK: WHAT THE OBAMA HEALTH CARE PLAN MEANS FOR YOU AND YOUR LOVED ONES (2010), *available at* http://www.stoptheabortionagenda.com/files/RHC2010.pdf ("Basically, doctors, hospitals, and other health care providers will be told by Washington just what diagnostic tests and medical care are considered to meet 'quality and efficiency' standards—not only for federally funded programs like Medicare, but also for health care paid for by private citizens and their nongovernmental health insurance. And these will be standards *specifically designed to limit what ordinary Americans may choose to spend on health care so that it is BELOW the rate of medical inflation.* Treatment that a doctor and patient deem needed or advisable to save that patient's life or preserve or improve the patient's health but which runs afoul of the imposed standards will be denied, *even if the patient is willing and able to pay for it.* In effect, there will be one uniform national standard of care, established by Washington bureaucrats and set with a view to limiting what private citizens are allowed to spend on saving their own lives.").

[98] For instance, after receiving news that a medical center refused to perform surgery on his wife, David Williams threatened to kill President Obama and to blow up the University of Mississippi Medical Center. Jacob Batte, *Mississippi man threatens Obama, UMMC, held without bond*, DM ONLINE (July 25, 2011, 6:57 PM), http://www.thedmonline.com/article/Mississippi-man-threatens-obama-ummc-held-without-bond; *see also* Jackie Calmes, *Lawmakers Join Protest Over Bill*, N.Y. TIMES (Nov. 7, 2009,

In addition, certain provisions of the PPACA are problematic for individuals who believe that the PPACA will be used to further limit Medicare patients' access to medical treatment. Specifically, Section 3025 places limits on reimbursements to healthcare providers for "excess readmissions," and further defines a "high-risk Medicare beneficiary" in part by her number of readmissions.[99] Describing the effect of this provision, one author remarked, "Both of these qualifiers describe more than half the country, making this provision a transparent attempt by government to cut costs by forcibly cutting lives short."[100]

Although Section 1233, the Advance Care Planning Counseling provision, was eventually eliminated from the final version of the PPACA, it initially stimulated controversy because of the requirements that it would have placed on physicians' conversations with patients regarding advance directives.[101] Section 1233 was intended to give physicians additional motivation and specifications for counseling Medicare patients in advance care planning.[102] This section not only provided for physician reimbursement for time spent in advance care planning consultations, but it also suggested what information physicians should provide patients during consultations.[103]

It is unlikely that Section 1233 really would have assisted physicians, helped patients preserve their autonomy in healthcare decisions, or promoted savings. First, the provisions of Section 1233 would have superseded state and local efforts already aimed at encouraging the implementation of advance directives. As researchers at the American Enterprise Institute for Public Policy Research argued, "Regulation of the practice of medicine historically has been left to states and professional groups. . . . [The provisions of Section 1233] usurp from

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4:19 PM), http://prescriptions.blogs.nytimes.com/2009/11/07/lawmakers-join-protest-over-bill/.

[99] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 3025, 124 Stat. 119, 408 (2010) (codified as amended in scattered sections of Titles 21, 25, 26, 29, and 42 of the U.S.C.); R. Brent Rawlings et al., *Health Reform for Hospitals and Health Systems*, MCGUIREWOODS 2 (2010), *available at* http://www.mcguirewoods.com/news-resources/publications/health_care/health%20reform%20for%20hospitals.pdf (explaining the effect of the hospital readmissions reduction program of PPACA Section 3025).

[100] John Griffing, *The Deadly Pact: How ObamaCare will 'Save' Money*, AM. THINKER (Aug. 9, 2010), http://www.americanthinker.com/2010/08/the_deadly_pact_how_obamacare.html ("[Section 3025] gives the Health Secretary the discretion to remove life-extending treatment from the reach of seniors and place them in state wards for the purposes of making the 'transition' to death as painless as possible. This 'transition' can be activated for virtually any reason, including 'a history of multiple readmissions' or 'risk factor.").

[101] *See* Joshua E. Perry, *A Missed Opportunity: Health Care Reform, Rhetoric, Ethics and Economics at the End of Life*, 29 MISS. C. L. REV. 409, 410–11 (2010).

[102] H.R. 3200, 111th Cong. § 1233 (2009).

[103] *Id.*

state and local efforts the authority to regulate aspects of medical practice."[104] Second, Section 1233 would have prompted physicians to go beyond providing information about treatment options as it

> mandat[ed] what specific information should be provided to patients. The statutory language actually require[d] . . . that physicians present certain . . . options as being in the patient's clear interest, stating that an "explanation of orders regarding life sustaining treatment or similar orders . . . shall include: the reasons why the development of such an order is *beneficial* to the individual and the individual's family and the reasons why such an order should be updated periodically as the health of the individual changes."[105]

In effect, the physician would have been required to tell the patient what healthcare treatment the patient should choose. Third, the narrow provisions may have actually discouraged patients from adopting advance directives and physicians from counseling patients to do so.[106] Ironically, not only was Section 1233 unlikely to promote adoption of advance directives, but it was unlikely to promote savings.[107] It did prompt, however, discussions infused with the fear that changes in health care would result in federally controlled death panels.[108]

Even if the PPACA does not impose additional limits or rationing of medical treatments as some have posited,[109] arguably rationing of health care already occurs.[110] Some physicians and bioethicists look to rationing as the answer to the funding question, proposing allocation of resources that will necessarily restrict the aging population from receiving certain care. Govind Persad, Alan Wertheimer, and Ezekiel Emanuel from the National Institutes of Health reviewed eight possible methods for allocating healthcare treatments, ultimately recommending the "complete lives system" that combines five, "morally relevant" principles to prioritize who should receive medical treatment: youngest-first, prognosis for recovery, lottery (or random selection), lives saved, and instrumental value.[111] In their report, these bioethicists propose that a framework discriminating against the aged and very young is morally necessary for a society that "must embrace the challenge of implementing a coherent multiprinciple framework" for allocation of

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[104] Gottlieb & DuPre, *supra* note 82, at 6.

[105] *Id.* at 5.

[106] *Id.* at 3.

[107] *Id.*

[108] Perry, *supra* note 101, at 411–12.

[109] *See, e.g.*, Testimony Presented to Congressman Dennis Moore, Myra Christopher, President and CEO, Ctr. for Practical Bioethics 2–3 (Aug. 27, 2009).

[110] *See* Gottlieb & DuPre, *supra* note 82, at 3.

[111] Govind Persad et al., *Principles for Allocation of Scarce Medical Interventions*, 373 LANCET 423, 428 (2009).

healthcare treatment.[112] The complete lives system not only discriminates against the aged, but also against infants, based on the "social and personal investment that people are morally entitled to . . . at a particular age."[113] In relation to the youngest-first principle, the three posited,

> Adolescents have received substantial education and parental care, investments that will be wasted without a complete life. Infants, by contrast, have not yet received these investments. Similarly, adolescence brings with it a developed personality capable of forming and valuing long-term plans whose fulfilment [sic] requires a complete life. As the legal philosopher Ronald Dworkin argues, "It is terrible when an infant dies, but worse, most people think, when a three-year-old child dies and worse still when an adolescent does."[114]

In addition, by incorporating the instrumental value principle into their calculation of a "complete life," Persad, Wertheimer, and Emanuel contemplate a system where the fittest are favored over the frail.[115] Such "ethics" have no *rightful* place in the American healthcare industry. But, unfortunately, they already have *a* place.

In light of such contemporary, compromising views of ethics, patients nearing the end of their "complete lives" justifiably fear that the conventions they have with their physicians about end-of-life care will be used to reduce costs. While patients who have end-of-life discussions with their physicians are likely to have lower medical costs in their final week of life,[116] reducing costs should not be the primary motive for having these discussions.

Rising demands and limited funding in Medicare and Medicaid increase the probability that physicians will not be able to offer patients the treatment they wish to give—much less that patients can receive the treatment they desire to receive. The crisis in funding and reimbursement means that physicians are less inclined to accept Medicare patients, and are restricted in the treatments they can prescribe.[117] States will be required to use federal dollars to raise the

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[112] *Id.* at 429.

[113] *Id.* at 428.

[114] *Id.*

[115] *See id.* at 426.

[116] Baohui Zhang et al., *Health Care Costs in the Last Week of Life: Associations with End-of-Life Conversations*, 169 ARCHIVES INTERNAL MED. 480, 484–85 (2009).

[117] ROBERT POWELL CTR. FOR MED. ETHICS, NAT'L RIGHT TO LIFE, LIFE AT RISK: HOW THE OBAMA HEALTH CARE PLAN WILL RATION YOUR FAMILY'S MEDICAL TREATMENT - A FACTSHEET 4 (2010), *available at* http://www.nrlc.org/HealthCareRationing/LifeatRisk Longform.pdf ("Even before the Obamacare cuts, Medicare . . . faced grave fiscal problems as the baby boom generation ages. . . . The consequence will be that the amount of money available for each Medicare beneficiary, when adjusted for health care inflation, will shrink. . . . In theory, taxes could be increased dramatically to make up the shortfall . . . . The second alternative—to put it bluntly but accurately—is rationing. Less money

physician Medicaid reimbursement rates in accordance with Medicare rates, costing up to $68 billion over the next 10 years according to estimates from CBO and CMS.[118] But, as The Heritage Foundation points out, federal funding may not be available in the future, and states will be stuck with the bill.[119]

CMS automatically adjusts reimbursements to physicians based on the Sustainable Growth Rate ("SGR") in order to restrain growing Medicare costs and to ensure that the yearly increase in the expense per Medicare beneficiary does not exceed GDP growth.[120] However, Congress regularly implements "fixes" to the SGR in an attempt to mollify what would be severely low reimbursements to physicians.[121] Whether or not the fixes should or will continue to be applied in the future is beyond the scope of this Note, but the financial restraints on healthcare providers will surely increase as they treat both Medicare and Medicaid patients.

To comply with the PPACA by 2014, states will have to cover all individuals below 138% of the poverty line with Medicaid.[122] Physicians in states like Texas with already low physician reimbursement rates will be increasingly unwilling to accept Medicaid and Medicare patients, placing an additional demand on hospital emergency rooms.[123] Ultimately, the growth in Medicaid healthcare costs is unsustainable, and it will hit the poorest states the hardest.[124]

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available per senior citizen would mean less treatment, including less of the treatments necessary to prevent death. For want of treatment, many people whose lives could have been saved by medical treatment would perish against their will. The third alternative is that, as the government contribution decreases, the shortfall could be made up by voluntary payments from older people themselves, so that their Medicare health insurance premium could be financed partly by the government and partly from their own income and savings.").

[118] Brian Blase, *Obamacare's Medicaid Policy: Putting the Doctors in Another "Fix,"* WEBMEMO, Oct. 4, 2010, at 1, *available at* http://report.heritage.org/wm3031.

[119] *Id.* at 3–4.

[120] *Id.* at 2.

[121] *Id.* ("SGR links the increase in Medicare reimbursement rates to growth in GDP. Since medical costs historically increase at a rate more than twice GDP, the SGR reduces the real (inflation-adjusted) payments physicians receive. Congress has overruled this decrease . . . 10 times over the past decade, with short-term boosts in Medicare rates above SGR levels.").

[122] *Id.* at 1–2. CMS estimates that this will increase Medicaid enrollment by 23 million individuals at a price tag of over $70 billion. *Id.* at 2. The Congressional Research Service estimates that coverage will be extended to qualifying individuals with incomes up to 133% of the federal poverty level. HINDA CHAIKIND ET AL., CONG. RESEARCH SERV., R41664, PPACA: A BRIEF OVERVIEW OF THE LAW, IMPLEMENTATION, AND LEGAL CHALLENGES 2 (2011).

[123] Blase, *supra* note 118, at 1. Reportedly, already less than one-third of physicians in Texas are active in Medicaid. *Id.*

[124] *See* Robert B. Helms, *Medicaid: The Forgotten Issue in Health Reform*, AEI HEALTH POL'Y OUTLOOK, Nov. 2009, at 2, *available at* http://www.aei.org/docLib/14-HPO-

Likewise, the growth in Medicare costs is unsustainable, and it will make certain standards unaffordable. While the aging population will increase Medicare costs by 2% over the next 70 years, the overall cost of health care is projected to increase by 6.2%.[125] The result? The quality of care will inevitably drop as physicians are "squeezed" to provide the required level of care to Medicare patients without assurance of reimbursement.[126] While there are several models that purport to address the Medicare cost crisis more efficiently,[127] what are the possible consequences of this squeezing? Specifically, what level of treatment will be available to an elderly population that must deal with chronic illnesses?

While demand for health care will certainly increase with a growing Medicare population, healthcare costs are also likely to increase with increased governmental control of supply—unless supply is limited.[128] Supply *will* decrease. According to reports by CMS, "[B]y 2017, when [PPACA's] changes are fully phased in, 14.8 million senior citizens and disabled Americans who would have had Medicare Advantage benefits under the previous law will be denied coverage for many services and

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Helms-g.pdf. Medicaid currently covers 20% of the United States population and represents 7% of the federal budget and about seventeen percent of states' budgets. Under the recent health reform measures, these costs will grow at almost 8.5% per year, and will increase from almost 2.5% to 3% of the nation's GDP by 2018. *Id.* at 1.

[125] White, *supra* note 74, at 51–52.

[126] John Goodman, *Bending the Cost Curve*, HEALTH AFFAIRS BLOG (Oct. 1, 2010), http://healthaffairs.org/blog/2010/10/01/bending-the-cost-curve ("Once you get past the rhetoric about doctors becoming more 'productive,' you will discover that the new law's mechanism to control Medicare spending is to ratchet down payments to doctors and hospitals. . . . Medicare payment rates will fall below Medicaid rates in 2019 and fall increasingly behind Medicaid in future years. Were there the political will to do this, Medicare enrollees would be getting Medicaid-like services in just a few years and, beyond that, the elderly and the disabled would be in a completely different (and inferior) health care system. The problem is, there is not a not a smidgen of evidence that the political will is there.").

[127] *See, e.g.*, Darius Lakdawalla et al., *Addressing Geographic Variation and Health Care Efficiency: Lessons for Medicare from Private Health Insurers*, AEI HEALTH POL'Y OUTLOOK, July 2010, at 3, 7–8, *available at* http://www.aei.org/docLib/2010-7-No-2-g.pdf.

[128] Goodman, *supra* note 126 ("This is a little-noticed feature of the new law that has been almost completely ignored by everyone . . . . The demand for care will almost certainly soar. Start with 32 million to 34 million newly insured people, who will try to double their consumption of care . . . . Add to that another 70 million or so who will have much more generous insurance than they currently have. Almost everybody else is promised an array of preventive care services, with no copayment or deductible. How can you have all this newly created demand for care without an enormous increase in health care spending? PPACA's answer: make sure there is no new supply to meet the demand. Although early versions of the bill contained subsidies to increase the number of doctors, nurses and paramedical personnel, these items were all zeroed out before final passage.").

incur higher out-of-pocket costs."[129] Healthcare providers and states are already faced with an increasingly limited supply of treatments.[130] They face these limits in hospital rooms at the side of patients who have not articulated or even considered their preferences for end-of-life care. With the incentives to cut corners on health care multiplying, it is more important than ever for patients to unequivocally communicate the type of care they expect to receive. Unfortunately, even if a patient has an advance directive on file, his preference may not be honored. This presents yet another reason set forth below that states must face the need for uniform advance directive legislation now.

B. Advance Directives May Not Reflect a Patient's Wishes—Either on the Document or in Its Enforcement

Simply because a patient puts his preferences in writing in an advance directive does not mean that these preferences will ultimately be honored. While there is always some doubt as to whether a proxy's selection of treatments reflects the patient's wishes, the patient may also have cause to doubt whether his own wishes as articulated in his advance directive will be honored.[131] The Department of Health and Human Services once confirmed this concern, stating that the problem may not be too much care, but instead too little care.[132] Advance directives have been ineffective in directing care and preempting friction when

> families desire life-sustaining treatment for family members in compromised health states (e.g., PVS) [but] providers find the treatment inappropriate. These conflicts may also be the result of philosophical or religious differences. Providers may respond to this situation by attempting to reduce the influence of patient/family preferences on care decisions.[133]

Ironically, this is the very type of problem advance directives attempt to address. The end-of-life patient is already unable to directly

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[129] Robert A. Book & James C. Capretta, *Reductions in Medicare Advantage Payments: The Impact on Seniors by Region*, BACKGROUNDER, Sept. 14, 2010, at 2, *available at* http://report.heritage.org/bg2464.

[130] *See* NICHOLAS JOHNSON ET AL., CTR. ON BUDGET AND POLICY PRIORITIES, AN UPDATE ON STATE BUDGET CUTS: AT LEAST 46 STATES HAVE IMPOSED CUTS THAT HURT VULNERABLE RESIDENTS AND CAUSE JOB LOSS 1 (2011), *available at* http://www.cbpp.org/files/3-13-08sfp.pdf (describing the recession's widespread effects on state budgets, including forcing cuts "that hurt vulnerable residents and cause job loss").

[131] Nina A. Kohn & Jeremy A. Blumenthal, *Designating Health Care Decisionmakers for Patients Without Advance Directives: A Psychological Critique*, 42 GA. L. REV. 979, 997 (2008) ("[R]esearchers consistently find that surrogate decisionmaking on behalf of patients in a variety of health situations frequently does not accurately reflect those patients' actual preferences.").

[132] *See* 2008 REPORT TO CONGRESS, *supra* note 4, at 12–13, 25–26.

[133] *Id.* at 12.

communicate his wishes to his physician, and so he has delegated this duty to a proxy. By overriding a proxy's decision—if it is based on a patient's preference—the healthcare provider effectively violates the patient's autonomy. While most states allow physicians to refuse to comply with a patient's wishes because of their religious beliefs or moral convictions,[134] many states also allow physicians to not comply if they find the treatment medically "futile," "inappropriate," or "ineffective."[135] In other words, a physician who disagrees with a patient's wishes may refuse to honor them. Many states, such as Texas, defer to hospital or medical ethics committees to determine the course of treatment if there is a conflict.[136] But even that seemingly neutral act takes the decision away from the patient.

Disabled and minority populations may feel the most vulnerable to a lack of compliance with their wishes. These populations fear that their values are not represented either in the advance directive document itself or in its execution.[137] In addition, some scholars fear that disabled individuals will be denied more costly treatments if access to health care is based on economic contribution to society.[138] Based on Persad, Wertheimer, and Emanuel's "complete lives" analysis, these populations have good cause to fear that treatment will be withheld unless they can show that they are making an economic contribution to society.

In addition, proxies' decisions sometimes fail to reflect patients' wishes. Although it is impossible to verify what the patient's actual wishes are after making a final decision to withdraw life-sustaining

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[134] WILL YOUR ADVANCE DIRECTIVE BE FOLLOWED?, *supra* note 27, at 8.

[135] *Id.* at 7–10.

[136] TEX. HEALTH & SAFETY CODE ANN. § 166.046 (West 2010 & Supp. 2011).

[137] 2008 REPORT TO CONGRESS, *supra* note 4, at xii ("[T]here is concern that some clinicians (and infrequently, some family members) of physically disabled individuals undervalue the quality of life of these individuals, and therefore will make decisions concerning life-sustaining care that contrast with what these individuals would want.").

[138] *See, e.g.*, Mark P. Mostert, *Useless Eaters: Disability as Genocidal Marker in Nazi Germany*, 36 J. SPEC. EDUC. 157, 169 (2002) ("[R]ecent developments in the United States and Europe are changing the voluntary nature of a 'gentle death' still further, also based, in part, on economic worth. In the United States, Oregon voters have . . . also established economic criteria for who should and who should not receive expensive health care via Medicaid health-care rationing. . . . [T]he Oregon example clearly shows a shift from strict compassion and ethical obligation for treatment of individuals to a more practical medical euthanasia based on collective economic viability. . . . It is important to note that the enactment of prejudice against people with disabilities in Nazi Germany could not have succeeded without the complicity of the medical and adjunct professions. . . . *Currently, there is evidence of the medical community's again being willing agents in hastening the deaths of people deemed not viable, including people with disabilities*, through familiar methods for ending the lives of terminally ill people, such as starvation and death by thirst.") (emphasis added).

treatment,[139] studies have shown that advance directives are often inadequate in representing an individual's wishes when he is actually faced with an end-of-life decision. For instance, in one study by the Agency for Healthcare Research and Quality of the Department of Health and Human Services, physicians were reportedly only sixty-five percent accurate in representing patients' wishes for treatment, often providing undertreatment.[140] In contrast, proxies' decisions often appeared not to represent end-of-life patients' interests either—but due to overtreatment, not undertreatment.[141] Further complicating the matter, patients who were studied often changed their wishes once faced with actual end-of-life questions.[142]

Advance directive documents and discussions could be reformed to more adequately prepare the family or proxy to understand and execute the patient's wishes. Studies indicate that while patients do want to exert some control over end-of-life care issues, they do not necessarily wish to "micromanage" their specific treatments, but prefer to defer to the judgment of a trusted proxy.[143] To account for such deference, advance directives should allow individuals to specify how much authority they want their proxy to have.[144] The advance directive may also be more successful in reflecting the patient's wishes if the document includes a "wider scope of values and goals the patients feel are most important in life."[145]

No matter how clearly the document expresses the patient's wishes, the patient and the proxy's decisions depend on what information is made available by the physician and how. Not only may the document and the proxy be inadequate or ill-prepared to represent the patient's interest, but the patient herself may be inadequately counseled about her medical future living with her health condition.[146] First, physicians

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[139] *See* Michael R. Flick, *The Due Process of Dying*, 79 CALIF. L. REV. 1121, 1143 (1991) ("In that destruction [of the person for whom the choice is made], autonomy is perversely, and inexplicably, said to be vindicated. The vexation of uncertainty is removed by an exercise of power. The victim, destroyed, cannot complain. The decisionmaker is anesthetized by the powerlessness of having made the only rational choice. . . . The responsibility for the decision rests on [the] victim.").

[140] Kass-Bartelmes & Hughes, *supra* note 6, at 2.

[141] *Id.*

[142] *Id.* at 4 ("[P]atients often changed their minds when confronted with the actual situation or as their health status changed. Some patients who stated that they would rather die than endure a certain condition did not choose death once that condition occurred.").

[143] Nikki Ayers Hawkins et al., *Micromanaging Death: Process Preferences, Values, and Goals in End-of-Life Medical Decision Making*, 45 GERONTOLOGIST 107, 116 (2005).

[144] *Id.*

[145] *Id.*

[146] *See* Temkin-Greener et al., *supra* note 25, at 687–89.

often lack adequate time and training to provide counseling.[147] Nevertheless, they are expected to give not only objective recommendations for medical treatment, but also an ethical evaluation of the possible treatments based on the patient's best interest.

Physicians have historically and commonly been accepted as the best individuals to provide counseling regarding end-of-life care treatments and decision-making.[148] As healthcare choices become increasingly complex and technical, patients are especially susceptible because they will tend to give even more deference to physicians' expertise.[149] The American Medical Association and medical schools do provide physicians and students with general ethical guidelines to help proxies make decisions.[150] Yet, with decreasing supply of healthcare professionals and medical attention, increasing demand for health care, and increasing costs, the patient should be wary of placing complete trust in the physician's ability to provide objective counseling.[151]

Second, patients may also be at risk because of difficulties physicians encounter in helping patients make medical choices. Although the Liaison Committee on Medical Education requires medical schools to include end-of-life care in their curriculum,[152] there is room for improvement according to responses recently obtained from medical

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[147] *Id.* at 688 ("Most physicians, and other health care professionals, receive very cursory, if any, school training in either end-of-life discussions or in patient-interviewing techniques.").

[148] *See* David J. Rothman, *Revisionism Misplaced: Why This Is Not the Time to Bury Autonomy*, 97 MICH. L. REV. 1512, 1514 (1999) (reviewing CARL E. SCHNEIDER, THE PRACTICE OF AUTONOMY: PATIENTS, DOCTORS, AND MEDICAL DECISIONS (1998) (explaining from poll data, sociological surveys, and patient memoirs that critically ill patients often turn to their doctor for counseling on the most difficult health decisions)).

[149] *Id.* at 1516.

[150] *See, e.g.*, COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, AM. MED. ASS'N, CODE OF MEDICAL ETHICS 223 (2004–2005) ("In general, physicians should respect decisions made by the appropriately designated surrogate on the basis of sound substituted judgment reasoning or the best interest standard. In cases where there is a dispute among family members, physicians should work to resolve the conflict through mediation. Physicians or an ethics committee should try to uncover the reasons that underlie the disagreement and present information that will facilitate decision making. When a physician believes that a decision is clearly not what the patient would have decided or could not be reasonably judged to be within the patient's best interests, the dispute should be referred to an ethics committee before resorting to the courts.").

[151] Rothman, *supra* note 148, at 1519 ("When physicians must see patients on a ten-minute schedule, and when financial conflict of interest is more acute now in medicine than ever before, I do not think it wise, in individual or policy terms, to worry about an excess of reliance on patient decisionmaking. Indeed, I cannot think of a worse time to champion the idea of passive patients.").

[152] LIAISON COMM. ON MED. EDUC., FUNCTIONS AND STRUCTURE OF A MEDICAL SCHOOL: STANDARDS FOR ACCREDITATION OF MEDICAL EDUCATION PROGRAMS LEADING TO THE M.D. DEGREE 9 (2011), *available at* http://www.lcme.org/functions2011may.pdf.

students.[153] Medical students are trained to focus on getting patients to tell doctors what doctors need to know—not vice versa, and some critics argue that in reality it is impossible to separate "value choices" (decisions that, in theory, only patients should make) from "technical choices" (decisions physicians would make).[154]

Healthcare professionals themselves are learning about new treatment mechanisms, and are expected not only to be able to decipher which treatments are most effective, but also to communicate to patients what treatment would have the most "meaningful" outcome.[155] Although physicians themselves are on a "learning curve," they are still in the best position to recommend treatments, as opposed to federal or state agencies that are really just trying to deal with rising Medicare and Medicaid costs. Physicians should not have to recommend only a single "best" healthcare option, but rather encourage patient autonomy by discussing a range of treatment options, allowing the patient or proxy to properly make the decision.[156]

While historically the physician has been the most qualified individual to recommend specific treatments, she also has an overwhelming level of discretionary power. She has great discretion, not only in recommending levels of treatments for the patient to adopt as part of the advance directive, but also for the proxy to approve when the patient is incapacitated. How much discretion the physician will have, however, likely depends on the predictive outcomes of CER.[157]

In addition, because individuals often do not take time to consider healthcare options until they face a medical crisis, counseling for advance directives often happens when the patient is perhaps the least emotionally prepared to deal with these issues. Patients at this point are often facing depression, have just been diagnosed with a terminal illness, or were admitted to a healthcare facility due to a sudden illness.[158] Patients are therefore vulnerable not only to the physician's counsel, but also to family social pressure and depression.[159] They may be easily

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[153] Thomas J. Papadimos et al., *An Overview of End-of-Life Issues in the Intensive Care Unit*, 1 INT'L J. CRITICAL ILLNESS & INJ. SCI. 138, 138–46 (2011).

[154] Rothman, *supra* note 148, at 1516.

[155] *See, e.g.*, Jackson P. Rainer & Patti Ellis McMurry, *Caregiving at the End of Life*, 58 J. CLINICAL PSYCHOL. 1421, 1425 (2002) ("As one home-health nurse said, 'We're on a learning curve. We've learned that modern technology has its role in treating some patients and not in treating others. Sure, we've got all kinds of fancy tools, but we've got to learn to use these tools when they can make a difference that's meaningful.'").

[156] *See supra* note 86 and accompanying text.

[157] *See* LIFE AT RISK, *supra* note 117, at 5.

[158] Kass-Bartelmes & Hughes, *supra* note 6, at 2–4.

[159] One neurologist creatively introduced the merits of physician-assisted suicide, which is often induced by family and social pressure on end-of-life patients, through a fictional discussion between a physician and friends that highlighted how physician-

coerced into thinking that they will be a burden on family and society, and that a decision to forego medical treatment would be the most moral and considerate choice.[160] As noted earlier, the physician's judgment may also be clouded by economic concerns as a result of limits in reimbursement.[161]

While there is no perfect way to protect patients' interests, advance directives that express patients' wishes—either in writing or through a proxy—go a long way to protect patients when they are most vulnerable and are unable to express their wishes. States should consider non-coercive ways to encourage residents to adopt advance directives well before they are faced with medical treatment. The differences among states in form, content and registry; the increasing cost and demand for health care; the growing elderly population; and dubious enforcement all point to a need for reform and uniformity of advance directives. This uniformity, however, must happen at the state level.

III. WHY ADVOCATE FOR UNIFORMITY AT THE STATE LEVEL?

State legislatures should work together to adopt not only uniform documents for advance directives, but also uniform protocols for counseling patients in completing forms and proxies in making end-of-life care decisions. Because under federal law states retain the right to determine the form and requirements for advance directives,[162] states are in the best position to identify patients' needs and address their concerns through legislation. Through avenues such as the National Conference of State Legislatures, the American Legislative Exchange Council, and the National Conference of Commissioners on Uniform

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assisted suicide can purportedly avoid family anguish. C. William Britt, Jr., *Reflections for May: Buster's View*, 76 NEUROLOGY 1677, 1678 (2011) ("When someone gets diagnosed with a terminal condition, why not tell them medication for suicide is available? . . . That way they can pick the time they die, work it out with their family and the doctors. There wouldn't be the shock to these families.").

[160] *See, e.g.*, Rita L. Marker et al., *Euthanasia: A Historical Overview*, 2 MD. J. CONTEMP. LEGAL ISSUES 257, 269 (1991) (quoting from a popular 1930s Nazi propaganda novel in which a doctor on trial for killing his crippled wife at her request defended himself by suggesting, "'Would you, if you were a cripple, want to vegetate forever?'"); ROBERT PEARLMAN ET AL., YOUR LIFE, YOUR CHOICES: PLANNING FOR FUTURE MEDICAL DECISIONS: HOW TO PREPARE A PERSONALIZED LIVING WILL 21, *available at* http://www.life issues.org/euthanasia/pdf/your_life_your_choices.pdf. The booklet by Robert Pearlman entitled *Your Life, Your Choices* offers an exercise for determining whether one's life is "worth living" based on a series of factors in a checklist, such as being no longer able to walk, get outside, or contribute to a family's well-being. The factors also include the need for long-term care, living in a nursing home, or causing severe emotional and financial burdens on a family. *Id.*

[161] Trew, *supra* note 12, at 300 ("With the cost of health care continuing to rise in the United States, health care providers could face the dangerous temptation to 'persuade chronic patients to minimize costs by ending it all painlessly.'").

[162] 42 U.S.C. § 1395cc(f) (2006).

State Laws ("NCCUSL"), states have already been able to effectively address regulatory needs by multi-state legislation.[163] As noted earlier, the NCCUSL has already proposed the UHCDA, which several states have adopted as the basis for their advance directive laws.[164] Just like multi-state legislation such as the Uniform Commercial Code, which has been adopted and effectively implemented by all fifty states after a drafting period of ten years, state legislatures can likewise work with state and national organizations to refine the UHCDA.

In addition, states could retain the ability to include limitations and allowances unique to their states. For example, by creating a multi-state form and registration process for advance directives, states that do not permit physician assisted suicide still could include provisions that explicitly prevent visitors to their state from receiving this treatment. Meanwhile, states that do allow for the treatment may include a warning to their own citizens that the particular treatment is only available in their states.

West Virginia's Initiative to Improve End-of-Life Care provides an example of a state that effectively took steps to address a statewide problem concerning adequately respecting end-of-life wishes. Alarmed by the low rate of use of hospice care, West Virginia created a task force in 2000 with representatives from the state nursing home association, hospice council, and the state office of health facility licensure and certification.[165] After finding that Medicaid had "created a financial disincentive for nursing homes to enroll residents in hospice" despite their wishes, the task force convinced Medicaid to change its policy, causing hospice enrollment to increase by 400% within a short time.[166] In addition, the state initiated the Healthy People 2010 program that includes, among its 300 objectives, a goal of increasing the percentage of people who complete written advance directives to 50%.[167] This example from West Virginia is just one of many that demonstrates that states best know their residents and their health needs, and why it is state legislatures who must create uniform advance directive regulations, not the federal government.

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[163] James M. Thunder, *Strengthening Federalism*, AM. SPECTATOR (Nov. 16, 2010, 6:08 AM), http://spectator.org/archives/2010/11/16/test.

[164] UNIF. HEALTH-CARE DECISIONS ACT (Proposed Official Draft 1993); *see also, e.g.*, ALASKA STAT. §13.52 (2010); DEL. CODE ANN. tit. 16, § 25 (2003 & Supp. 2010); HAW. REV. STAT. § 327E (2008 & Supp. 2010); ME. REV. STAT. ANN. tit. 18–A, §§ 5-801 to -817 (1998 & Supp. 2010).

[165] *Data-Driven Policymaking (An Update): Using Statistics to Shape Agendas and Measure Progress*, STATE INITIATIVES IN END-OF-LIFE CARE, Feb. 2003, at 2–3.

[166] *Id.* at 3.

[167] *Id.*

IV. WHAT EXISTING FORMS PROVIDE A MODEL?

The current UHCDA (1) establishes when advance directives will be enforced,[168] (2) sets out "best interest" as the standard for agents' decision-making in the absence of instructions from a patient,[169] (3) describes when an advance directive may be revoked,[170] and (4) provides a model form that allows both the nomination of a power of attorney for health care or agents, as well as specific instructions for any aspect of the patients' health care.[171] The UHCDA is a helpful model because it provides one form that allows patients to designate their proxy and to specify desired treatments.

In addition, the "Five Wishes" form, although it does not provide model legislation, meets the requirements of forty-two states regarding advance directives.[172] Created by Aging with Dignity together with the assistance of the American Bar Association Commission on Law and Aging, Five Wishes is written in plain, everyday language and allows patients to decide their proxy, the kind of medical treatment they do or do not want, how comfortable they want to be, how they want people to treat them, and what they want their loved ones to know.[173] Five Wishes provides a complete booklet with forms for very little cost to interested patients.[174] A 2009 *Wall Street Journal* article providing an overview of advance directive options highlighted satisfied individuals who had completed the Five Wishes document.[175] Five Wishes's strength appears to be that it is readily available and understandable for individuals even without explanation. Despite its strengths, Five Wishes has been criticized by some practitioners who warn that it "should not be used as a replacement for statutory advance directives because it contains legally ambiguous language and may conflict with the authority delegated under [another portion of the state's law]."[176] Unfortunately, the document was rejected by Veterans' Affairs ("VA") in exchange for

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168 UNIF. HEALTH-CARE DECISIONS ACT, § 10 cmt. at 29–30.

169 *Id.* § 2(e).

170 *Id.* § 3.

171 *Id.* § 4.

172 *Five Wishes*, AGING WITH DIGNITY, http://www.agingwithdignity.org/five-wishes.php (last visited Nov. 27, 2010).

173 *Id.*

174 *Id.*

175 Melinda Beck, *Preparing for the Final Hours*, WALL ST. J., Aug. 18, 2009, at D2.

176 Ray J. Koenig III & Mackenzie Hyde, *Be Careful What You Wish For: Analyzing the "Five Wishes" Advance Directive*, 97 ILL. B.J. 242, 243 (2009) (arguing that Five Wishes, though helpful in prompting dialogue about end-of-life care, is not a proper substitute for statutory advance directives under Illinois law as it may create ambiguities and conflicting interests).

VA's adoption of the controversial booklet, *Your Life, Your Choices.*[177] Five Wishes remains, however, independent and compliant with most state documents and requirements.

NRL's "Will to Live" project likewise proposes a document not attached to any one state. Will to Live was created with the express purpose of protecting patients from being denied medical care.[178] NRL's Will to Live, in contrast with the UHCDA or Five Wishes, explains to patients, among other things, that the terminology used in most advance directives forms, such as "excessive pain" or "excessive burden," has specific legal consequences and must be carefully selected.[179]

None of these three documents singularly addresses the need for a uniform advance directive form. Of the three, the UHCDA provides the best model for a uniform document. The drawback of the UHCDA, however, is that it does not offer the plain language and user-friendly approach of the Five Wishes document, nor does it include the protective language of the Will to Live form. While patients should be able to understand the language of an advance directive apart from the counseling of a physician or attorney, they must also be aware of the legal consequences not only of word choice but of the implications of CER and limits in healthcare funding. NRL's Will to Live form attempts to offer such explanations. Ideally, states should draw upon the strengths of all of three documents, formulating a composite of these three (and perhaps other) documents in order to achieve legislation that allows for a uniform advance directive that is informative, clear, and user-friendly.

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[177] Jim Towey, *Your Life Is Not Worth Living: the frightening message a VA document sends to aging veterans*, NAT'L REV. ONLINE (Sept. 9, 2009, 4:00 AM), www.nationalreview.com/articles/228199/your-life-not-worth-living/jim-towey.

[178] *Why Not Sign a Living Will Instead of the Will to Live?*, NAT'L RIGHT TO LIFE, http://www.nrlc.org/euthanasia/willtolive/WhynotWTL.html (last visited Nov. 27, 2011) ("The bottom line is this: if you are someone who doesn't want medical technology to prolong your last hours, but who also doesn't want to be starved or allowed to die just because you have a disability, your wishes will be far more likely to be respected if you sign a properly prepared Will to Live than if you sign a living will.").

[179] ROBERT POWELL CTR. FOR MED. ETHICS, NAT'L RIGHT TO LIFE, SUGGESTIONS FOR PREPARING WILL TO LIVE DURABLE POWER OF ATTORNEY, at ii (rev. 2008), *available at* http://www.nrlc.org/euthanasia/willtolive/docs/virginia.rev1208.pdf (last visited Nov. 27, 2011) ("[D]o not use language rejecting treatment which has a phrase like 'excessive pain, expense or other excessive burden.' Doctors and courts may have a very different definition of what is 'excessive' or a 'burden' than you do. Do not use language that rejects treatment that 'does not offer a reasonable hope of benefit.' 'Benefit' is a legally vague term. If you had a significant disability, a health care provider or court might think you would want no medical treatment at all, since many doctors and judges unfortunately believe there is no 'benefit' to life with a severe disability.").

V. WHY SHOULD STATES ACT NOW?

One of the most critical ethical issues of our time, end-of-life healthcare decisions, depends on what healthcare options are available to the decision maker. Despite the best efforts of proxies to comply with patients' wishes, absent assurance that these wishes can be complied with, advance directives are meaningless. In light of an increase in the Medicare-eligible population, reduced funding for Medicare and Medicaid, encouraged dependence on CERs, and the dubious enforcement of existing advance directives, states should act now to protect their citizens' healthcare interests.

With only eighteen to thirty-six percent of the population having adopted an advance directive,[180] and with the looming reality of rationed healthcare, states have a narrow window to reform existing laws so that advance directives are accessible to patients and physicians, uniform in requirement, easy to understand, protective of patients' wishes, and uniform in enforcement. State legislatures should begin working together to develop a multi-state law similar to the UCC. They should not repeat the VA's error in using *Your Life, Your Choices*, a publication created by authors from the Hemlock Society, adopted amidst controversy and after protest from experts in the field.[181]

Instead, states should develop model legislation with the counsel of entities that represent the interests of disabled, pro-life, minority, and religious communities, and with the counsel of physicians and other healthcare providers. The involvement of these communities does not guarantee that individuals in those communities will adopt advance directives. It will, however, force legislatures to consider their perspectives and knowledge, and may increase the rate of adoption of advance directives.

CONCLUSION

States should work together to develop uniform regulations for advance directives that address the concerns raised by individual patients and scholars alike. They should do so in consultation with certain groups such as the disabled community who are most affected by government regulations of advance directives. The regulations' forms should use plain, everyday language but also provide legal definitions so the patient using the advance directive can understand the legal impact of each statement. It should also include a "will to live," allowing the patient to stipulate which treatments may never be withheld. In addition, states should develop a national registry of advance directives

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[180] 2008 REPORT TO CONGRESS, *supra* note 4, at 13.

[181] *See* Towey, *supra* note 177 and accompanying text.

that is accessible to the patient and the treating physician in any state. Finally, apart from conflicts with existing state law or the physician's value-based objection, the advance directive should be honored. Although uniform legislation will not ensure that each patient's wishes are known and respected, it will address the need for clarity, consistency, and the ability of patients to use advance directives to protect their health care and their lives.

Ruth F. Maron[182]

[182] I am grateful to the *Regent University Law Review* staff and board members for their hard work and especially to my mother, Maureen Maron, and family for their constant encouragement, prayers, and support.

TABLE 1: COMPARISON OF SELECT STATE LEGISLATION FOR ADVANCE DIRECTIVES AND SURROGATE DECISION-MAKING*

State	Statutes*	Title	When AD/Other Document Is Triggered	Honor Other States' Documents?
AL	ALA. CODE §§ 22-8A-1 to -14 (LexisNexis 2006).	Natural Death	P cannot understand or direct medical treatment; two physicians determine terminal illness or unconscious. § 22-8A-4.	Yes, unless not in compliance with AL law. § 22-8A-12.
AK	ALASKA STAT. §§ 13.52.010–.395 (2010).	Health Care Decisions	P lacks capacity; determined by primary physician or court (mental illness).	Yes, unless not in compliance with AK law. § 13.52.010.
AZ	ARIZ. REV. STAT. ANN. §§ 36-3201 to -3297 (2009 & Supp. 2011).	Living Wills and Health Care Directives	P is unable to make or communicate healthcare treatment decisions. § 36-3231.	Yes, to the extent that it does not conflict with the criminal laws of AZ. § 36-3208.
AR	ARK. CODE ANN. §§ 20-17-201 to -218 (2005 & Supp. 2011).	Rights of the Terminally Ill or Permanently Unconscious	P in TC and cannot make decisions regarding LST or is permanently unconscious; two physicians determine. § 20-17-203.	Yes. § 20-17-212.
CA	CAL. PROB. CODE §§ 4600–4806 (West 2009).	Health Care Decisions	P lacks capacity. § 4682.	Yes. § 4676.
CO	COLO. REV. STAT. §§ 15-14-503 to -509, 15-18-101 to -113, 15-18.5-101 to -105 (2011).	Patient Autonomy; Medical Treatment Decision	P lacks decisional capacity; determined by attending physician or APRN. §15-18.5-103.	Yes, presumed to comply. § 15-14-509.
CT	CONN. GEN. STAT. ANN. §§ 19a-570 to -580g (West 2011).	Removal of Life Support Systems	P incapacitated; determined by attending physician. § 19a-579.	Yes, if not contrary to public policy. § 19a-580g.
DE	DEL. CODE ANN. tit. 16, §§ 2501–2518 (2003 & Supp. 2010)	Health-Care Decisions	P lacks capacity; determined by primary or other physicians; DPAHC may accommodate P's beliefs and designate another person other than physician to certify in notarized document. § 2503.	Yes. § 2517.
DC	D.C. CODE §§ 21-2202 to -2212 (2001 & Supp. 2011).	Health-Care Decisions	P incapacitated; determined by one physician and one other physician or healthcare professional. § 21-2204.	

* Table 1 is intended to serve only as a guide to relevant state code sections and is not a comprehensive listing of all state statutes that are implicated by advance directives or similar legislation. Key words and phrases are abbreviated throughout the table as follows:

AD	"Advance Directive"
(AP)NP	"(Advanced Practice) Nurse Practitioner"
(AP)RN	"(Advanced Practice) Registered Nurse"
(D)PAHC	"(Durable) Power of Attorney for Health Care"
P	"Principal, Declarant, Patient"
PA	"Physician's Assistant"
PVS	"Permanent Vegetative State"
LST	"Life-sustaining Treatment"
TC	"Terminal Condition"

FL	FLA. STAT. ANN. §§ 765.101–.113 (West 2010 & Supp. 2012).	Health Care Advance Directives	P lacks capacity; determined by attending physician or two physicians if in doubt. § 765.204.	Yes. § 765.112.
GA	GA. CODE ANN. §§ 31-32-1 to -14 (2009 & Supp. 2011).	Advance Directives for Health Care	P in TC or permanently unconsciousness. §§ 31-32-5, -9.	Yes. § 31-32-5.
HI	HAW. REV. STAT. ANN. §§ 327E-1 to -16, 327K-1 to -4 (LexisNexis 2008 & Supp. 2010).	Health-Care Decisions; Physician Orders for Life-Sustaining Treatment	P lacks capacity; determined by primary physician. § 327E-3.	Likely yes (seeks uniform application among states enacting law). § 327E-15.
ID	IDAHO CODE ANN. §§ 39-4501 to -4515 (2011)	Medical Consent and Natural Death	P not able to communicate healthcare wishes. § 39-4509.	Yes, if it substantially complies with ID law. § 39-4514.
IL	755 ILL. COMP. STAT. ANN. 35/1 to /10, 40/1 to /65, 45/4-1 to -12 (West 2007 & Supp. 2011)	Living Will; Health Care Surrogate Act; Powers of Attorney for Health Care	P incapacitated or has a qualifying condition. 40/20.	Yes. 35/9.
IN	IND. CODE ANN. §§ 16-36-4-0.1 to -21 (LexisNexis 2011); IND. CODE ANN. §§ 30-5-5-16 to -17 (LexisNexis 2000 & Supp. 2011).	Living Wills and Life Prolonging Procedures; Powers of Attorney	P cannot consent or communicate preferences for health care. §§ 30-5-5-16, -17.	Yes, if executed according to IN law. §16-36-4-14.
IA	IOWA CODE ANN. §§ 144A.1 to .12, 144B.1 to .12 (West 2005 & Supp. 2011).	Life-Sustaining Procedures; Durable Power of Attorney for Health Care	P cannot make healthcare decisions; physician determines. § 144B.5.	Yes, as consistent with IA law. § 144B.3.
KS	KAN. STAT. ANN. §§ 58-625 to -632 (2005 & Supp. 2010); KAN. STAT. ANN. §§ 65-28,101 to -28,109 (2002 & Supp. 2010).	Durable Power of Attorney for Health Care Decisions; Natural Death	P incapacitated or suffers disability (DPAHC). § 58-625.	Yes, but actions by healthcare providers must comply with KS law. § 58-630.
KY	KY. REV. STAT. ANN. §§ 311.621–.643 (LexisNexis 2007 & Supp. 2011).	Living Will Directive Act	Attending physician determines P lacks decisional capacity. § 311.629.	Yes, as consistent with accepted medical practice. § 311.637.
LA	LA. REV. STAT. ANN. §§ 40:1299.58.1 to .10, 40:1299.64.1 to .6 (2008 & Supp. 2011).	Declarations Concerning Life-Sustaining Procedures; Physician Order for Scope of Treatment	P comatose, incompetent, or otherwise cannot communicate. § 40:1299.58.5.	Yes. § 40:1299.58.10.
ME	ME. REV. STAT. ANN. tit. 18, §§ 5-801 to -818 (1998 & Supp. 2010).	Uniform Health-Care Decisions Act	P lacks capacity; primary physician determines. §§ 5-802, -811.	Likely yes (seeks uniform application among states enacting law). § 5-815.
MD	MD. CODE ANN., HEALTH–GEN. §§ 5-601 to -618 (LexisNexis 2009 & Supp. 2011).	Health Care Decisions	P incapable of making informed decision for health care; certified by treating and other physician. § 5-602.	Yes, as conforms with MD law. § 5-617.

MA	MASS. GEN. LAWS ch. 201D, §§ 1–17 (West 2004 & Supp. 2011).	Health Care Proxies	P lacks capacity to make or communicate healthcare choices; determined by attending physician. § 6.	Yes, as complies with MA law. § 11.
MI	MICH. COMP. LAWS ANN. §§ 333.5651–.5661 (West 2001 & Supp. 2011); MICH. COMP. LAWS §§ 700.5501–5520 (West 2002 & Supp. 2011).	Dignified Death; Durable Power of Attorney	P in advanced illness. § 333.5655. P cannot participate in medical treatment decisions; determined by attending and other physician or psychologist. § 700.5508.	
MN	MINN. STAT. ANN. §§ 145B.01–.17, 145C.01–.16 (West 2011).	Living Will; Health Care Directives	Effective when P, as determined by the attending physician, lacks decision-making capacity to make healthcare decision or as otherwise specified by P. § 145C.06.	Yes, if substantially complies with MN law. § 145B.16.
MS	MISS. CODE ANN. §§ 41-41-201 to -229 (2009 & Supp. 2011)	Health-Care Decisions	Primary physician determines or is informed that P lacks capacity. § 41-41-215.	Yes, as conforms with MS law. § 41-41-205.
MO	MO. ANN. STAT. §§ 404.800–.865 (West 2011); MO. ANN. STAT. §§ 459.010–.055 (West 2007 & Supp. 2011).	Durable Power of Attorney for Health Care; Declarations, Life Support	P incapacitated; certified by two physicians; must be periodically reviewed. § 404.825.	
MT	MONT. CODE ANN. §§ 50-9-101 to -505 (2011).	Rights of the Terminally Ill	P in TC and cannot make decisions regarding LST; determined by attending physician or APRN. § 50-9-105.	Yes, if substantially similar to MT law. § 50-9-111.
NE	NEB. REV. STAT. ANN. §§ 20-401 to -416 (LexisNexis 2008); NEB. REV. STAT. ANN. §§ 30-3401 to -3432 (LexisNexis 2010).	Rights of the Terminally Ill; Health Care Power of Attorney	P in TC or PVS, cannot make decisions for LST, and attending has tried to notify family member. § 20-405. P incapable of making medical treatment decisions. § 30-3401.	Yes. § 20-414.
NV	NEV. REV. STAT. ANN. §§ 162A.700–.860 (LexisNexis 2009); NEV. REV. STAT. ANN. §§ 449.535–.690 (LexisNexis 2009); NEV. REV. STAT. ANN. §§ 450B.400–.590 (LexisNexis 2009).	Durable Power of Attorney for Health Care Decisions; Rights of the Terminally Ill; Withholding Life Sustaining Treatment	DPAHC effective when document is executed unless document provides that it becomes effective on a certain day or P incapacitated; incapacity determined by physician, psychiatrist, or psychologist. § 162A.810. Living will operative when P in TC and cannot make decisions regarding LST. § 449.617.	Yes, if in compliance with NV law. § 449.690.
NH	N.H. REV. STAT. ANN. §§ 137-J:1 to -J:33 (LexisNexis 2006 & Supp. 2010).	Written Directives for Medical Decision Making for Adults Without Capacity to Make Health Care Decisions	P lacks capacity to make healthcare decisions; certified by attending physician or APRN. § 137-J:5.	Yes, execution must comply with NH law § 137-J:17.
NJ	N.J. STAT. ANN. §§ 26:2H-53 to -91 (West 2007 & Supp. 2011).	Advance Directives for Health Care	P lacks capacity to make healthcare decisions; determined by attending physician; confirmed by another physician (but not needed if incapacity clearly apparent). § 26:2H-59, -60.	Yes. Also recognizes AD executed in foreign country if not contrary to public policy. § 26:2H-76.
NM	N.M. STAT. ANN. §§ 24-7A-1 to -18 (West 2003 & Supp. 2010).	Uniform Health Care Decisions	P lacks capacity; determined by primary and other physician. § 24-7A-11.	Yes, enforced to extent if made in NM. § 24-7A-16.

NY	N.Y. PUB. HEALTH LAW §§ 2980–2994 (McKinney 2007 & Supp. 2011).	Health Care Agents and Proxies	P lacks capacity; determined by attending physician. §§ 2981, 2983.	Yes. § 2990.
NC	N.C. GEN. STAT. ANN. §§ 32A-15 to -27 (West 2008 & Supp. 2010); N.C. GEN. STAT. ANN. §§ 90-320 to -323 (West 2008 & Supp. 2010).	Health Care Powers of Attorney; Right to Natural Death; Brain Death	P lacks capacity; determined by attending physician. If P has religious objections, P may designate agent to certify lack of capacity before notary. § 32A-20.	Yes. § 32A-27.
ND	N.D. CENT. CODE §§ 23-06.5-01 to -19 (2002 & Supp. 2011).	Health Care Directives	P lacks capacity; certified by attending physician. § 23-06.5-03.	Yes. § 23-06.5-11.
OH	OHIO REV. CODE ANN. §§ 1337.11–.17 (LexisNexis 2006 & Supp. 2011); OHIO REV. CODE §§ 2133.01–.26 (LexisNexis 2007 & Supp. 2011).	Durable Power for Health Care; Rights of the Terminally Ill and the DNR Identification and Do-Not-Resuscitate Order	DPAHC in effect when P lacks capacity; determined by attending physician. § 1337.13. Declaration for LST operative when P in TC, permanently unconscious, or unable to make decisions regarding LST. § 2133.03.	Yes. § 2133.14.
OK	OKLA. STAT. ANN. tit. 63, §§ 3101.1–3102.3 (West 2004 & Supp. 2011).	Advance Directive	P unable to make decisions about LST. § 3101.5.	Yes, but only to extent permitted by OK law. § 3101.14
OR	OR. REV. STAT. ANN. §§ 127.505–.660, 127.800–.897 (West 2003 & Supp. 2011).	Advance Directives for Health Care; Death with Dignity	P incapable of directing health care; determined by court or attending physician. §§ 127.505–.510.	Yes, subject to OR law. § 127.515.
PA	20 PA. CONS. STAT. ANN. §§ 5421–5471 (West 2005 & Supp. 2011).	Health Care	Living will operative when attending physician determines P incompetent and in end-stage or permanently unconscious. § 5443. DPAHC operative when attending physician determines P incompetent. § 5454.	Yes, unless inconsistent with PA law. §§ 5446, 5463–5464.
RI	R.I. GEN. LAWS §§ 23-4.10-1 to -12, 23-4.11-1 to -15 (2008).	Health Care Power of Attorney; Rights of the Terminally Ill	Declaration for LST operative when attending physician determines P in TC and unable to make medical decisions. § 23-4.11-3. DPAHC operative only when P unable to give informed consent. §§ 23-4.10-2.	Yes. §§ 23-4.10-11, -12.
SC	S.C. CODE ANN. §§ 44-77-10 to -160 (2002); S.C. CODE ANN. §§ 62-5-504 to -505 (2009 & Supp. 2010).	Death with Dignity; Health Care Power of Attorney	DPAHC effective when P mentally incompetent to make healthcare decision; determined by state code or physician determines P cannot make healthcare decisions; P's mental incompetence permanent or of extended nature. § 62-5-504.	Yes. § 44-77-65.
SD	S.D. CODIFIED LAWS §§ 34-12D-1 to -29 (2004 & Supp. 2011).	Living Wills	P in TC, not able to communicate medical care decisions, and death imminent, as determined by physician. § 34-12D-5.	Yes. § 34-12D-22.

TN	TENN. CODE ANN. §§ 32-11-101 to -113 (2007 & Supp. 2011); TENN. CODE ANN. §§ 34-6-201 to -218 (2007 & Supp. 2011); TENN. CODE ANN. §§ 68-11-1801 to -1815 (2011).	Right to Natural Death; Durable Power of Attorney for Health Care; Health Care Decisions	Physician determines P lacks capacity. § 68-11-1803.	Yes for living wills and DPAHC. § 32-11-111, -215.
TX	TEX. HEALTH & SAFETY CODE ANN. §§ 166.001–.166 (West 2010).	Advance Directives	P determined incompetent by attending physician. § 166.152.	Yes, but expressly prohibits withdrawal of life support in manner not compliant with TX law. § 166.005.
UT	UTAH CODE ANN. §§ 75-2a-101 to -125 (LexisNexis 1993 & Supp. 2011).	Advance Health Care Directive	Physician, APRN, or PA finds P lacks decision making capacity, records finding, reasonable effort to communicate decision to P and surrogate. §§ 75-2a-104, -109.	Yes. § 75-2a-121.
VT	VT. STAT. ANN. tit. 18, §§ 9700–9720 (Supp. 2010).	Advance Directives for Health Care and Disposition of Remains	P lacks capacity; determined by P's physician. § 9706.	Yes, interpreted according to VT law. § 9716.
VA	VA. CODE ANN. §§ 54.1-2981 to -2993 (2009 & Supp. 2011).	Health Care Decisions	P incapable of making informed decision; determined by attending physician; must be reassessed every 180 days. Physician needs written certification from independent capacity reviewer unless P unconscious or unconsciousness due to trauma. § 54.1-2983.2.	Yes, executed based on VA law. § 54.1-2993.
WA	WASH. REV. CODE ANN. §§ 70.122.010–.925 (West 2011).	Natural Death	P permanently unconscious or in TC; determined by attending physician. § 70.122.030.	Yes, to extent permitted by WA law. § 70.122.030.
WV	W. VA. CODE ANN. §§ 16-30-1 to -25, 16-30C-1 to -16 (LexisNexis 2011).	Health Care Decisions; Do Not Resuscitate	P incapacitated; determined by physician or APNP; must inform P if conscious. § 16-30-7. For do-not-resuscitate order, P must have incapacity. § 16-30C-6.	Yes, for AD and DNR. § 16-30-21; § 16-30C-15.
WI	WIS. STAT. ANN. §§ 154.01–.29 (West 2006 & Supp. 2011); WIS. STAT. ANN. §§ 155.01–.80 (West 2006 & Supp. 2011).	Declarations to Physicians and Do-Not-Resuscitate Orders; Power of Attorney for Health Care	For living will, P in TC or PVS. § 154.03.	Yes. § 154.11.
WY	WYO. STAT. ANN. §§ 35-22-201 to -416 (2011).	Living Will	P lacks capacity; determined by primary or treating physician. § 35-22-403(d).	Likely yes (seeks uniform application among states enacting law). § 35-22-416.