REGENT UNIVERSITY LAW REVIEW

Volume 28 **2015–2016** **Number 1**

REGENT UNIVERSITY LAW REVIEW

VOLUME 28 2015–2016 NUMBER 1

CONTENTS

ARTICLES

NOTES

CASE SUMMARY

REGENT UNIVERSITY
SCHOOL OF LAW

UNIVERSITY OFFICERS

DANIEL C. "DANNY" SELLERS, JR., *Chairman of the Board of Trustees*

DR. M.G. "PAT" ROBERTSON, *Chancellor*

MICHAEL V. HERNANDEZ, *Dean; Professor*

B.A., J.D., University of Virginia

LYNNE MARIE KOHM, *Associate Dean of Faculty Development & External Affairs; John Brown McCarty Professor of Family Law*

B.A., State University of New York at Albany; J.D., Syracuse University

BENJAMIN V. MADISON III, *Associate Dean of Instructional and Curricular Affairs; Professor*

B.A., Randolph-Macon College; M.A., College of William and Mary; J.D., College of William and Mary, Marshall-Wythe School of Law

JUDGE PATRICIA L. WEST, *Associate Dean of Career, Alumni, & Student Services; Distinguished Professor*

B.A., College of William and Mary; J.D., College of William and Mary, Marshall-Wythe School of Law

JAMES E. MURPHY, *Director of the M.A. in Law Program; Business Affairs Manager; Lecturer*

B.A., University of Iowa; J.D., University of Oklahoma

FACULTY

JOHN ASHCROFT, *Distinguished Professor of Law and Government*

A.B., Yale University; J.D., University of Chicago

W. WADE BERRYHILL, *Professor Emeritus at the University of Richmond School of Law; Visiting Professor*

B.S., Arkansas State University; J.D., University of Arkansas-Fayetteville; LL. M., Colombia University

JAMES M. BOLAND, *Director, Legal Research and Writing; Associate Professor*

B.A., Wheaton College; J.D., Regent University School of Law

JEFFREY A. BRAUCH, *Professor; Director, LL.M. in Human Rights; Director, Honors Program*

B.A., University of Wisconsin at Madison; J.D., University of Chicago

BRUCE N. CAMERON, *Reed Larson Professor of Labor Law*

B.A., Andrews University; J.D., Emory University School of Law

DOUGLAS H. COOK, *Associate Vice President for Academic Affairs; Professor*

B.A., Miami University; J.D., The Ohio State University

JAMES A. DAVIDS, *Associate Professor*

B.A., Calvin College; J.D., Duke University School of Law; Ph.D., Regent University

ERIC A. DEGROFF, *Professor*

B.A., University of Kansas; M.P.A., University of Southern California; J.D., Regent University School of Law

JAMES J. DUANE, *Professor*
B.A., J.D., Harvard University

TESSA L. DYSART, *Assistant Professor; Faculty Advisor, Moot Court Board*
B.A., Willamette University; J.D., Harvard Law School

THOMAS C. FOLSOM, *Professor*
B.S., U.S. Air Force Academy; J.D., Georgetown University Law Center

L.O. NATT GANTT II, *Professor; Director, Center for Ethical Formation & Legal Education Reform; Director, Academic Success Program; Director, Academic Advising & Counseling*
A.B., Duke University; J.D., Harvard Law School; M.Div., Gordon-Conwell Theological Seminary

LOUIS W. HENSLER III, *Professor*
B.A., Bob Jones University; J.D., University of Chicago

BRADLEY P. JACOB, *Associate Professor*
B.A., University of Delaware; J.D., University of Chicago

JANIS L. KIRKLAND, *Instructor; Director, Wealth Management Concentration, M.A. Program; Assistant Director, Legal Analysis, Research & Writing Program*
B.S., College of William and Mary; J.D., T.C. Williams School of Law, University of Richmond

KATHLEEN A. MCKEE, *Associate Professor; Director, LL.M. in American Legal Studies; Director, Center for Advocacy; Director, Civil Practice Clinic*
B.A., State University of New York at Albany; J.D., Columbus School of Law, Catholic University; LL.M., Georgetown University Law Center

JAY ALAN SEKULOW, *Distinguished Professor of Law*
B.A., J.D., Mercer University; Ph.D., Regent University

JUDGE ROBERT M.M. SETO, *Professor Emeritus*
B.S., St. Louis University; J.D., St. Louis University School of Law; LL.M., The George Washington University School of Law

CRAIG A. STERN, *Professor; Executive Director, Center for Global Justice, Human Rights, and the Rule of Law*
B.A., Yale University; J.D., University of Virginia

KIMBERLY ROUSE VAN ESSENDELFT, *Instructor, Legal Research and Writing*
B.A., University of Virginia; J.D., College of William and Mary, Marshall-Wythe School of Law

GLORIA A. WHITTICO, *Associate Professor; Associate Director, Academic Success*
A.B., College of William and Mary; J.D., University of Virginia

ADJUNCT FACULTY

RACHEL F. ALLEN
B.S., Liberty University; J.D., Regent University School of Law

JULIE ANJO

B.A., University of the Nations; J.D., Liberty University School of Law

TRACY BANKS

B.A., Rice University; J.D., Regent University School of Law

GREGORY P. BERGETHON

B.S., University of Richmond; J.D., College of William and Mary, Marshall-Wythe School of Law

GARY A. BRYANT

B.A., Bob Jones University; J.D., Washington & Lee University

JUSTIN BUSH

B.A., Virginia Tech; J.D., Regent University School of Law

JAMES L. CHAPMAN IV

B.A., Virginia Polytechnic Institute and State University; J.D., Washington and Lee University School of Law

DARIUS K. DAVENPORT

B.A., Norfolk State University; J.D., University of Wisconsin

ERIN K. DEBOER

B.A., Hillsdale College; J.D., Regent University School of Law

JOSHUA DIDLAKE

Th.B., Louisiana Baptist University; J.D., Regent University School of Law

SHAHERYAR GILL

B.A., University of the Punjab, Pakistan; J.D., Handong International School of Law, South Korea; LL.M., Regent University School of Law

MARC V. HEDRICK

B.S., Southern Illinois University at Carbondale; M.S.Ed Southern Illinois University at Carbondale; J.D., Regent University School of Law

THE HONORABLE ROBERT J. HUMPHREYS

B.A., Washington and Lee University; J.D., Widener University School of Law

MARK L. JAMES

B.A., Grove City College; M.B.A., Michigan State University; E.M.L, Georgetown University; J.D., Regent University School of Law; L.L.M., College of William and Mary, Marshall-Wythe School of Law

DAVID C. JOHNSON

B.S., Montana State University; J.D., Regent University School of Law

VICTORIA JOHNSON

B.A., M.S., Pensacola Christian College; J.D., Regent University School of Law

THE HONORABLE DENHAM ARTHUR KELSEY

B.A., Old Dominion University; J.D., College of William and Mary, Marshall-Wythe School of Law

THOMAS C. KLEINE

B.S.F.S. Georgetown University; J.D., Washington and Lee University

THE HONORABLE DAVID W. LANNETTI
B.S., U.S. Naval Academy; M.S. Management, Troy University; J.D., College of William and Mary, Marshall-Wythe School of Law

STEPHEN D. LENTZ
B.A., Bowling Green State University; J.D., College of William and Mary, Marshall-Wythe School of Law

JAMES A. METCALFE
B.A., U.S. Naval Academy; J.D., College of William and Mary, Marshall-Wythe School of Law

THE HONORABLE HENRY COKE MORGAN, JR.
B.S., Washington and Lee University; J.D., Washington and Lee University School of Law

SUSAN MORITZ
B.S., University of Massachusetts; M.B.A., George Washington University; J.D., Regent University School of Law

ANTHONY S. MULFORD
B.A., University of Nebraska; J.D., Regent University School of Law

GUSTAV NELSON
B.S., Virginia Polytechnics Institute and Virginia Tech; J.D., University of Virginia School of Law

THE HONORABLE H. THOMAS PADRICK, JR.
B.A., Old Dominion University; Virginia State Bar Law Reader Program

JOHN Y. PEARSON, JR.
B.A., Washington & Lee; J.D., University of Virginia

CORRYNN PETERS
B.S., Liberty University; J.D., Regent University School of Law

STEPHEN P. PFEIFFER
B.A., Carroll College; J.D., Regent University School of Law

MICHAEL P. SCHUTT
B.A., Stephen F. Austin State University; J.D., University of Texas School of Law

RANDY D. SINGER, *Attorney-in-Residence*
B.A., Houghton College; J.D., College of William and Mary, Marshall-Wythe School of Law

CATHERINE L. SIX
B.A., University of Richmond; J.D., Regent University School of Law

CHARLES SLEMP
B.A., University of Virginia's College at Wise; M.A., Regent University; J.D., Regent University School of Law

MARTHA SMITH
Senior Professional in Human Resources, Human Resources Certification Institute; M.A., Regent University School of Business; J.D., Regent University School of Law

JOHN G. STEPANOVICH
B.A., Kent State University; J.D., University of Akron (Ohio) School of Law

NORMAN THOMAS
B.A., University of Virginia; J.D., College of William and Mary, Marshall-Wythe School of Law
HUGO R. VALVERDE
B.S., College of William and Mary; M.E.M., Duke University; J.D., Regent University School of Law
DAVID D. VELLONEY
B.S., United States Military Academy; J.D., Yale Law School; LL.M., The Judge Advocate General's School, U.S. Army
SHAWN A. VOYLES
B.A., DePauw University; J.D., Regent University School of Law
S. ERNIE WALTON, *Administrative Director, Center for Global Justice, Human Rights, and the Rule of Law*
B.S., Houghton College; J.D., Regent University School of Law

LAW LIBRARY ADMINISTRATION

MARGARET L. CHRISTIANSEN, *Director of Law Library*
B.S., William Woods College; J.D., Regent University School of Law; M.S.I.S., Florida State University
MARIE SUMMERLIN HAMM, *Assistant Director for Collection Development; Adjunct Professor*
Dual B.S., Mount Olive College; J.D., Regent University School of Law; M.L.S., Syracuse University
WILLIAM E. MAGEE, *Head of Faculty & Student Services*
B.A., Old Dominion University; J.D., Regent University School of Law; M.L.S., Catholic University

LAW SCHOOL CAREER AND ALUMNI SERVICES

KATHY STULL, *Director of Career and Alumni Services*
MARCIA CLARKE, *Assistant Director of Career Services*

REGENT UNIVERSITY LAW REVIEW

ISSN 1056-3962. The *Regent University Law Review* is published at Regent University and is produced and edited by the students of the Regent University School of Law under the supervision of the faculty. The domestic subscription rate is $14.00 per issue. Third-class postage paid at Virginia Beach, Virginia. POSTMASTER: Send address changes to Editor-in-Chief, Law Review, Regent University School of Law, Virginia Beach, VA 23464-9800. Absent receipt of notice to the contrary, subscriptions to the *Law Review* are renewed automatically each year. Claims for issues not received will be filled for published issues within one year before the receipt of the claim. Subscription claims for issues beyond this limitation period will not be honored.

Regent University Law Review accepts unsolicited manuscripts by email addressed to the Editor-in-Chief. Citations in submitted manuscripts should use footnotes and conform to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (20th ed. 2015).

Address all correspondence to Editor-in-Chief, Regent University Law Review, Regent University School of Law, 1000 Regent University Drive, RH 252C, Virginia Beach, VA 23464. Regent University Law Review's e-mail address is *lawreview@regent.edu*, and Law Review's website address is *http://www.regent.edu/lawreview*.

REGENT UNIVERSITY LAW REVIEW

Volume 28 **2015–2016** **Number 1**

FOREWORD

*George Allen**

This *Regent University Law Review* Issue will shine a light on several current topics related to our freedom of religion, often rightfully called our "First Freedom." Rather than read the short phrases in the First Amendment of the U.S. Constitution, it is much more illuminating to read the text of the foundational Virginia Statute for Religious Freedom, which was adopted by the Virginia General Assembly on January 16, 1786.

Fortunately, one need not translate languages to comprehend the revolutionary concept of religious freedom in the writings of George Mason in the Virginia Declaration of Rights which preceded our Declaration of Independence and was the basis for the later-adopted Bill of Rights to the U.S. Constitution.[1]

The Virginia Statute for Religious Freedom was originally drafted and introduced by Thomas Jefferson and passed seven years later under the essential leadership of James Madison in the Virginia General Assembly. It is valuable to read these powerful words slowly and out loud to understand the full contextual meaning of religious freedom.

> Whereas, Almighty God hath created the mind free; that all attempts to influence it by temporal punishment, or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do . . . .[2]

Essentially, humans are naturally created free according to God's plan. If God wanted us to all believe the same, He would have created us without free will. The Virginia General Assembly further observed:

> [T]he impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own

---

* Former Governor of Virginia and United States Senator.

1 Daniel L. Dreisbach, *George Mason's Pursuit of Religious Liberty in Revolutionary Virginia*, 108 VA. MAG. HIST. & BIOGRAPHY 5, 9, 41 (2000).

2 VA. CODE ANN. § 57-1 (LexisNexis, LEXIS through 2015 Reg. Sess.).

> opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time.[3]

These brave freedom-securing members proclaimed "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."[4]

This sensibility emanated in rebellion from the established Church of England, which was originally formed by King Henry VIII partly due to the restraints of the Roman Catholic Church that forbade his many divorces and remarriages. Historically, monarchs and their established church were co-conspirators in granting each other exclusive, monopolistic franchises for ruling over the people. The monarchy would grant or state-sanction only to one official established religious organization. And the leaders of that church would reciprocate by granting the monarchs and their family the divine right to rule, notwithstanding their merit or qualifications. These institutions garnered power and tremendous wealth through centuries of religious control.

For these reasons, the revolutionary, enlightened American concept of individual liberty and responsibility threatened the long history of subjugation of people and their God-given Natural Rights by rulers and established religious operations. Understandably, the General Assembly of Virginia emphatically asserted:

> [N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.[5]

Indeed, as Thomas Jefferson emphasized in his address to the University of Virginia Board of Visitors in 1822, "the constitutional freedom of religion [is] the most inalienable and sacred of all human rights."[6] President George Washington also praised the American concept in his letter to the Hebrew Congregation in Rhode Island (which was in response to warm remarks from the Jewish congregation in Newport, R.I.), stating:

> The Citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and

---

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Minutes of the Board of Visitors of the University of Virginia, during the Rectorship of Thomas Jefferson* (Oct. 7, 1822), *in* 19 THE WRITINGS OF THOMAS JEFFERSON 408, 416 (Andrew A. Lipscomb & Albert Ellery Bergh eds., definitive ed. 1905).

> liberal policy: a policy worthy of imitation. All possess alike liberty of conscience and immunities of citizenship. It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the Government of the United States, which gives to bigotry no sanction, to persecution no assistance requires only that they who live under its protection should demean themselves good citizens, in giving it on all occasions their effectual support. . . . May the Children of the Stock of Abraham, who dwell in this land, continue to merit and enjoy the good will of the other Inhabitants; while every one shall sit in safety under his own vine and figtree, and there shall be none to make him afraid.[7]

These foundational principles of the American Revolution and of the new American Government remain relevant in the United States and throughout the world.

Regardless of the procedural approaches and structure, I believe there are four pillars of a free and just society:

1. *Freedom of Religion*: A citizen's rights or opportunities are not enhanced nor diminished on account of their religious persuasion. Individuals should be allowed to exercise their religious beliefs and the government should not tell a religious organization how to operate. The corollary also applies, as I will discuss later.
2. *Freedom of Expression*: All men and women express themselves without fear of retribution from government authorities. This also means that the government derives its just powers from the owners of the government: the People.
3. *Private Ownership of Property*: Property is owned by individuals, creating incentives and the basis of a free enterprise system where people decide who has the best product or service, not the government. There is competition and better quality when property is privately owned, rather than by a government authority or monarchy.
4. *Rule of Law*: Citizens benefit from fair adjudication of disputes, enforcement of contracts, and protection of our God-given individual Natural Rights.

Consider the present dangers to our country and the countries with the worst unrest and seemingly hopeless poverty. The most serious threats and unfortunate conditions are in nations where people do not enjoy the blessings of liberty—for example, the sectarian violence and wars in the Middle East where people are ruled by theocracies and dictatorships without freedom of religion. Due to indulgences for favored religions or persecution and retribution against believers of disfavored

---

[7] Letter from George Washington to the Hebrew Congregation in Newport, Rhode Island (Aug. 18, 1790), *in* 6 THE PAPERS OF GEORGE WASHINGTON 284, 285 (Dorothy Twohig et al. eds., 1996).

sects, there is often no freedom of expression or, in some cases, no equality of opportunity for women. Moreover, there are no norms for equal protection or due process under the law.

Imagine if the oppressed people in these ravaged countries considered what Thomas Jefferson wrote in his *Notes on the State of Virginia*: "[t]he legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg."[8] A good test of any society would be whether a female private business owner could express religious views without reprisals from authorities. Allowing religious doctrines to override the will of the people and civil laws imposes excessive dogma as well as the implementation of excessive bans. Bans would be implemented covering alcohol, tobacco, coffee, caffeine, pork products, soft drinks, guns, internal combustion and other power engines, electricity, electrical appliances, equal treatment and opportunity for women, marriage outside of a religious sect, divorce, military service, as well as commerce and activities on certain days of the week. Adherence to countless religious doctrines, regardless of personal belief, would restrict our lives.

Australian Cardinal George Pell showed theological restraint when asked about Pope Francis's call for regressive action on climate change. Pell observed that "the church has got no mandate from the Lord to pronounce on scientific matters."[9] The Pope's encyclical gives aid and comfort to those political interests advocating drastic governmental policies that would result in higher electricity, fuel, and food costs. These increased costs burden and regressively inflict more harm proportionately on lower- and middle-income families as well as diminish job opportunities and American competitiveness. Some opponents use religion as a tactic against the production and utilization of coal, oil, natural gas, and hydraulic fracturing. These well-funded groups and politicized government agencies seem to look at these energy resources as a curse. Yet, the United States is blessed with more energy resources than any country in the world. We should responsibly and efficiently unleash these resources for the benefit of all Americans' quality of life as well as for more jobs, thriving communities, government revenues without raising taxes, entrepreneurial competitiveness, our balance of trade, and national security.

Theological restraint also applies to government officials performing their duties. A department of motor vehicles office clerk cannot deny a

---

[8] THOMAS JEFFERSON, *Notes on the State of Virginia*, *in* THOMAS JEFFERSON: WRITINGS 123, 285 (Merrill D. Peterson ed., 1984).

[9] Rachel Sanderson & James Politi, *Reformer Tries to Bring Light to Closed World of Vatican Finance*, FIN. TIMES (July 16, 2015), http://www.ft.com/intl/cms/s/0/7f429c28-2bc6-11e5-acfb-cbd2e1c81cca.html#axzz3sGEMVwid.

woman a driver's license because it is contrary to his religious beliefs. A county clerk's office is not a religious organization to determine whether to record a deed to a dance hall where alcohol is served. These offices are civil authorities, not religious authorities.

In our society, if someone wants to live without electricity, not use alcohol, coffee or tobacco, not serve in the armed services, not allow women to rise in their church, or hold certain days holy, then that is their conscientious choice, which can be protected, respected, and accommodated in their private lives. And, most certainly, religious organizations must not be compelled to participate in activities contrary to their deeply held religious beliefs. The due process and equal protection of our laws and commerce should not be impaired for those individuals whose views and God-given natural rights of individual freedom are reflected in the Constitution and duly enacted laws by elected representatives of the people.

Religious freedom, free enterprise, equal opportunity, individual liberty, and personal responsibility can peaceably be protected in our free and just society through their enshrinement in the Constitution and the Bill of Rights. The United States seceded from the British monarchy and the established church to create a civil, free society, in which government derives its just powers from the consent of the governed, not to create a different type of monarchy or theocracy.

The measureable objective truth is that people in countries with these freedoms have better, healthier, and happier lives. Where the invigorating breeze of freedom blows, there are well-educated people who see growth in opportunity, innovation, and prosperity. As one's conscience is engaged in this Issue of the *Regent University Law Review*, one can appreciate that these principles of religious freedom are pertinent today. Furthermore, these personally empowering principles can be easily spread on the internet (the greatest invention since the Gutenberg Press for the dissemination of ideas and information).

For example, think back to Martin Luther's vigorous objections to the corrupt practice of selling indulgences by the established Roman Catholic Church. Acting on the belief that salvation could be reached through faith and divine grace only, he wrote the *Disputation on the Power and Efficacy of Indulgences*, also known as *The Ninety-Five Theses*, which were a list of questions and propositions for debate. Martin Luther nailed his theses to the door of Schlosskirche (Castle Church) in Wittenberg in 1517 and they were promptly torn down.[10] Nevertheless, the theses were printed and Luther's ideas distributed thanks to an enterprising printing press.

---

[10] Timothy George, *Reformation Day: Did Martin Luther really nail 95 theses on the castle door?*, AL.COM (October 31, 2014, 1:15 PM), http://www.al.com/living/index.ssf/2014/10/reformation_day_did_martin_lut.html.

Indeed, in our times these foundational principles of freedom can be spread via today's enterprising technology of the internet and smartphones.

Think of how quickly and universally President Ronald Reagan's toast on December 9, 1987, at dinner with Soviet General Secretary Mikhail Gorbachev would have dispersed with social media. President Reagan (with that twinkle in his eye) raised his glass, looked at the Soviet leader, and said:

> General Secretary Gorbachev, you've declared that in your own country there is a need for greater glasnost, or openness, and the world watches expectantly and with great hopes to see this promise fulfilled. . . . Thomas Jefferson, one of our nation's great founders and philosophers, once said, "The God who gave us life, gave us liberty as well." He meant that we're born to freedom and that the need for liberty is as basic as the need for food. And he, as the great revolutionary he was, also knew that lasting peace would only come when individual souls have the freedom they crave. What better time than in this Christmas and Hanukkah season, a season of spirit you recently spoke to, Mr. General Secretary, when you noted the millennium of Christianity in your land and spoke of the hopes of your people for a better life in a world of peace. These are hopes shared by the people of every nation, hopes for an end to war; hopes, especially in this season, for the right to worship according to the dictates of the conscience.[11]

Amen, amen.

I hope and pray that people throughout the world will be able to enjoy their God-given freedoms protected by the principles enshrined by our Founders in our Constitution.

---

[11] Ronald Reagan, Toast at a Dinner Hosted by Soviet General Secretary Mikhail Gorbachev (Dec. 9, 1987) (transcript available at http://www.reagan.utexas.edu/archives/speeches/1987/120987b.htm).

POPE FRANCIS, ENVIRONMENTAL ANTHROPOLOGIST

*John Copeland Nagle**

INTRODUCTION

Giovanni di Pietro di Bernardone was born in Italy around 1181. His father was a wealthy silk merchant, and Giovanni relished his status as the wealthy son.[1] But then he had a vision that changed his life and his name.[2] The christened Francis lived in poverty, joined the poor in begging at St. Peter's Basilica, and began preaching in his hometown of Assisi. Later, he founded a religious order, traveled to Egypt in an attempt to convert the Sultan and end the Crusades, and arranged the first known Christmas nativity scene.[3] Two years after his death in 1226, he became Saint Francis, the patron saint of animals and the environment.[4]

The story of Saint Francis inspired Jorge Mario Bergoglio to take the name of Pope Francis when he assumed the papacy in 2013.[5] He took that name to honor "the man of poverty, the man of peace, the man who loves and protects creation."[6] Saint Francis, the Pope explained, "invites us to see nature as a magnificent book in which God speaks to us and grants us a glimpse of his infinite beauty and goodness."[7] Pope Francis cited Saint Francis as "the example par excellence of care for the vulnerable and of an integral ecology lived out joyfully and authentically."[8] He described Saint Francis as "the patron saint of all who study and work in the area of ecology," who was "particularly concerned for God's creation and for the poor and outcast," one who is "much loved by non-Christians," and one

---

* John N. Mathews Professor, Notre Dame Law School. I am grateful to Farris Gilman for excellent research assistance.

1 Anna Kirkwood Graham, *Francis of Assisi (1181/1182–1226), in* 2 ICONS OF THE MIDDLE AGES: RULERS, WRITERS, REBELS, AND SAINTS 323, 327 (Lister M. Matheson ed., 2012).

2 *Id.* at 342.

3 *Id.* at 324, 333–35, 339–40.

4 *Id.* at 324; *Francis of Assisi, Saint*, KEY FIGURES IN MEDIEVAL EUROPE: AN ENCYCLOPEDIA 225 (Richard K. Emmerson ed., 2006) (stating that Pope Gregory IX officially proclaimed Francis's sainthood in July of 1228).

5 Pope Francis, Audience to Representatives of the Communications Media (Mar. 16, 2013) (transcript and translation available at http://w2.vatican.va/content/francesco/en/speeches/2013/march/documents/papa-francesco_20130320_delegati-fraterni.html).

6 *Id.*

7 Pope Francis, Encyclical Letter, *Laudato Si'* para. 12 (2015) [hereinafter *Laudato Si'*], http://w2.vatican.va/content/dam/francesco/pdf/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si_en.pdf.

8 *Id.* at para. 10.

"who lived in simplicity and in wonderful harmony with God, with others, with nature and with himself."[9]

It was within this context that in June 2015—after much anticipation—Pope Francis released his encyclical entitled *Laudato Si': On Care for Our Common Home*.[10] "Laudato si'" means "praise be to you," a phrase that appears repeatedly in Saint Francis's poem *Canticle of the Sun*.[11] Praise is an uncommon feature of environmental debates.[12] To the contrary, most discussions of environmental policy emphasize the dire status of the natural world around us.[13] The rhetoric often takes an apocalyptic turn, suggesting that the world on which we depend is in such dire straits that we must take fundamental, immediate action to avert an ecological catastrophe.[14] Such warnings are typically accompanied by evidence of how bygone civilizations collapsed because of their abuse of the environment.[15]

Francis adopts such an approach in his encyclical. He warns of "global environmental deterioration."[16] More specifically, in a chapter on "What is Happening to Our Common Home?" Francis laments the rise of pollution, waste, and the throwaway culture, the declining quality and quantity of water, the loss of biodiversity, and the unhealthy aspects of many of the world's growing cities.[17] At other points, he worries about

---

9 *Id.*

10 *Laudato Si'*, *supra* note 7; Sylvia Poggioli, *Will Pope's Much-Anticipated Encyclical Be A Clarion Call On Climate Change?*, NPR (June 16, 2015, 5:07 AM), http://www.npr.org/sections/parallels/2015/06/16/414666357/popes-missive-on-environment-poverty-could-affect-habits-of-millions.

11 SAINT FRANCIS OF ASSISI, THE WRITINGS OF SAINT FRANCIS OF ASSISI 83–84 (Paschal Robinson trans., The Dolphin Press 1906).

12 *See* Kirsten Powers, *New Green Pope's Encyclical Colors Climate Change Debate*, USA TODAY (June 16, 2015, 3:59 PM), www.usatoday.com/story/opinion/2015/06/16/pope-encyclical-environment-credibility-science-column/28799109/ (noting the uniqueness of Pope Francis' contribution to the debate); Taylor Wofford, *Can Pope Francis Save the Planet?*, NEWSWEEK (May 22, 2015, 1:38 PM), www.newsweek.com/can-pope-francis-save-planet-345586 (arguing that Pope Francis' approach offers people an opportunity to think about climate change as a moral issue instead of purely scientific or political).

13 *See* JARED M. DIAMOND, COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED 516–517, 523 (2005) (arguing that societal collapse and political disasters are imminent due to problems of environmental devastation).

14 *See id.* at 521 (arguing that the world will face a declining standard of living within the next few decades if environmental issues are not successfully solved).

15 *See generally id.* at x (listing several ancient societies discussed in the book).

16 *Laudato Si'*, *supra* note 7, at para. 3.

17 *Id.* at para. 21 ("[T]he elderly lament that once beautiful landscapes are now covered with rubbish."); *id.* at para. 33 ("Because of us, thousands of species will no longer give glory to God by their very existence, nor convey their message to us. We have no such right."); *id.* at para. 44 ("We were not meant to be inundated by cement, asphalt, glass, and

global inequality,[18] the possible harms of genetically modified organisms,[19] and the fact that the "[l]ack of housing is a grave problem in many parts of the world."[20] According to Francis, these unprecedented ailments are the result of our careless actions.[21] Thus, proclaims Francis, "[d]oomsday predictions can no longer be met with irony or disdain."[22]

So where is the praise? "Rather than a problem to be solved," Francis observes, "the world is a joyful mystery to be contemplated with gladness and praise."[23] That is the way it should be, and it gets better. Francis quotes *Psalm* 148: "Praise him, sun and moon, praise him, all you shining stars! Praise him, you highest heavens, and you waters above the heavens! Let them praise the name of the Lord, for he commanded and they were created."[24] Francis insists that such praise is irresistible:

> When we can see God reflected in all that exists, our hearts are moved to praise the Lord for all his creatures and to worship him in union with them. This sentiment finds magnificent expression in the hymn of Saint Francis of Assisi: "Praise be you, my Lord, with all your creatures . . . ."[25]

This is not typical twenty-first century environmental discourse. And yet, the Encyclical itself has been widely praised and widely reported, far more than one would expect from an explicitly religious document.[26] The Encyclical is breathtakingly ambitious. Much of it is addressed to "every person living on this planet,"[27] while some parts speak specifically to Catholics and others to religious believers generally.[28] It surveys a

---

metal, and deprived of physical contact with nature."); *id.* at para. 45 ("[T]he privatization of certain spaces has restricted people's access to places of particular beauty.").

[18] *Id.* at para. 48.

[19] *Id.* at paras. 133–34.

[20] *Id.* at para. 152.

[21] *See id.* at para. 53 (contending that "[n]ever have we so hurt and mistreated our common home as we have in the last two hundred years"); *id.* at para. 165 (insisting that "the post-industrial period may well be remembered as one of the most irresponsible in history").

[22] *Id.* at para. 161. Francis adds,

> We may well be leaving to coming generations debris, desolation and filth. The pace of consumption, waste and environmental change has so stretched the planet's capacity that our contemporary lifestyle, unsustainable as it is, can only precipitate catastrophes, such as those which even now periodically occur in different areas of the world.

Id.

[23] *Id.* at para. 12.

[24] *Id.* at para. 72 (quoting *Psalms* 148:3–5).

[25] *Id.* at para. 87 (quoting ASSISI, *supra* note 11).

[26] Jena McGregor, *World Leaders React to Pope Francis's Call for Action on Climate Change*, WASH. POST (June 19, 2015), http://www.washingtonpost.com/news/on-leadership/wp/2015/06/19/the-reaction-to-pope-franciss-call-for-action-on-climate-change/.

[27] *Laudato Si'*, *supra* note 7, at para. 3.

[28] *See, e.g.*, *id.* at paras. 62–64.

sweeping range of environmental and social problems.[29] Along the way, it relies on anthropology, theology, science, economics, politics, law, and other disciplines.[30]

Especially anthropology. Many observers described *Laudato Si'* as a "climate change" encyclical.[31] It's not—only 5 of the 180 pages specifically address climate change, which is about the same length as the discussion on the factors that affect the "ecology of daily life."[32] *Laudato Si'* is not really even an environmental encyclical in that the natural environment does not play the starring role. Rather, it is an encyclical about humanity. Francis contends that the natural environment suffers because we misunderstand humanity.[33]

Indeed, a proper view of our environmental challenges depends on a proper view of ourselves. Or, as others have put it, a proper view of creation depends on a proper view of the Creator.[34] Francis stresses the relational character of environmental issues that turn on the relationship between the natural world, human cultures, humanity, and God. Environmental harm, in turn, results when we misunderstand or abuse those relationships.[35]

The most powerful parts of the Encyclical proceed from the Pope's moral claims. That is not surprising, for in those claims he draws on the unique resources of his religious authorities. The Encyclical is at its strongest when Pope Francis describes how the poor and the natural world suffer together when people view themselves as the most important creatures in the world.[36] Here, Francis rightly condemns how sin distorts our understanding of ourselves and the world in which we live.

That understanding appears unevenly throughout the Encyclical. Generally, Francis exaggerates both the uniqueness of current environmental challenges and our ability to solve them.[37] At the same

---

[29] *See, e.g., id.* at paras. 17–52 (discussing water issues, loss of biodiversity, and societal breakdown).

[30] *See, e.g., id.* at paras. 62–67, 124–29, 166–69 (discussing the role of faith, employment, and technology in the environmental conversation). The Encyclical especially relies on anthropology. *Id.* at paras. 16–21.

[31] *See, e.g.*, Statement by the President on Pope Francis's Encyclical, 2015 DAILY COMP. PRES. DOC. 201500441 (June 18, 2015).

[32] *Compare Laudato Si', supra* note 7, at paras. 23–26 (discussing the "climate as a common good"), *with id.* at paras. 147–55 (discussing the "ecology of daily life").

[33] *Id.* at paras. 115–17.

[34] Andy Lewis, *Environmental Stewardship: A Theological Model for the Environment*, ETHICS & RELIGIOUS LIBERTY COMMISSION (Aug. 12, 2005), https://erlc.com/article/environmental-stewardship-a-theological-model-for-the-environment.

[35] *Laudato Si', supra* note 7, at paras. 93–95.

[36] *See infra* Part IV.

[37] *See infra* Parts V.B–D.

time, he underestimates the long history of environmental degradation, the value of human improvements, and the obstacles to producing the ecological conversion today.[38] That makes the balance of the Encyclical valuable, but not as powerful as its theological and moral critique. The scientific arguments regarding environmental harm repeat arguments written elsewhere and are disconnected from the Encyclical's cautionary insights into the role of science and technology.[39] The critique of Western capitalism has provoked a counterargument from economists, and the Encyclical lacks a comparable assessment of other economic models.[40] Most of the political and legal analysis is modest in amount and in the recognition of its limits.

This Article examines the Encyclical from the perspective of Christian environmental thought more generally than the Encyclical. It begins by outlining the development of such thought and then turns to the contributions of the Encyclical with respect to environmental anthropology, environmental connectedness, environmental morality, and environmental governance. As I will explain, Pope Francis is a powerful advocate for a Christian environmental morality but a less convincing advocate for specific regulatory reforms. His greatest contribution is to encourage more people, religious believers and non-believers alike, to engage in a respectful dialogue about how we can better fulfill our responsibilities to each other and the natural world that we share.

I. CHRISTIAN TEACHING AND THE ENVIRONMENT

Francis begins chapter two of his Encyclical with this question: "Why should this document, addressed to all people of good will, include a chapter dealing with the convictions of believers?"[41] Francis acknowledges,

> [I]n the areas of politics and philosophy there are those who firmly reject the idea of a Creator, or consider it irrelevant, and consequently dismiss as irrational the rich contribution which religions can make towards an integral ecology and the full development of humanity. Others view religions simply as a subculture to be tolerated.[42]

Francis responds that "[i]f we are truly concerned to develop an ecology capable of remedying the damage we have done, no branch of the sciences and no form of wisdom can be left out, and that includes religion and the

---

38 *See infra* Part I.

39 *See infra* Part III.

40 *See infra* Part V.A.

41 *Laudato Si'*, *supra* note 7, at para. 62.

42 *Id.*

language particular to it."[43] He also points out that "[t]he majority of people living on our planet profess to be believers. This should spur religions to dialogue among themselves for the sake of protecting nature, defending the poor, and building networks of respect and fraternity."[44]

Francis draws on a rich collection of sources to support his claims. He begins his environmental history in 1971 by citing the remarks of Pope Paul VI, and he credits his immediate predecessors John Paul II and Benedict XVI for emphasizing environmental concerns during their papacies.[45] But the Encyclical reads as if the concern about environmental issues began in 1971 because few sources cited precede that year.

To be sure, many others have pointed to 1970 as the pivotal year in the emergence of modern environmental policy. On the very first day of 1970, President Richard Nixon signed the National Environmental Policy Act (NEPA),[46] one of the first of the canonical federal environmental statutes that still govern us today.[47] Congress enacted the Clean Air Act (CAA) in December 1970.[48] The first Earth Day was held on April 22, 1970.[49]

This federal environmental law canon emerged without significant influence from Christian teaching. While "[h]undreds, perhaps thousands,"[50] of ministers preached about environmental issues on the Sunday before Earth Day in April 1970, and a Unitarian leader testified at the only congressional hearing on NEPA,[51] the real value of Christian

---

[43] *Id.* at para. 63. Pope Francis also notes that "science and religion, with their distinctive approaches to understanding reality, can enter into an intense dialogue fruitful for both." *Id.* at para 62.

[44] *Laudato Si'*, *supra* note 7, at para. 201.

[45] *Id.* at paras. 4–6. For a deeper discussion on this aspect of Pope Francis's predecessors, see Lucia A. Silecchia, *Discerning the Environmental Perspective of Pope Benedict XVI*, 4 J. CATH. SOC. THOUGHT 227, 227–28, 235–38 (2007) (describing the extensive environmental reflections of Pope John Paul II and Pope Benedict XVI).

[46] National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321, 4331–4335, 4341–4347 (2012)).

[47] *See, e.g.*, Endangered Species Act of 1973, Pub. L. No. 94-325, 90 Stat. 724 (codified as amended at 16 U.S.C. §§ 1531–1542 (2012)); Clean Water Act of 1977, Pub. L. No. 96-148, 93 Stat. 1088 (codified as amended at 33 U.S.C. §§ 1251–1387 (2012)).

[48] Clean Air Act of 1970, Pub. L. No. 91-604, 81 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401–7626 (2012)).

[49] *The First Earth Day*, LIBR. OF CONGRESS, http://www.americaslibrary.gov/jb/modern/jb_modern_earthday_1.html (last visited Oct. 6, 2015).

[50] ADAM ROME, GENIUS OF EARTH DAY: HOW A 1970 TEACH-IN UNEXPECTEDLY MADE THE FIRST GREEN GENERATION 175 (2013).

[51] *National Environmental Policy: Hearing on S. 1075, S. 237, and S. 1752 Before the S. Comm. on Interior & Insular Affairs*, 91st Cong. 159 (1969) (statement of John Corrado, Reverend, Davies Memorial Unitarian Church).

teaching for environmental law arises from what has happened since Congress enacted the enduring statutes of the 1970s.

By the 1960s, some blamed Christian teaching for the environmental harms that resulted from environmental improvement projects.[52] Most famously, on the day after Christmas in 1966, a medieval historian named Lynn White presented a paper to the Washington meeting of the American Association for the Advancement of Science entitled *The Historical Roots of Our Ecologic Crisis*.[53] White faulted Christianity for encouraging a system of thought in which scientific progress without regard to its consequences for the natural environmental was possible. "Especially in its Western form," White wrote, "Christianity is the most anthropocentric religion the world has seen."[54] Moreover, "[b]y destroying pagan animism, Christianity made it possible to exploit nature in a mood of indifference to the feelings of natural objects."[55] Thus, White concluded that "we shall continue to have a worsening ecologic crisis until we reject the Christian axiom that nature has no reason for existence save to serve man."[56]

Chastened, a trickle of Christian writers pondered White's conclusion, and that trickle soon swelled into a flood of writing that sought to address environmental issues from a Christian perspective in the modern era. As Oxford theologian Alister McGrath later explained, "[a] scapegoat had to be found for the ecological crisis, and this article conveniently provided one" for those who were sympathetic to the idea that religion presents a societal problem, not a solution.[57] But for Christian scholars, White's thesis demanded closer attention to whether their faith was to blame for the undeniable problems that they observed. They approach the topic from the many perspectives within Christian theology: mainline Protestantism,[58] ecofeminism,[59] Catholicism,[60]

---

[52] *See* Lynn White, Jr., *The Historical Roots of Our Ecological Crisis*, 155 SCI. 1203, 1206–07 (1967) (discussing Christianity's contribution to the environmental crisis).

[53] *Id.* at 1203. The journal *Science* published White's speech in 1967. *Id.*

[54] *Id.* at 1205.

[55] *Id.*

[56] *Id.* at 1207.

[57] ALISTER MCGRATH, THE REENCHANTMENT OF NATURE: THE DENIAL OF RELIGION AND THE ECOLOGICAL CRISIS xv (2002).

[58] *See* ROBERT B. FOWLER, THE GREENING OF PROTESTANT THOUGHT, at vii (1995) (discussing the environmental crisis from a Protestant perspective and addressing critics of its approach).

[59] *See* ROSEMARY R. RUETHER, GAIA & GOD: AN ECONFEMINIST THEOLOGY OF EARTH HEALING 1 (1992) (arguing that the Earth's healing, which includes the healing of human relationships, can only be achieved through recognizing and transforming Western culture's justification of domination).

[60] *See* JOHN L. ALLEN, JR., THE FUTURE CHURCH: HOW TEN TRENDS ARE REVOLUTIONIZING THE CATHOLIC CHURCH 299–300 (2009) (discussing the reflections of Pope John Paul II and Pope Benedict XVI on man's role in the environmental crisis).

Reformed Protestantism,[61] Orthodoxy,[62] liberation theology,[63] etc. One scholar groups these disparate ideas into three general eco-theologies: (1) Christian stewardship based on an evangelical understanding of biblical teaching about caring for the earth; (2) an eco-justice ethic that connects environmental concerns to other social justice problems; and (3) a creation spirituality that situates humanity "as one part of a larger, panentheistic creation."[64] The prescription that Christian writers offer for responding to environmental ailments often differs, but they all share a skepticism about White's diagnosis.[65]

In his encyclical, Pope Francis does not address White nor the debate he provoked. Francis does cite countless documents that have been produced by many Catholic thinkers and other religious leaders in recent years.[66] Those sources add to the depth of analysis contained throughout the Encyclical. What is missing from the Encyclical, and what has been missing from much of recent Christian environmental literature, is an appreciation of what happened *before* 1970.

Two books published about the same time as the Encyclical begin to tell that story. In *Inherit the Holy Mountain: Religion and the Rise of American Environmentalism*, Mark Stoll argues that "[a] high proportion of leading figures in environmental history had religious childhoods."[67] More specifically, "[e]specially before the 1960s, a very large majority of the figures of the standard histories of environmentalism grew up in just two denominations, Congregationalism and Presbyterianism, both in the

---

[61] *See* MARK R. STOLL, INHERIT THE HOLY MOUNTAIN: RELIGION AND THE RISE OF AMERICAN ENVIRONMENTALISM 6, 8–9 (2015) (discussing Calvinism's role in America's environmental history).

[62] *See* John Chryssavgis & Bruce V. Foltz, *The Sweetness of Heaven Overflows Onto the Earth: Orthodox Christianity and Environmental Thought*, *in* TOWARD AN ECOLOGY OF TRANSFIGURATION: ORTHODOX CHRISTIAN PERSPECTIVES ON ENVIRONMENT, NATURE, AND CREATION 1, 3–6 (John Chryssavgis & Bruce V. Foltz eds., 2013) ("[S]olely on these very [Christian Orthodox] principles[] we can . . . articulate a spirituality that is adequate to the environmental tasks awaiting us.").

[63] *See* STEVEN BOUMA-PREDIGER, THE GREENING OF THEOLOGY 12–13 (1995) (incorporating a liberation theological perspective into a discussion of theological approaches to the environmental crisis).

[64] Laurel Kearns, *Saving the Creation: Christian Environmentalism in the United States*, 57 SOC. OF RELIGION 55, 55–57 (1996).

[65] *See, e.g.*, STEVEN BOUMA-PREDIGER, FOR THE BEAUTY OF THE EARTH 67 (2001) ("[W]hile extremely influential, the Lynn White thesis is not as plausible as many believe. In fact, there are compelling reasons to reject it."); Chryssaygis & Foltz, *supra* note 62, at 3 ("White's understanding . . . is far from flawless.").

[66] *See, e.g.*, *Laudato Si'*, *supra* note 7, at paras. 4–6 nn.2–11 (citing encyclical from 1979 and 1991 as well as a Catechesis from 2001 among others sources).

[67] STOLL, *supra* note 61, at 2.

Calvinist tradition."[68] Stoll describes the parallel Christian and environmental thinking of a diverse collection of luminaries, including the theologian Jonathan Edwards, landscape artists Thomas Cole and Frederick Edwin Church, Forest Service head Gifford Pinchot, as well as Park Service founder (and Cotton Mather descendant) Stephen Mather.[69] His claim is that Reformed Protestant ideas guided their environmental thinking, regardless of whether they remained observant believers themselves.[70]

The second book, Evan Berry's *The Religious Roots of American Environmentalism*, agrees "that modern American environmental thought is deeply shaped by its relationship with Christian theological tradition."[71] Berry traces Christian thought about nature back to the middle ages, and in doing so counters White's thesis that Christian teaching was uniformly hostile to the world around us.[72] Berry follows the trail in thinking to the United States in the early twentieth century, and specifically to the Mountaineers Club based in Seattle.[73] That organization "played an instrumental role in the development of Mount Rainier National Park and the establishment of both North Cascades and Olympic National Parks."[74] In doing so, "its leaders framed their purposes in religious terms, not because such terms were merely convenient or persuasive but because their project grew from fertile religious soil and always bore traces of its origins."[75] Berry sifts through the hymnals used by the Club during its expeditions to show how devoutly they conceived their relationship to God and all He had created.[76]

The recent and ongoing efforts to recapture history show that Christian ideas have influenced western environmental thinking long before 1970 or *Laudato Si'*. Other research into environmental history calls into question the Encyclical's assumption that the environmental

---

[68] *Id.* Stoll describes himself as "a lapsed Presbyterian environmentalist." *Id.* I characterize myself as an evangelical Presbyterian, though the denominational shifts of the early twenty-first century complicate any such label.

[69] *See id.* at 7 (discussing Pinchot); *id.* at 25 (examining Edwards); *id.* at 54 (considering Cole & Church); *id.* at 102 (describing Mather).

[70] *See id.* at 267 (concluding that Presbyterianism fostered the principles for later environmental movements).

[71] EVAN BERRY, DEVOTED TO NATURE: THE RELIGIOUS ROOTS OF AMERICAN ENVIRONMENTALISM, at viii (2015).

[72] *See id.* at 48–49 ("Christians [over the centuries] . . . beg[a]n to look to the natural world as a means to knowledge of God . . . .").

[73] *Id.* at 84–85.

[74] *Id.* at 86.

[75] *Id.*

[76] *Id.* at 97–98.

problems we experience today are greater than those that our ancestors experienced before us.[77] Francis asserts:

> Men and women have constantly intervened in nature, but for a long time this meant being in tune with and respecting the possibilities offered by the things themselves. . . . Now, by contrast, we are the ones to lay our hands on things, attempting to extract everything possible from them while frequently ignoring or forgetting the reality in front of us.[78]

Francis does not identify when that past age of "being in tune" with nature occurred. Actually, human history, in many ways, is a story of efforts to "extract everything possible" from the natural environment, or to redirect watercourses, cut entire forests, and otherwise fundamentally manipulate the world to serve our interests. We were no more restrained then than we are now.

II. ENVIRONMENTAL ANTHROPOLOGY

"There can be no ecology without an adequate anthropology," writes Francis.[79] The Encyclical's claim is unfamiliar in today's environmental debates.[80] But it correctly notes that anthropology explains a fundamental divide in our understanding of human interactions with the natural environment.[81] There are different ideas of what it means to be human, and those contrasting ideas yield different ideas of appropriate environmental policy.[82] Francis rejects both an anthropocentric view that

---

[77] *See* Joseph Stromberg, *Air Pollution Has Been a Problem Since the Days of Ancient Rome*, SMITHSONIAN MAG. (Feb. 2013), http://www.smithsonianmag.com/history/air-pollution-has-been-a-problem-since-the-days-of-ancient-rome-3950678/?no-ist("[A]s far back as the . . . Roman Empire, human activities emitted enough methane gas to have had an impact on . . . the entire atmosphere.").

[78] *Laudato Si'*, *supra* note 7, at para. 106.

[79] *Id.* at para. 118.

[80] Other topics, such as economics, are more typical. *See, e.g.*, *National Center for Environmental Economics*, EPA, http://yosemite.epa.gov/ee/epa/eed.nsf/webpages/homepage (last visited Sept. 18, 2015) (using economics to evaluate the effectiveness of environmental policy).

[81] *See Laudato Si'*, *supra* note 7, at para. 119 ("[W]e cannot presume to heal our relationship with nature and the environment without healing all fundamental human relationships.").

[82] *Compare* Robert L. Ehrlich, Jr., *One Size Does Not Fit All: Governor Robert L. Ehrlich, Jr.'s Perspective on Command-and-Control Versus Market Driven Approaches to Environmental Policy and Lawmaking*, 13 U. BALT. J. ENVTL. L. 95, 97 (2005) (arguing that a command-and-control approach by governments that incentivizes compliance and punishes violations is essential for enforcing environmental regulation), *with* E. Calvin Beisner et al., *A Biblical Perspective on Environmental Stewardship*, ACTON INST., http://www.acton.org/public-policy/environmental-stewardship/theology-e/biblical-perspective-environmental-stewardship (last visited Sept. 26, 2015) (arguing that a biblically mandated private property approach operates to hold people accountable for individual actions).

accepts all human desires and a misanthropic view that wishes people would disappear.[83] Instead, he promotes the idea that people are unique among God's creatures, but such uniqueness demands care for the rest of God's creation as well.[84]

White charged that Christianity was "the most anthropocentric religion the world" has ever known.[85] Francis disagrees. In the Encyclical, he writes, "the Bible has no place for a tyrannical anthropocentrism unconcerned for other creatures."[86] He repeatedly rails against humanity's tendency to think of ourselves as the only thing that matters:

> Modernity has been marked by an excessive anthropocentrism which today, under another guise, continues to stand in the way of shared understanding and of any effort to strengthen social bonds. The time has come to pay renewed attention to reality and the limits it imposes; this in turn is the condition for a more sound and fruitful development of individuals and society. An inadequate presentation of Christian anthropology gave rise to a wrong understanding of the relationship between human beings and the world. Often, what was handed on was a Promethean vision of mastery over the world, which gave the impression that the protection of nature was something that only the faint-hearted cared about.[87]

But he does not stop there; Francis also explains how to remedy such misplaced anthropocentrism. He argues that "speak[ing] once more of the figure of a Father who creates and who alone owns the world" is the best means for restoring mankind to its proper place in the world, which would also end mankind's claim to absolute dominion on earth.[88] Francis further condemns the individualism which constitutes a focused version of anthropocentrism, and he decries the modern tendency to see ourselves as the ultimate measure of what is right and good.[89]

At the same time, Pope Francis is equally concerned about placing too low a value on people. "At the other extreme are those who view men

---

[83] *Laudato Si'*, *supra* note 7, at para. 122.

[84] *Id.* at para. 115 ("Not only has God given the earth to man . . . but, man too is God's gift to man. He must therefore respect the natural and moral structure with which he has been endowed.").

[85] White, *supra* note 52, at 1205.

[86] *Laudato Si'*, *supra* note 7, at para. 68.

[87] *Id.* at para. 116. Pope Francis further argued that "[a] misguided anthropocentrism leads to a misguided lifestyle. . . . When human beings place themselves at the centre, they give absolute priority to immediate convenience and all else becomes relative," *id.* at para. 122, and he noted that "it would also be mistaken to view other living beings as mere objects subjected to arbitrary human domination," *id.* at para. 82.

[88] *Id.* at para. 75.

[89] *See id.* at para. 122–23 (explaining that in an age of relativism, people place themselves in the center, only considering what is most convenient to them in determining their actions).

and women and all their interventions as no more than a threat, jeopardizing the global ecosystem, and consequently the presence of human beings on the planet should be reduced and all forms of intervention prohibited."[90] He specifically rejects the biocentric view that many environmentalists adopt to replace anthropocentrism. According to Francis, "[a] misguided anthropocentrism need not necessarily yield to 'biocentrism', for that would entail adding yet another imbalance, failing to solve present problems and adding new ones."[91]

Francis is especially worried about sacrificing the most vulnerable groups of humanity in our zeal to care for the environment. "It is clearly inconsistent to combat trafficking in endangered species," he writes, "while remaining completely indifferent to human trafficking, unconcerned about the poor, or undertaking to destroy another human being deemed unwanted. This compromises the very meaning of our struggle for the sake of the environment."[92] This contrast was vividly illustrated a couple of months after Francis released his Encyclical by the juxtaposition of two stories that dominated the news. One was the story of an American dentist who had brutally killed a lion that was a favorite of a local African community and that had been lured away from its protected reserve.[93] The other was the release of videos showing the indifference of Planned Parenthood officials to the tiny human bodies that

---

[90] *Id.* at para. 60.

[91] *Id.* at para. 118.

[92] *Id.* at para. 91. Francis repeats his concern on multiple occasions. *See id.* at para. 50 (arguing that the focus on overpopulation "is one way of refusing to face the issues" of "extreme and selective consumerism on the part of some"); *id.* at para. 90 ("At times we see an obsession with denying any pre-eminence to the human person; more zeal is shown in protecting other species than in defending the dignity which all human beings share in equal measure. Certainly, we should be concerned lest other living beings be treated irresponsibly. But we should be particularly indignant at the enormous inequalities in our midst, whereby we continue to tolerate some considering themselves more worthy than others."); *id.* at para. 120 ("Since everything is interrelated, concern for the protection of nature is also incompatible with the justification of abortion. How can we genuinely teach the importance of concern for other vulnerable beings, however troublesome or inconvenient they may be, if we fail to protect a human embryo, even when its presence is uncomfortable and creates difficulties?"); *id.* at para. 155 ("[T]hinking that we enjoy absolute power over our own bodies turns, often subtly, into thinking that we enjoy absolute power over creation. Learning to accept our body, to care for it and to respect its fullest meaning, is an essential element of any genuine human ecology. Also, valuing one's own body in its femininity or masculinity is necessary if I am going to be able to recognize myself in an encounter with someone who is different. In this way we can joyfully accept the specific gifts of another man or woman, the work of God the Creator, and find mutual enrichment.").

[93] Katie Rodgers, *After Cecil the Lion's Killing, U.S. and U.N. Look to take Action*, N.Y. TIMES (July 22, 2015), http://www.nytimes.com/2015/07/31/world/africa/after-cecil-the-lions-killing-us-and-un-look-to-take-action.html?emc=eta1.

were killed during abortions.[94] The popular discourse often featured commentators who raged about the death of the lion while remaining silent about the aborted babies, and vice versa.[95] Francis sees both episodes as connected to the same callous indifference for both defenseless human and animal life.[96]

The correct anthropology, Francis argues, views humanity as special and the rest of creation as deserving respect and care. "Christian thought sees human beings as possessing a particular dignity above other creatures," writes Francis, and "it thus inculcates esteem for each person and respect for others."[97] Christian teaching insists that humans are indeed different from other creatures, but also similar in that humans are still created beings. It suggests a hierarchy descending from God to humanity to the rest of creation.[98] Yet Christian teaching also supports a bifurcated view of the world that simply distinguishes between the Creator (God) and all creatures (humanity, animals, plants, and the rest of creation alike). As one writer explains, "the human race has a dual position in creation. Although Homo sapiens are one of countless millions of created life forms, we are unique and special to God."[99] The scriptural text most cited to support that claim is *Genesis* 1, which says that God created humanity alone "in our image."[100] The challenge is to synthesize humanity's unique status in God's image and humanity's common created status with all other creatures. "The vertical," one Bible scholar explains, "does not cancel the horizontal."[101]

---

[94] Jackie Calmes, *With Planned Parenthood Videos, Activist Ignites Abortion Issue*, N.Y. TIMES (July 21, 2015), http://www.nytimes.com/2015/07/22/us/with-planned-parenthood-videos-activist-ignites-abortion-issue.html.

[95] Charles Camosy, *Outraged over Cecil the lion? It may help you understand the rage over Planned Parenthood*, L.A. TIMES (July 30, 2015, 2:35 PM), http://www.latimes.com/opinion/op-ed/la-oe-0730-camosy-cecil-the-lion-planned-parenthood-20150730-story.html.

[96] *See Laudato Si'*, *supra* note 7, at para. 92 (arguing that an indifferent and cruel attitude to animals eventually affects a person's attitude towards human life).

[97] *Id.* at para. 119.

[98] John C. Bergstrom, *What the Bible Says About the Environment*, APOLOGETICS RESOURCE CTR. (Nov. 14, 2014), http://arcapologetics.org/culture/subdue-earth-bible-says-environment/.

[99] DAN STORY, SHOULD CHRISTIANS BE ENVIRONMENTALISTS? 82 (2012); *see also An Examination of the Views of Religious Organizations Regarding Global Warming: Hearing Before the S. Comm. on Env't and Pub. Works*, 110th Cong. 206 (2007) [hereinafter *Religious Leaders & Climate Change Hearing*] (testimony of David Barton, author and historian) ("In general, conservative people of faith view the creation in Genesis as moving upward in an ascending spiritual hierarchy, beginning with the creation of the lowest (the inanimate) and moving toward highest (the animate), with the creation of man and woman being the capstone of God's work.").

[100] *Genesis* 1:26.

[101] RICHARD BAUCKHAM, LIVING WITH OTHER CREATURES: GREEN EXEGESIS AND THEOLOGY 4 (2011).

Of course, such views are controversial in many quarters outside of Christian circles, and even among different parts of the Christian church. A biblical understanding of humanity's place in creation is a common justification for Christians' leeriness toward environmental concerns unrelated to the health and welfare of humanity. Focus on the Family, for example, has expressed its refusal to support any issue that places environmental issues above human beings.[102] Supporters of a hierarchical view of creation sometimes neglect God's place above humanity. For instance, former senator and presidential candidate Rick Santorum chastised "a lot of radical environmentalists" for "hav[ing] it upside down."[103] He stated that man is the objective, rather than the Earth.[104] This too is a distortion of the scriptural teaching, for man is not the objective. Rather, our objective is to glorify God.

The Christian environmental literature thus rejects White's charge that Christianity is "the most anthropocentric religion the world has seen."[105] Christianity is more likely to embrace theocentrism, not anthropocentrism or biocentrism. As one scholar, Steven Bouma-Prediger, wrote, *Genesis* 1 "shows that humans are distinct in some important sense" and "unique among all the creatures to come from God's hand."[106] He further argued that "it is a non sequitur to claim that a necessary condition for equality between women and men is that all hierarchy between humans and nonhumans, or humans and God, be abolished."[107] Or, as Abraham Kuyper put it, "[o]nly in man does the creation reach its consummation."[108]

Perhaps the best way of explaining the view of humanity advocated by Pope Francis is by contrasting the leading environmental justice with the leading environmental saint. Justice William O. Douglas left his Presbyterian upbringing behind once he left his home state of Washington, but he took his love of nature with him. Justice Douglas was

---

[102] *See* Michael Luo, *Evangelicals Debate the Meaning of 'Evangelical'*, N.Y. TIMES (Apr. 16 2006), http://www.nytimes.com/2006/04/16/weekinreview/16luo.html?pagewanted=print&_r=1& (noting Dr. James Dobson, head of Focus on the Family, refused to support an evangelical group calling for action against climate change because he believed it prioritized animals and plants above people).

[103] Leigh A. Caldwell, *Santorum: Obama's Worldview Upside-Down*, CBS NEWS (Feb. 19, 2012, 1:37 PM), http://www.cbsnews.com/news/santorum-obamas-worldview-upside-down/.

[104] *Id.*

[105] White, *supra* note 52, at 1205.

[106] BOUMA-PREDIGER, *supra* note 65, at 73.

[107] *Id.* at 169 (arguing that proper care of the environment does not require that God is recognized as an existing being).

[108] ABRAHAM KUYPER, TO BE NEAR UNTO GOD 270 (John Hendrik de Vries trans., Baker Book House 1979) (1925).

once described as "a lover of humanity who did not like *people*."[109] Saint Francis was exactly the opposite—as G.K Chesterton described him, Francis loved people but not humanity.[110] The dual understanding of humanity's tendency to make bad choices, while loving the individual people who make those choices, seems best suited to respond to our environmental challenges.

Francis and other defenders of such a hierarchical understanding emphasize that humanity has a responsibility to care for the rest of creation. As Bouma-Prediger argued, "[h]uman uniqueness is not a license for exploitation but a call to service."[111] The Encyclical describes the ideal relationship as one of harmony between people and the rest of creation.[112] Harmony means that each part of creation can live for its intended purpose. Using a broad understanding of what constitutes harm and who can be harmed, harmony does not happen when the environment is harmed; disharmony occurs as a result of human sin and ignorance.[113] Harmony does not expect, though, that each person and animal will always enjoy an environment that is ideal for their purposes. Harmony recognizes that the environment is dynamic.[114] The role of the law, therefore, is to constrain human actions that result in disharmony while facilitating those actions that cultivate harmony even in a changing environment.[115]

III. ENVIRONMENTAL CONNECTEDNESS

"Everything is connected," proclaims Francis.[116] That is an ecological truism which will not surprise anyone who is familiar with debates about environmental policy. But he means more than that; when Francis says that "everything" is connected, he refers to more than hydrology or

---

[109] BERNARD SCHWARTZ, THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION 19 (1990).

[110] G.K. CHESTERTON, ST. FRANCIS OF ASSISI 15 (1990) ("[A]s St. Francis did not love humanity but men, so he did not love Christianity but Christ.").

[111] BOUMA-PREDIGER, *supra* note 65, at 177.

[112] *See Laudato Si'*, *supra* note 7, at para. 66 (describing the original relationship between people and nature as harmonious before it was broken when humans tried acting as God).

[113] *Id.*

[114] *Id.* at para. 144.

[115] *See id.* at para. 177 (observing that the law's purpose is to prevent harmful occurrences as well as to promote helpful behavior).

[116] *Id.* at para. 91.

ecosystems or the world's climate.[117] Francis sees all ecological systems as connected with cultural institutions.[118]

Quoting Pope Benedict XVI, Pope Francis contends that "'[t]he book of nature is one and indivisible,' and includes the environment, life, sexuality, the family, social relations, and so forth. It follows that 'the deterioration of nature is closely connected to the culture which shapes human coexistence.'"[119] Emphasizing an "integral ecology" which accounts for the relationship between nature and society, Francis argues that there is a correlation between the cure for environmental harm and social harm.[120] Using a poignant illustration of this connection, Pope Francis states that "[w]hen we fail to acknowledge as part of reality the worth of a poor person, a human embryo, a person with disabilities . . . it becomes difficult to hear the cry of nature itself; everything is connected."[121]

Francis also refers to "cultural ecology," which he defines as "a part of the shared identity of each place and a foundation upon which to build a habitable city."[122] He emphasizes the "need to incorporate the history, culture and architecture of each place, thus preserving its original identity. Ecology . . . involves protecting the cultural treasures of humanity in the broadest sense."[123] The cultural ecology suffers from many of the same actions as the natural ecology, such as environmental exploitation and degradation. This cost exhausts physical resources along with undoing social structures shaping cultural identity.[124] And Francis sees the consequences as dire: "The disappearance of a culture can be just as serious, or even more serious, than the disappearance of a species of plant or animal. The imposition of a dominant lifestyle linked to a single form of production can be just as harmful as the altering of ecosystems."[125]

That is why it is a mistake to characterize the document as a climate change encyclical. Of course, climate change is addressed, but so are other environmental problems such as air pollution, water pollution, and the

---

[117] *See id.* at paras. 141–42 (referring to the connection between economics and social contexts such as in the home, urban settings, and work environment).

[118] *See id.* at para. 48 ("The human environment and the natural environment deteriorate together.").

[119] *Id.* at para. 6.

[120] *Id.* at para. 139. Elsewhere, Pope Francis states that "[s]ince everything is closely interrelated, and today's problems call for a vision capable of taking into account every aspect of the global crisis, . . . suggest[s] that we now consider some elements of an *integral ecology*, one which clearly respects its human and social dimensions." *Id.* at para. 137.

[121] *Id.* at para. 117.

[122] *Id.* at para. 143.

[123] *Id.*

[124] *Id.* at para. 145.

[125] *Id.*

loss of biodiversity.[126] Beyond those environmental problems, the Encyclical also targets a similarly broad range of social problems, such as overcrowded cities, flawed transportation systems, and the need to protect labor.[127] Climate change is featured in many of those discrete environmental and social issues, but the same could be said of how those other issues feature in climate change.

While struggling to fully grasp what Francis describes, United States environmental law does show some recognition of interconnectedness. For example, federal protection of wetlands under the Clean Water Act (CWA) depends on the threshold determination that an affected area constitutes "waters of the United States."[128] To establish such a showing, the Environmental Protection Agency (EPA) and the Army Corps of Engineers commissioned a hydrologic study that demonstrated the many ways in which waters are connected, and thus how seemingly insignificant and remote bodies of water are nonetheless connected to the lakes and rivers that everyone acknowledges are "waters of the United States."[129] The Agency then promulgated a regulation that claims federal jurisdiction over all such waters based on their connectedness.[130]

The Endangered Species Act (ESA)[131] offers other examples. Under the Commerce Clause of the United States Constitution, the federal government has the authority to regulate interstate commerce. However, the federal government's ability to regulate species that live in only one state and otherwise fail to affect interstate commerce depends on the aggregation of all such species and the ecosystems on which they depend.[132] In other words, the connectedness inherent in an ecosystem justifies federal regulation at each of its components. A similar approach arises under the ESA's prohibition on actions that "harm" a listed species.

---

[126] *See id.* at paras. 20–24, 28–29, 32 (examining air pollution, water quality, and the loss of biodiversity respectively).

[127] *See id.* at paras. 125–29, 149–52, 153–54 (considering employment protection, overcrowding, and transportation respectively).

[128] Definition of "Waters of the United States" Under the Clean Water Act, 79 Fed. Reg. 22188, 22195 (proposed Apr. 21, 2014) (to be codified at 33 C.F.R. pt. 328).

[129] *Id.* at 22195–98.

[130] *See* Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37054, 37056–57 (June 29, 2015) (to be codified at 33 C.F.R. pt. 328) (describing the standards used to determine whether bodies of water are connected to waters of the United States).

[131] Endangered Species Act of 1973, Pub. L. No. 94-325, 90 Stat. 724 (codified as amended at 16 U.S.C. §§ 1531–1542 (2012)).

[132] *See, e.g.*, Gibbs v. Babbitt, 214 F.3d 483, 492–94 (4th Cir. 2000) (noting the aggregate impact of taking North Carolina red wolves while upholding the regulation); People for the Ethical Treatment of Prop. Owners v. U.S. Fish & Wildlife Serv., 57 F. Supp. 3d 1337, 1346–47 (D. Utah 2014) (declining to rely on aggregation to authorize the regulation of the Utah prairie dog).

For instance, leading environmental groups have argued that the harm prohibition applies to a coal-fired power plant in, say, Texas that emits greenhouse gases that contribute to climate change and thus threaten the survival of polar bears in Alaska.[133] That connectedness is true as a matter of atmospheric science, but the Supreme Court has blocked such a move by reading the ESA to contain a proximate cause limitation on harms resulting from a remote action.[134]

The Encyclical also struggles with the full implications of ecological connectedness. Although Pope Francis noted that "[t]he establishment of a legal framework which can set clear boundaries and ensure the protection of ecosystems has become indispensable,"[135] such boundaries necessarily interfere with some ecological and social connections.[136] Additionally, Francis is skeptical of private property rights,[137] which function as the most obvious way of establishing clear boundaries. "The Christian tradition has never recognized the right to private property as absolute or inviolable," he contends, "and has stressed the social purpose of all forms of private property."[138]

Likewise, the Encyclical fails to grasp the ways in which interconnectedness means that the activities praised result in their own environmental harms. For example, Francis writes, "We read in the Gospel that Jesus says of the birds of the air that 'not one of them is forgotten before God.' How then can we possibly mistreat them or cause them harm?"[139] And yet, Francis praises renewable energy without acknowledging the hundreds of thousands of birds that wind turbines and

---

[133] Kim Murphy, *U.S. Suggests No Emissions Limits to Protect Polar Bears*, L.A. TIMES (Apr. 17, 2012), http://articles.latimes.com/2012/apr/17/nation/la-na-nn-polar-bears-greenhouse-gases-20120417.

[134] *See* Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 700 n.13 (1995) (explaining that the ESA's reach is limited by the requirements of proximate cause and foreseeability); *see also* Michael C. Blumm & Kya B. Marienfeld, *Endangered Species Act Listings and Climate Change: Avoiding the Elephant in the Room*, 20 ANIMAL L. 277, 289 (2014) (describing the limits on the application of the ESA's take prohibition to species affected by climate change).

[135] *Laudato Si'*, *supra* note 7, at para. 53.

[136] *See, e.g.*, Neil D. Hamilton, *Trends in Environmental Regulation of Agriculture*, *in* INCREASING UNDERSTANDING OF PUBLIC PROBLEMS AND POLICIES 108, 112–14 (1994) (describing the tension between farmers and non-farmers that is created by environmental laws because certain agricultural uses are considered damaging and environmental laws will restrict the farmers' use of land); Carmen G. Gonzalez, *Environmental Justice, Human Rights, and the Global South*, 13 SANTA CLARA J. INT'L L. 151, 154 (2015) (explaining the divide and conflict of interests between the countries in the north, which produce the majority of the pollution, and the countries in the south, which suffer from that pollution).

[137] *See, e.g.*, *Laudato Si'*, *supra* note 7, at paras. 67, 93–95.

[138] *Id.* at para. 93.

[139] *Id.* at para. 221 (quoting *Luke* 12:6).

solar facilities kill.[140] That is not meant to say that it is wrong to promote renewable energy; rather, environmental interconnectedness means that one cannot make that decision simply by promising to avoid "harm." For example, the Fish and Wildlife Service (FWS) may be sued because it has failed to protect larks—a favorite bird of Saint Francis—from ordinary agricultural practices.[141] Again, the interconnectedness is undisputed, but the appropriate legal response remains contested.

IV. ENVIRONMENTAL MORALITY

The Encyclical is at its strongest when it makes moral arguments. Among the moral claims, the concern for the poor is most prominent. Francis goes to great lengths to explain how a degraded environment harms the poor.[142]

The Encyclical builds on a robust literature.[143] Furthermore, the Bible repeatedly emphasizes the duty to care for the elderly, the sick, and the disabled.[144] Solomon declared that God "will deliver the needy who cry

---

[140] *Id.* at paras. 26, 164–65, 179; Rebecca Solnit, *Are We Missing the Big Picture on Climate Change?*, N.Y. TIMES (Dec. 2, 2014), http://www.nytimes.com/2014/12/07/magazine/are-we-missing-the-big-picture-on-climate-change.html?_r=0 (discussing the quantity of waterfowl killed by the world's largest solar thermal plant as well as bird deaths by wind farms).

[141] Letter from Tanya Sanerib, Senior Attorney, Ctr. for Biological Diversity, to Daniel Ashe, Dir., U.S. Fish & Wildlife Serv. et al. (Aug. 5, 2015), http://www.biologicaldiversity.org/species/birds/pdfs/Streaked_horned_lark_NOI_.pdf (writing to the FWS informing of an intent to sue for not listing the lark as an endangered species).

[142] *See Laudato Si'*, *supra* note 7, at para. 25 (describing the effects of climate change on the poor); *id.* at para. 29 ("[T]he quality of water available to the poor" is a "particularly serious problem."); *id.* at para. 51 ("A true 'ecological debt' exists, particularly between the global north and south, connected to commercial imbalances with effects on the environment, and the disproportionate use of natural resources by certain countries over long periods of time."); *id.* at para. 52 ("The developed countries ought to help pay this debt by significantly limiting their consumption of non-renewable energy and by assisting poorer countries to support policies and programmes of sustainable development."); *id.* at para. 90 ("We fail to see that some are mired in desperate and degrading poverty, with no way out, while others have not the faintest idea of what to do with their possessions, vainly showing off their supposed superiority and leaving behind them so much waste which, if it were the case everywhere, would destroy the planet. In practice, we continue to tolerate that some consider themselves more human than others, as if they had been born with greater rights."); *id.* at para. 149 ("The extreme poverty experienced in areas lacking harmony, open spaces or potential for integration, can lead to incidents of brutality and to exploitation by criminal organizations. In the unstable neighbourhoods of mega-cities, the daily experience of overcrowding and social anonymity can create a sense of uprootedness which spawns antisocial behaviour and violence.").

[143] *See, e.g.*, Lucia A. Silecchia, *The "Preferential Option for the Poor": An Opportunity and a Challenge for Environmental Decision-Making*, 5 U. ST. THOMAS L.J. 87, 100–08 (2008) (describing the Bible's emphasis on supporting particularly the poor in society).

[144] *See, e.g.*, *Deuteronomy* 15:10–11; *Proverbs* 14:21, 31, 19:17, 22:9, 28:27; *Matthew* 19:21; *Luke* 14:12–14, 12:33–34; *1 Timothy* 5:8.

out, the afflicted who have no one to help. He will take pity on the weak and the needy and save the needy from death."[145] The writer of *Proverbs* instructed his readers to "defend the rights of the poor and needy."[146]

Poverty is closely associated with the experience of environmental harm.[147] Those who are poor are much more likely to live near polluting factories and landfills.[148] The poor who live in urban environments are less likely to experience the beauties and wonders of nature simply because of a lack of access. Overseas, the poorest nations are typically those that are prone to droughts or flooding, whose land cannot support crops or livestock, and who are most likely to experience the first and worst effects of climate change.[149]

Environmental law offers some solicitude for the needs of the poor in the United States. The CAA directs the EPA to establish pollution standards according to the lesser tolerance of the most vulnerable groups: children, the elderly, those suffering from various asthmatic ailments.[150] The environmental threats toward the poor should be of special concern to Christians; and this concern grows as the communities near hazardous waste facilities and landfills prove to mainly be the home of minorities.[151] In the 1990s, this environmental racism and the desire for justice became one of the leading environmental issues,[152] but the law on the issue has

---

[145] *Psalms* 72:12–13.

[146] *Proverbs* 31:9; *see also* CRY JUSTICE 27–76 (Ronald J. Sider ed., 1980) (listing similar passages).

[147] Andrew C. Revkin, *Poor Nations to Bear Brunt as World Warms*, N.Y. TIMES (Apr. 1, 2007), http://www.nytimes.com/2007/04/01/science/earth/01climate.html?ex=.

[148] Clarence Page, *Environment Getting On Board: Many Hues Blend with Green*, L.A. TIMES (Apr. 20, 1990), http://articles.latimes.com/1990-04-20/local/me-1257_1_minority-communities.

[149] *See, e.g.*, *A Bad Climate for Development*, THE ECONOMIST (Sept. 17, 2009), http://www.economist.com/node/14447171 (examining the impact of climate change on poor countries because they are not able to cope with the change in weather, which causes flooding from rising sea levels and hurricanes); M. Alimullah Miyan, *Droughts in Asian Least Developed Countries: Vulnerability and Sustainability*, 7 WEATHER & CLIMATE EXTREMES 8, 8 (2015), http://ac.els-cdn.com/S2212094714000632/1-s2.0-S2212094714000632main.pdf?_tid=61bba0d2-609b-11e5-a206-00000aacb362&acdnat=1442865798_7066da881d8a6b5b526c132cb35207fa (stating that least developed countries suffer the most from droughts and famines compared to developed countries); Revkin, *supra* note 147 (identifying the disparity of climate change impact between rich and poor countries).

[150] *See* WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 156–58 (2d ed. 1994) (explaining that the Clean Air Act's legislative history reveals that air quality standards are to be calculated based on the health of particularly sensitive individuals).

[151] Robert D. Bullard & Glenn S. Johnson, *Environmental Justice: Grassroots Activism and Its Impact on Public Policy Decision Making*, 56 J. SOC. ISSUES 555, 556 (2000) (discussing studies that revealed landfills were much more likely to be near minority communities).

[152] *Id.* at 556–57, 561–62.

been slower to develop than academic literature.[153] Moreover, despite the actions of neighborhood associations filing lawsuits intended to protect poor and minority communities from environmental harms, most of the lawsuits have failed.[154] To combat the issue federally, an executive order, issued by President William Jefferson Clinton in 1994, instructed agencies to address the disproportionate effects of their programs on minority populations.[155] While that order does not give rise to any rights in court, the order has been used to challenge the actions of federal agencies as a violation of NEPA.[156]

Consider, for example, the Federal Highway Administration's (FHA) decision to build a new bridge from Detroit to Canada through the Delray neighborhood of Detroit.[157] The stated purpose of the bridge is to "provide safe, efficient and secure movement of people and goods across the U.S.-Canadian border in the Detroit River area to support the economies of Michigan, Ontario, Canada and the United States."[158] A group representing Hispanics in southwest Detroit alleged that the FHA violated environmental justice principles, NEPA, and other federal laws "by failing to give a 'hard look'" at other bridge crossings that would not have a negative impact on the Delray neighborhood.[159] Delray "is one of the most diverse communities in the City of Detroit," with a population almost evenly divided between African-Americans, Hispanics, and

---

[153] John C. Nagle, *Christianity and Environmental Law*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 435, 450 (Michael W. McConnell et al. eds., 2001).

[154] *See, e.g.*, Rozar v. Mullis, 85 F.3d 556, 558–59 (11th Cir. 1996) (rejecting equal protection and Title VI challenges to discrimination in permitting a landfill in a neighborhood where most residents were African-American). *But see* Bradford C. Mank, *Is There a Private Cause of Action Under EPA's Title VI Regulations?: The Need to Empower Environmental Justice Plaintiffs*, 24 COLUM. J. ENVTL. L. 1, 37–53 (1999) (discussing cases that argue an implied private cause of action to enforce the prohibition on racial discrimination in federal grant applications).

[155] Exec. Order No. 12,898, 59 Fed. Reg. 7629, 7629 (Feb. 16, 1994), *reprinted as amended in* 42 U.S.C. § 4321 (1995).

[156] *See, e.g.*, Coliseum Square Ass'n v. Jackson, 465 F.3d 215, 231–33 (5th Cir. 2006) (holding that the executive order did not create a private right of action and would be reviewed with an arbitrary and capricious standard); Sur Contra la Contaminación v. EPA, 202 F.3d 443, 449 (1st Cir. 2000) (refusing to revoke permit on the basis that the executive order was meant for the improvement of internal management and not for the creation of legal rights).

[157] Environmental Impact Statement: Wayne County, MI, 73 Fed. Reg. 74,226 (Dec. 5, 2008).

[158] *Id.*

[159] Latin Americans for Soc. & Econ. Dev. v. Adm'r of Fed. Highway Admin., 756 F.3d 447, 453 (6th Cir. 2014), *cert. denied sub nom.* Detroit Int'l Bridge Co. v. Nadeau, 135 S. Ct. 1411 (2015).

whites.[160] In an environmental impact statement (EIS) for the project prepared pursuant to NEPA, the FHA acknowledged that constructing the proposed international bridge would have a "disproportionately high and adverse effect on minority and low-income population groups," resulting in displacements, lost jobs, changed traffic patterns, and rerouted bus lines.[161] The transportation impacts were "particularly important because the population affected has relatively low access to an automobile."[162] Even after the project was modified to reduce its effects on the community, it would displace 257 housing units, 43 businesses, and 5 churches.[163]

One of those churches was the St. Paul African Methodist Episcopal Church, built in 1928 and "the lone surviving structure associated with early African-American settlement in Delray."[164] The EIS found that "[t]he hallmark of the African American community in Delray has historically been the church."[165] As the church's congregation shrank from 350 members to about 100 over two decades, its pastor observed that "[s]o many families and individuals in the community feel hopeless because of the blight, the conditions of the community. It's a real challenge."[166] He further commented that many families in the church have left Delray but they return "to worship at the church their ancestors built, because they feel a connection to the community."[167] In spite of these community connections, every proposed configuration of the bridge would place the church in the middle of the project, and none of the alternatives to avoid the church were deemed practical.[168] Still, the pastor supported the construction of the bridge.[169] Community advocates called on the city to use the $1.4 million collected from selling 301 city-owned properties for the project in Delray to clean up and improve the neighborhood.[170] "Some may have less money than those benefited by the bridge, some may speak a different language, some may struggle to find and keep a job, some are

---

[160] U.S. DEP'T OF TRANSP. ET AL., FINAL ENVIRONMENTAL IMPACT STATEMENT & FINAL SECTION 4(F) EVALUATION: THE DETROIT INTERNATIONAL CROSSING STUDY 3-33 (Feb. 2008), http://www.partnershipborderstudy.com/reports_us.asp#feis.

[161] *Id.* at 3-37.

[162] *Id.*

[163] *Id.* at 3-38, tbl. 3-6D.

[164] *Id.* at 5-11 to 5-13.

[165] *Id.* at 5-13.

[166] Pat Batcheller, *Hard-Hit Delray Still Feels Like A Community to Those Who Live Here: The Detroit Agenda*, WDET NEWS (June 9, 2014), http://archives.wdet.org/news/story/060914-Detroit-Agenda-Delray/.

[167] *Id.*

[168] U.S. DEP'T OF TRANSP., *supra* note 160, at 3-157, 3-158, 5-2 tbl.5-1, 5-23.

[169] *Id.* at 5-27.

[170] *See* Joe Guillen, *Delray wants $1.4M from land sale to be reinvested in neighborhood*, DETROIT FREE-PRESS, Sept. 14, 2014, at A4.

sick with asthma and cancer from the pollution," the pastor explained, "but they are citizens of the Detroit that you serve."[171]

The environmental justice challenge to the bridge failed.[172] The court noted that the FHA selected the route for the bridge "[a]fter exhaustive study and consideration of environmental justice issues."[173] The EIS itself boasted that the public outreach to address environmental justice concerns included facilitating "[a]lmost 100 public meetings, hearings, and workshops," sending mail to "[a]pproximately 10,000 residences and businesses," and delivering "over a thousand fliers . . . door-to-door in Delray and along the I-75 service drive north of the freeway."[174] Nonetheless, the group challenging the decision contended that the "predominantly affluent white neighborhoods west of Detroit . . . were improperly eliminated due to political pressures."[175] The court, however, agreed that other site options "were not considered practical alternatives for a variety of reasons, including the presence of old mining sites, poor performance in regional mobility rankings, and significant community impacts on both sides of the river."[176] Ultimately, the court emphasized that "[e]nvironmental impacts and environmental justice issues are a consideration in agency decision making, but are not controlling."[177]

Whether the law should take the further step of providing poor communities, such as Delray, with special protections against environmentally harmful activities presents a harder question. It may be difficult to know what is best for such communities. In Delray, doing nothing (not building the bridge) could "cause businesses and homes to be left vacant as jobs and related income are lost."[178] The Bible does not contain many examples of legal commands that are inapplicable to the poor and oppressed; in fact, some passages explicitly reject such treatment. Three chapters after the Ten Commandments appear in *Exodus*, God further commands "do not show favoritism to the poor in a lawsuit."[179] The consistent message of the Bible demands that laws designed to apply equally to all should be enforced without favoritism

---

[171] *Id.* (quoting Rev. Jeffrey Baker).

[172] Latin Ams. for Soc. & Econ. Dev. v. Adm'r of Fed. Highway Admin., 756 F.3d 447, 451 (6th Cir. 2014), *cert. denied sub nom.* Detroit Int'l Bridge Co. v. Nadeau, 135 S. Ct. 1411 (2015).

[173] *Id.* at 477.

[174] U.S. DEP'T OF TRANSP., *supra* note 160, at 6-1.

[175] *Latin Americans for Soc. & Econ. Dev.*, 756 F.3d at 475–76.

[176] *Id.* at 476.

[177] *Id.* at 477.

[178] U.S. DEP'T OF TRANSP., *supra* note 160, at 3-221 tbl.3-31A.

[179] *Exodus* 23:3.

towards the wealthy and the powerful.[180] However, the increased frequency of environmentally-harmful landfills and industries in low income and minority communities demonstrates how the biblical command to protect the poor and the vulnerable has not been satisfied. Perhaps, then, remedial action to protect those communities from the introduction of further harms would be appropriate.[181]

The modest obligation to "address" these issues, which is contained in President Clinton's environmental justice executive order, may offer the wisest approach at this time. The order offers a way to level the playing field when the concerns of local residents, who already confront a disproportionate share of environmental harms, are in danger of being overwhelmed by economic development; but the order's existence recognizes that sometimes even the local residents are ambivalent.[182] To forbid certain kinds of economic development in poor and minority areas would communicate to the residents of those communities that they must not place a higher value on creating more jobs than on preserving the environment. A legal regime that acknowledges each of these perspectives without prejudging any of them fits well with Christian teachings because it requires the question to be addressed while empowering the affected communities to decide how to answer it.[183]

Climate change poses a special conundrum on which there is a robust debate, especially within the evangelical community,[184] about whether climate change or climate change law poses a greater threat to the poor.[185] Christian world relief organizations are on the front lines in many parts of the developing world where the effects of a changing climate are

---

[180] *See, e.g.*, *Leviticus* 19:15; *Acts* 10:34; *James* 2:1–9.

[181] NAT'L ENVTL. JUST. ADVISORY COUNCIL, ENSURING RISK REDUCTION IN COMMUNITIES WITH MULTIPLE STRESSORS: ENVIRONMENTAL JUSTICE AND CUMULATIVE RISKS/IMPACTS 36 (2004) (concluding remedial measures are necessary to aid pollution-burdened communities).

[182] *See supra* note 155 and accompanying text.

[183] *See* Nora Jacobson, *Dignity and Health: A Review*, 64 SOC. SCI. & MED. 292, 293, 296–97 (2007) (describing that dignity in Christianity comes from human's unique relationship to God and that dignity is often a foundational principle that is upheld by legal systems).

[184] *See* John Copeland Nagle, *The Evangelical Debate Over Climate Change*, 5 U. ST. THOMAS L.J. 53, 62–64, 77, 81–82 (2008) (discussing the major points in the evangelical climate change debate).

[185] *See* David Jackson, *Obama Cites Public Health in Urging Climate Change Laws*, USA TODAY (June 23, 2015, 2:28 PM), http://www.usatoday.com/story/news/nation/2015/06/23/obama-summit-on-climate-change-and-health/29153495/ (describing Obama's conflict with a Republican Congress over the legitimacy and effects of climate change).

exacerbating already poor environmental conditions.[186] The U.S. Catholic bishops have testified that "[t]he real inconvenient truth is that those who contributed least to climate change will be affected the most . . . and have the least capacity to cope or escape [and that] their lives, homes, children and work are most at risk."[187]

At the same time, climate change *law* can hurt the poor. Most climate change mitigation policies seek to increase the cost of energy generated from polluting sources, but that increased energy cost has a disproportionate effect on those who can least afford it.[188] The head of Catholic Charities in Cleveland told a congressional committee that raising the cost of energy would force the children in his city living in poverty to "suffer further loss of basic needs as their moms are forced to make choices as to whether to pay the rent or live in a shelter; pay the heating bill or see their child freeze; buy food or risk the availability of a hunger center."[189] The debate over the effect of the Obama Administration's Clean Power Plan illustrates the contested nature of climate change regulations on the poor.[190]

The dilemma is even more acute for those in the least developed countries. The poorest parts of the world also have the most energy poverty.[191] Many people in these countries still do not have access to

---

[186] *See Religious Leaders & Climate Change Hearing*, *supra* note 99, at 105–06 (statement of John L. Carr, Secretary, Dep't of Social Dev. and World Peace, U.S. Conference of Catholic Bishops) (discussing the effort of the Catholic Church in this area).

[187] *Id.* at 103. Russell Moore, Dean of Dallas Baptist Theological Seminary, also testified asking how climate change regulations would affect "the economic development of poor countries to providing electrification, water purification, and sanitation to the world's poor." *Id.* at 124 (statement of Russell Moore, Dean, Dallas Baptist Theological Seminary).

[188] *See* Bjørn Lomborg, *How Green Policies Hurt the Poor*, THE SPECTATOR (Apr. 5, 2014), http://www.spectator.co.uk/features/9176251/let-them-eat-carbon-credits/ (discussing the impact of "green taxes" and energy options on the poor).

[189] *Clean Power Act: Hearings on S. 556 Before the Subcomm. on Clean Air, Wetlands, and Climate Change & the Comm. on Env't and Public Works*, 107th Cong. 758 (2002) (statement of J. Thomas Mullen, President and CEO, Catholic Charities Health and Human Services).

[190] *Compare* 161 CONG. REC. S6,213 (daily ed. Aug. 3, 2015) (statement of Sen. McConnell) (asserting that the Clean Power Plan will "likely result in higher energy bills for those who can least afford them"), *with* President Obama's Remarks Announcing the Environmental Protection Agency's Clean Power Plan, 2015 DAILY COMP. PRES. DOC. 201500546 (Aug. 3, 2015) ("Even more cynical, we've got critics of this plan who are actually claiming that this will harm minority and low-income communities, even though climate change hurts those Americans the most, who are the most vulnerable.").

[191] *See* Marianne Lavelle, *Five Surprising Facts About Energy Poverty*, NATIONAL GEOGRAPHIC (May 30, 2013), http://news.nationalgeographic.com/news/energy/2013/05/130529-surprising-facts-about-energy-poverty/ (recognizing India, China, and Nigeria among nations that struggle most with energy poverty).

electricity,[192] though providing access to electricity and energy is one of the Millennium Development Goals.[193] Yet the production of energy can have serious environmental consequences including, but not limited to, climate change.[194] Therein is the dilemma. Efforts to eliminate energy poverty by promoting the use of coal and other fossil fuels could counteract efforts to mitigate climate change, while efforts to mitigate climate change could perpetuate energy poverty by making energy too expensive for those who can least afford it.[195]

In *Laudato Si'*, Pope Francis explains that poor countries must promote social development:

> For poor countries, the priorities must be to eliminate extreme poverty and to promote the social development of their people. At the same time, they need to acknowledge the scandalous level of consumption in some privileged sectors of their population and to combat corruption more effectively. They are likewise bound to develop less polluting forms of energy production, but to do so they require the help of countries which have experienced great growth at the cost of the ongoing pollution of the planet. [196]

The development of renewable energy can help avoid the dilemma of choosing between energy poverty and environmental harms, even though most of the world's electricity is produced from fossil fuels (especially coal).[197]

V. ENVIRONMENTAL GOVERNANCE

Inevitably, Pope Francis addresses the solutions to the problems that he catalogs in the Encyclical.[198] Here, he is more cautious than in his moral claims, recognizing that "[t]here are no uniform recipes, because each country or region has its own problems and limitations."[199] At several points he acknowledges the significant progress that has been made and is being made to achieve environmental improvement goals.[200]

---

[192] *Id.*

[193] VIJAY MODI ET AL., ENERGY SERVICES FOR THE MILLENNIUM DEVELOPMENT GOALS: ACHIEVING THE MILLENNIUM DEVELOPMENT GOALS 2–4 (2005).

[194] *Climate Impacts on Energy*, EPA.COM, http://www.epa.gov/climatechange/impacts-adaptation/energy.html (last visited Sept. 15, 2015).

[195] *See* 161 CONG. REC. S6, 213–14 (daily ed. Aug. 3, 2015) (statement of Sen. McConnell) (arguing that proposed regulations will outsource energy production to countries with poor environmental records).

[196] *Laudato Si'*, *supra* note 7, at para. 172.

[197] UNITED NATIONS DEV. PROGRAMME, WORLD ENERGY ASSESSMENT: ENERGY AND THE CHALLENGE OF SUSTAINABILITY 147, 396–98 (2000).

[198] *See, e.g.*, *Laudato Si'*, *supra* note 7, at paras. 202–12.

[199] *Id.* at para. 180.

[200] *See id.* at para. 37 (noting the significant progress in establishing wildlife sanctuaries); *id.* at para. 55 ("Some countries are gradually making significant progress,

Overall, the Encyclical is far less powerful in its explication of the proper solutions to our environmental problems than it is in its diagnosis of those problems. This is not surprising, because Francis is much more of an expert on theology and morality than he is on jurisprudence, political science, and administrative theory. But what is surprising is the Encyclical's inconsistent anthropology when it addresses the response to environmental challenges. As I will explain below, the Encyclical presumes that we are willing and able to change our individual lifestyles, and to advocate effective regulatory restraints, even though both the historical evidence and Christian anthropology suggest otherwise.

A. Economic Structures & Economic Individuals

Francis reserves much of his greatest scorn for how the global market economy facilitates environmental harm. His criticism of cap-and-trade systems shows that he even opposes the use of the marketplace to respond to environmental harms.[201] Corporations are the villain in the Encyclical, both because they destroy the environment and because they block efforts to protect the environment.[202] For example, he attacks how, during the economic crisis of 2008, the world focused on "[s]aving banks at any cost, making the public pay the price," and failing to rethink "the outdated criteria which continue to rule the world."[203]

The structural indictment against abusive corporate environmental actions is important, but it ignores other forces and tells only part of the story. Michael Vandenbergh has shown that individuals are responsible

---

developing more effective controls and working to combat corruption."); *id.* at para. 58 ("In some countries, there are positive examples of environmental improvement: rivers, polluted for decades, have been cleaned up; native woodlands have been restored; landscapes have been beautified thanks to environmental renewal projects; beautiful buildings have been erected; advances have been made in the production of non-polluting energy and in the improvement of public transportation. These achievements do not solve global problems, but they do show that men and women are still capable of intervening positively. For all our limitations, gestures of generosity, solidarity and care cannot but well up within us, since we were made for love.").

[201] *Id.* at para. 171 (asserting that carbon credits "can lead to a new form of speculation which would not help reduce the emission of polluting gases worldwide").

[202] *See, e.g.*, *id.* at para. 38. Douglas Kysar made many of the same points when he spoke on a panel addressing the impending Encyclical. *See* Douglas Kysar, A Price on Carbon, Panel Address on Pope Francis and the Environment: Yale Examines Historic Climate Encyclical (Apr. 8, 2015) (transcript available at http://fore.yale.edu/files/Papal_Panel_Transcript.pdf) (blaming "economic interests that are capable of investing not only in traditional capital, but also in the capture of laws and institutions that are intended to regulate capital" for the stalemate in global climate change agreements, and suggesting that climate change "may also be our best opportunity to address underlying economic, political, and cultural diseases that give climate change its appearance of inevitability").

[203] *Laudato Si'*, *supra* note 7, at para. 189.

for more environmental harms than businesses in the United States.[204] We are all polluters. Of course, the Encyclical recognizes that individuals often make poor environmental decisions: "People may well have a growing ecological sensitivity but it has not succeeded in changing their harmful habits of consumption which, rather than decreasing, appear to be growing all the more."[205] Overconsumption by wealthy western societies is the micro corollary to the macro role played by multinational corporations. Francis even emphasizes that it is overconsumption, not overpopulation, which deserves more blame for environmental destruction.[206]

The Encyclical offers a strange example of unnecessary consumption. "A simple example," Francis states, "is the increasing use and power of air-conditioning. The markets, which immediately benefit from sales, stimulate ever greater demand. An outsider looking at our world would be amazed at such behaviour, which at times appears self-destructive."[207] The increased availability of air conditioning has decreased deaths resulting from heat during the summer.[208] Heating during the winter pollutes more than cooling during the summer;[209] yet the Encyclical faults the latter while ignoring the former.[210] Cooler temperatures increase workplace productivity[211] and air conditioning has transformed previously uninhabitable regions. Some observers have pointed out the hypocrisy of the Vatican employing air conditioning to protect its archival records and to allow the Sistine Chapel to remain open to large crowds of tourists.[212]

---

[204] *See* Michael P. Vandenbergh, *From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law*, 57 VAND. L. REV. 515, 517–18 (2004) (arguing that an aggregation of individuals contributes greater pollution to the environment than industrial corporations).

[205] *Laudato Si'*, *supra* note 7, at para. 55.

[206] *Id.* at para. 50 ("To blame population growth instead of extreme and selective consumerism on the part of some, is one way of refusing to face the issues.").

[207] *Id.* at para. 55.

[208] Juliet Eilperin, *Study: Home Air Conditioning Cut Premature Deaths on Hot Days 80 Percent Since 1960*, WASH. POST (Dec. 22, 2012), https://www.washingtonpost.com/national/health-science/study-home-air-conditioning-cut-premature-deaths-on-hot-days-80-percent-since-1960/2012/12/22/5b57f3ac-4abf-11e2-b709-667035ff9029_story.html (noting that air conditioning has reduced the number of heat-related deaths in recent decades).

[209] Daniel Engber, *Don't Sweat It*, SLATE (August 1, 2012, 3:44 AM), http://www.slate.com/articles/health_and_science/science/2012/08/air_conditioning_haters_it_s_not_as_bad_for_the_environment_as_heating_.html (observing that heating systems produce more pollution than air conditioners).

[210] *Laudato Si'*, *supra* note 7, at para. 55.

[211] Shubhankar Chhokra, *Pope Francis is Wrong about Air Conditioning*, NAT'L REV. (June 18, 2015, 6:56 PM), http://www.nationalreview.com/article/420011/pope-francis-wrong-about-air-conditioning-shubhankar-chhokra.

[212] *Id.*

Air conditioning, in short, is an odd example of an unnecessary use of energy.

The condemnation of air conditioning becomes even more peculiar when it is compared to the list of technological advances that Francis applauds. "We are the beneficiaries of two centuries of enormous waves of change: steam engines, railways, the telegraph, electricity, automobiles, aeroplanes, chemical industries, modern medicine, information technology and, more recently, the digital revolution, robotics, biotechnologies and nanotechnologies."[213] Looking at that list, Francis writes that "[i]t is right to rejoice in these advances and to be excited by the immense possibilities which they continue to open up before us, for 'science and technology are wonderful products of a God-given human creativity.'"[214] Yet he fails to offer an explanation for which advances are worthy of celebration and the advances that surrender to rampant consumerism. Indeed, perhaps the harshest criticism of the Encyclical came from Michael Shellenberger, the environmental activist who tweeted: "It is blasphemous to call our ancestors, who were trying to improve lives for their children & themselves greedy thieves."[215] Shellenberger added that "humans appreciated nature more as consumption grew."[216] Conversely, "Benedictine monks led the process of deforestation for agricultural expansion in 7th/8th centuries,"[217] but they did so not "out of greed but rather desire to improve lives."[218]

Francis's opposition to the unfettered economic marketplace also overlooks the extent of current regulation. While some countries complain that environmental regulations are too strict, others contend that they are inadequate.[219] Francis recognizes those regulatory developments, but

---

[213] *Laudato Si'*, *supra* note 7, at para. 102.

[214] *Id.* (quoting John Paul II, Address to Scientists and Representatives of the United Nations University (Feb. 25, 1981) (transcript available at https://w2.vatican.va/content/john-paul-ii/en/speeches/1981/february/documents/hf_jp-ii_spe_19810225_giappone-hiroshima-scienziati-univ.html)).

[215] Mike Shellenberger (@MichaelBTI), TWITTER (June 16, 2015, 3:37 AM), https://twitter.com/michaelbti/status/610758009149595648.

[216] Mike Shellenberger (@MichaelBTI), TWITTER (June 16, 2015, 3:41 AM), https://twitter.com/michaelbti/status/610758009149595648.

[217] Mike Shellenberger (@MichaelBTI), TWITTER (June 16, 2015, 3:49 AM), https://twitter.com/michaelbti/status/610758009149595648.

[218] Mike Shellenberger (@MichaelBTI), TWITTER (June 18, 2015, 1:32 PM), https://twitter.com/michaelbti/status/610758009149595648.

[219] *Compare* Edward Wong, *As Pollution Worsens in China, Solutions Succumb to Infighting*, N.Y. TIMES, Mar. 22, 2013, at A8 (reporting the strict regulations in China implemented after record air pollution levels), *with* Matthew Daly, *EPA Tightens Limits on Oil Refineries as Agency Prepares for Fight over New Smog Standard*, ASSOCIATED PRESS (Sept. 29, 2015, 4:43 PM), http://www.usnews.com/news/business/articles/2015/09/29/epa-

desires more progress.[220] Governments are also omitted from the Encyclical's account of environmentally irresponsible actors. The only governmental entities mentioned in the Encyclical are those that fail to control environmentally harmful corporations.[221] The Encyclical entirely neglects the destructive role of socialist and totalitarian governments in producing their own environmental catastrophes. Much has been written about the environmental devastation wrought in the Soviet Union,[222] but Pope Francis leaves the issue unaddressed. His predecessor Pope John Paul II, a native of Poland,[223] would not have made that mistake.[224] Francis also does not say anything about China, where the government has exercised control over some of the greatest environmental disasters in human history.[225] In short, there are many other structures that facilitate environmental harm besides multinational corporations.[226]

B. Democratic Governance

Democratic and republican government presumes that it is humble to defer to the people's values. The basic theory is simple: "Legislatures

---

set-to-tighten-smog-limits-as-business-gears-for-fight (covering the desire for stronger air pollution standards in the United States).

[220] *Laudato Si'*, *supra* note 7, at para. 166 ("Worldwide, the ecological movement has made significant advances, thanks also to the efforts of many organizations of civil society. It is impossible here to mention them all, or to review the history of their contributions. But thanks to their efforts, environmental questions have increasingly found a place on public agendas and encouraged more far-sighted approaches. This notwithstanding, recent World Summits on the environment have not lived up to expectations because, due to lack of political will, they were unable to reach truly meaningful and effective global agreements on the environment.").

[221] *Id.* at paras. 174–75.

[222] *See e.g.*, BORIS KOMAROV, THE GEOGRAPHY OF SURVIVAL: ECOLOGY IN THE POST-SOVIET ERA 5 (1994) (stating that almost all of the countries in the former USSR failed to protect their environments); MARIE-LOUISE LARSSON, THE LAW OF ENVIRONMENTAL DAMAGE: LIABILITY AND REPARATION 192–93 (1999) (reporting the Soviet Union compensation claim for an oil spill from one of its tankers in the Baltic Sea); THE FORMER SOVIET UNION IN TRANSITION 575 (Richard F. Kaufman & John P. Hard eds., 1993) (listing toxic pesticide contamination and water pollution among the Soviet Union's environmental challenges).

[223] *The Life and Ministry of Saint John Paul II*, U.S. CONFERENCE OF CATHOLIC BISHOPS, http://www.usccb.org/about/leadership/holy-see/john-paul-ii/index.cfm (last visited Sept. 17, 2015).

[224] Jozef Tischner, *A View from the Ruins*, *in* A NEW WORLDLY ORDER: JOHN PAUL II AND HUMAN FREEDOM 165, 166 (George Weigel et al. eds., 1992) (arguing that Pope John Paul II fully realized and worked to expose the devastation of Communism).

[225] *See* Tom Phillips, *China Facing "Extremely Grave" Environmental Crisis*, THE TELEGRAPH (Jan. 6, 2013, 4:16 PM), http://www.telegraph.co.uk/news/worldnews/asia/china/9783784/China-facing-extremely-grave-environmental-crisis.html (detailing the government's role in environmental disasters such as blight, pollution, and chemical leaks).

[226] *See, e.g.*, Vandenbergh, *supra* note 204, at 517–18.

are, generally speaking, elective and accountable bodies," explains Jeremy Waldron, and "[t]heir members are elected as legislators and they can be replaced at regular intervals if their constituents dislike what they or their political party are doing in the legislature. This gives their lawmaking a legitimacy that lawmaking by judges lacks."[227] Waldron emphasized that "legislation embodies a commitment to explicit lawmaking—a principled commitment to the idea that on the whole it is good, if law is to be made or changed, that it should be made or changed in a process publicly dedicated to that task." [228] He grounds the argument for legislation in a respect for the multiplicity of popular values that echoes the call for humility:

> Different people bring different perspectives to bear on the issues under discussion and the more people there are the greater the richness and diversity of viewpoints are going to be. When the diverse perspectives are brought together in a collective decision-making process, that process will be informed by much greater informational resources than those that attend the decision-making of any single individual.[229]

Numerous writers champion the virtues of democracy for environmental law.[230] Jedediah Purdy, for example, argues that "[t]he ultimate political challenge is to limit, together and legitimately, the scope of human appetites, so that we do not exhaust and undo the living world."[231] As Purdy explains:

> A democracy open to post-human encounters with the living world would be more likely to find ways to restrain its demands and stop short of exhausting the planet. The history of environmental lawmaking suggests that people are best able to change their ways when they find two things at once in nature: something to fear, a threat they must avoid, and also something to love, a quality they can admire or respect, and which they can do their best to honor. The first impulse, of fear, can be rendered in purely human-centered terms, as a matter of avoiding environmental crisis. The second impulse, of love, engages animist intuitions, and carries us toward post-humanism, which is perhaps just another name for an enriched humanism. Either impulse can stay the human hand, but the first stops it just short of being burnt or broken. The second keeps the hand poised, extended in greeting or in an offer of peace. This gesture is the beginning of collaboration, among people but also beyond us, in building our next home.[232]

---

[227] Jeremy Waldron, *Representative Lawmaking*, 89 B.U. L. REV. 335, 335 (2009).

[228] *Id.* at 339.

[229] *Id.* at 343.

[230] *See, e.g.*, Douglas R. Williams, *Environmental Law and Democratic Legitimacy*, 4 DUKE ENVTL. L. & POL'Y F. 1, 1–2 (1994) (arguing that concerns about environmental protection should be resolved by citizens in a democratic fashion).

[231] JEDEDIAH PURDY, AFTER NATURE: A POLITICS FOR THE ANTHROPOCENE 268 (2015).

[232] *Id.* at 288.

Reliance on the democratic process to implement popular values lends popular legitimacy to environmental law. The nearly decade-long struggle to enact the Wilderness Act in 1964 illustrates the process.[233] As John Leshy explains, "The grassroots organizing and lobbying that pushed the Act across the finish line helped forge similar efforts to protect not only landscapes, but the nation's air and water quality and its biological resources."[234] The Wilderness Act that emerged from the congressional process was "shot through with political concessions," but those compromises were both necessary to get the law passed and ultimately not harmful to the cause of wilderness preservation.[235] Soon after Congress enacted the Wilderness Act, it moved on to enact the NEPA,[236] the CAA,[237] the CWA,[238] the ESA,[239] and other leading environmental statutes. Leshy affirms that the Wilderness Act "plowed the ground so that the seeds of these statutes could germinate."[240] The Wilderness Act also guaranteed the ongoing importance of popular support.[241] Originally, wilderness supporters had wanted to empower federal agencies to designate new wilderness areas, but they heeded the objections of those who demanded that only Congress have the authority to designate the areas.[242] Each new wilderness area now requires a concerted public campaign.[243] This is why the Sierra Club's Brock Evans proclaimed that "[t]he essence of the politics of the creation of wilderness is local—the grassroots."[244] He observed that new wilderness areas "can rarely be created unless there is substantial local support for it in the congressional district, or at least in the state where the area is to be

---

[233] *See* John Copeland Nagle, *Wilderness Exceptions*, 44 ENVTL. L. 373, 375 (2014) (describing the history of the Act).

[234] John D. Leshy, *Legal Wilderness: Its Past and Some Speculations on Its Future*, 44 ENVTL. L. REV. 549, 569–70 (2014).

[235] *Id.* at 565.

[236] National Environmental Policy Act of 1969, Pub. L. 91-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321, 4331–4335, 4341–4347 (2012)).

[237] Clean Air Act of 1970, Pub. L. No. 91-604, 81 Stat. 1676 (codified at 42 U.S.C. §§ 7401–7626 (2012)).

[238] Clean Water Act of 1977, Pub. L. No 96-148, 93 Stat. 1088 (codified as amended at 33 U.S.C. §§ 1251–1387 (2012)).

[239] Endangered Species Act of 1973, Pub. L. No. 94-325, 90 Stat. 724 (codified as amended at 16 U.S.C. §§ 1531–1542 (2012)).

[240] Leshy, *supra* note 234, at 570.

[241] *See id.* at 566 (explaining that the language of the Act allows supporters to interpret into it their own preferences).

[242] *Id.* at 568.

[243] *Id.* at 568–69.

[244] Brock Evans, *The Wilderness Idea as a Moving Force in American Cultural and Political History*, 16 IDAHO L. REV. 389, 400 (1980).

found."[245] Similarly, a study of Idaho Senator Frank Church's efforts to establish wilderness areas praised "Church's coalition-building, one-wilderness-at-a-time paradigm, which incorporates the best of local collaboration."[246] Senator Church "was fond of quoting the irascible Edward Abbey line that 'wilderness needs no defense—only more defenders.'"[247]

For its part, the Encyclical offers a schizophrenic view of representative government. On the one hand, Pope Francis laments the choices that popular governance produces. "In response to electoral interests," he frets that "governments are reluctant to upset the public with measures which could affect the level of consumption or create risks for foreign investment. The myopia of power politics delays the inclusion of a far-sighted environmental agenda within the overall agenda of governments."[248] That would appear to suggest that expert, bureaucratic officials should be entrusted with the difficult responsibility of resisting popular demands and making environmentally wise decisions. But Francis also stresses the importance of citizens controlling government decision making: "Unless citizens control political power—national, regional and municipal—it will not be possible to control damage to the environment."[249]

Francis envisions a world in which enlightened citizens will make the necessary decisions to preserve the natural world around them. He writes, "The local population should have a special place at the table; they are concerned about their own future and that of their children, and can consider goals transcending immediate economic interest."[250] But what if they don't? Francis is far too optimistic about human nature. The very notion of environmental *law* presumes that sometimes people will not do the environmentally right thing. Still, law plays a modest role in Francis's vision of environmental issues:

> One authoritative source of oversight and coordination is the law, which lays down rules for admissible conduct in the light of the common good. The limits which a healthy, mature and sovereign society must impose are those related to foresight and security, regulatory norms, timely enforcement, the elimination of corruption, effective responses to undesired side-effects of production processes, and appropriate intervention where potential or uncertain risks are involved. There is a

---

[245] *Id.* at 401.

[246] Sara Dant, *Making Wilderness Work: Frank Church and the American Wilderness Movement*, 77 PAC. HIST. REV. 237, 271 (2008).

[247] *Id.* at 271–72.

[248] *Laudato Si'*, *supra* note 7, at para. 178.

[249] *Id.* at para. 179.

[250] *Id.* at para. 183.

> growing jurisprudence dealing with the reduction of pollution by business activities. But political and institutional frameworks do not exist simply to avoid bad practice, but also to promote best practice, to stimulate creativity in seeking new solutions and to encourage individual or group initiatives.[251]

At another point Francis opines,

> The existence of laws and regulations is insufficient in the long run to curb bad conduct, even when effective means of enforcement are present. If the laws are to bring about significant, long-lasting effects, the majority of the members of society must be adequately motivated to accept them, and personally transformed to respond. Only by cultivating sound virtues will people be able to make a selfless ecological commitment.[252]

The Encyclical expresses a particular affinity for local environmental laws. The claim of subsidiarity is that laws should be made by the government that is closest to the people that can successfully address the problem at hand, and one cannot get any closer to the people than their municipal representatives.[253] Subsidiarity is a Catholic innovation,[254] which makes it surprising that Francis pays relatively little attention to it in the Encyclical.[255] Some of the first American environmental statutes heeded the subsidiary instruction.[256] During the end of the nineteenth century and the beginning of the twentieth century, numerous municipalities enacted "smoke ordinances" designed to address the growing problem of air pollution. "Ordinances relating to the emission of smoke have been enacted in nearly every city and village," according to one court reviewing such an ordinance in 1910.[257] Cities acted because the problem was viewed as being one of aesthetic impairment and thus uniquely local, for the worst of the smoke did not stray far from its

---

[251] *Id.* at para. 177.

[252] *Id.* at para. 211.

[253] Robert K. Vischer, Subsidiarity as a Principle of Governance: Beyond Devolution, 35 IND. L. REV. 103, 103 (2001).

[254] *Id.* at 108.

[255] *See Laudato Si'*, *supra* note 7, at paras. 157, 196 (mentioning the principle of solidarity only twice, and even then with brevity, in the entire Encyclical). Much more has been said about subsidiarity in the context of environmental law, yet the Encyclical does not engage those discussions.

[256] *See e.g.*, Air Quality Act of 1967, Pub. L. 90-148, 81 Stat. 485 (codified as amended in scattered sections of 42 U.S.C.) ("[T]he Secretary shall encourage cooperative activities by the States and Local governments for the prevention . . . of air pollution . . ."); Clean Water Restoration Act of 1966, Pub. L. 89-753, 80 Stat. 1246 § 6(a) (codified as amended in scattered sections of 33 U.S.C.) (authorizing the Secretary to make grants to any state or municipality agency for methods of enforcement).

[257] City of Rochester v. Macauley-Fien Milling Co., 92 N.E. 641, 643 (N.Y. 1910).

sources.[258] Eventually, though, state laws began to address air and water pollution, followed by initial federal forays into the area beginning in the 1940s, and finally leading to the federal pollution control laws that are so familiar today.[259]

The problem with local environmental laws is that local residents often prioritize their economic well-being over the environmental well-being.[260] That, in summary, is why most environmental law in the United States is now federal, not local or even state.[261] While some municipalities may seek greater environmental protections, others may seek more relaxed rules that accommodate more economic activity, even if it is more environmentally destructive.[262] Some local governments champion fracking.[263] Many local governments in western states chafe at federal environmental regulations that interfere with land use within their borders. For example, Kane County, Utah, may actually succeed in its effort to lift wilderness protections on some federal lands because of roads that predated the wilderness designation.[264] Colton, California, blames the Federal ESA for stymying economic development and has championed legislation to remove the federal protection of the offending endangered fly.[265] Alternatively, local governments may try to block projects that are promoted as environmentally beneficial. Several counties have tried to exclude wind farms because they interfere with the area's pastoral setting, notwithstanding the environmental benefits associated with renewable

---

[258] *See* David Stradling & Peter Thorsheim, *The Smoke of Great Cities: British and American Efforts to Control Air Pollution, 1860–1914*, 4 ENVTL. HIST. 6, 8 (1999) (explaining that the absence of wind or rain permitted the smoke to accumulate, and once settled would turn everything from the flowers to bridges black).

[259] *See supra* notes 47, 236–39 and accompanying text.

[260] *See* Barry G. Rabe, *The Eclipse of Health Departments and Local Governments in American Environmental Regulation*, 9 J. PUB. HEALTH POL'Y 376, 379, 381 (1988) (explaining that local governments are more apt to protect productive industries that contribute to the economy than enforce environmental regulation that could threaten the economy's well-being).

[261] *See id.* at 376–77 (explaining that environmental regulation was run at a local and state level, but now is "dominated aggressively by federal and state 'super' environmental agencies").

[262] *See* Charles Davis & Katherine Hoffer, *Federalizing Energy? Agenda Change and the Politics of Fracking*, 45 J. POL'Y SCI. 221, 223 (2012) (discussing that some states avoid federal environmental regulations in the production of gas and oil to increase their economic growth).

[263] *Id.*

[264] Kane Cnty. v. United States, 934 F. Supp. 2d 1344, 1347–48 (D. Utah 2013).

[265] For a more thorough description of the saga of Colton and the Delhi Sands Flower-Loving Fly, see generally JOHN COPELAND NAGLE, LAW'S ENVIRONMENT: HOW THE LAW SHAPES THE PLACES WE LIVE (2010).

energy.[266] In the desert southwest, local environmental activists are likely to oppose solar energy projects that national environmental groups support.[267]

C. Global Solutions

"Interdependence obliges us to think of one world with a common plan," Francis urges.[268] Thinking of the world in that way encourages him to insist that "[e]nforceable international agreements are urgently needed" and "[g]lobal regulatory norms are needed to impose obligations and prevent unacceptable actions."[269] The Encyclical thus adopts what can fairly be described as a Catholic view of international governance, which befits an institution that commands global authority.

But such calls for global solutions have fared poorly in the context of climate change. In June 2009, the House of Representatives passed the American Clean Energy and Security Act, whose stated purpose was "[t]o create clean energy jobs, achieve energy independence, reduce global warming pollution and transition to a clean energy economy."[270] And in December 2009, the world's leaders met in Copenhagen to negotiate a new international treaty that would build on the Kyoto Protocol establishing a binding commitment for each nation to reduce its greenhouse gas emissions and contribute to programs needed to facilitate adaptation to unavoidable climate change.[271] With the rising importance of environmental issues and the gathering of so many nations, some had described the role of the Copenhagen meeting as a time when world

---

[266] *See, e.g.*, Sarah Favot, *L.A. County Supervisors to Ban Large Wind Turbines in Unincorporated Areas*, L.A. DAILY NEWS (July 14, 2015), http://www.dailynews.com/government-and-politics/20150714/la-county-supervisors-to-ban-large-wind-turbines-in-unincorporated-areas (stating that although generating renewable energy is important to Antelope Valley residents, residents are concerned that the wind turbines would "destroy their vistas," and "create fugitive dust and noise" in the community).

[267] *See* John Copeland Nagle, *Green Projects and Green Harms*, 27 NOTRE DAME J.L. ETHICS & PUB. POL'Y 59, 68–69 (2013) (explaining that the shiny, metallic structures used in wind farms create an undesirable industrial landscape in the community where the facilities are located).

[268] *Laudato Si'*, *supra* note 7, at para. 164 (emphasis omitted).

[269] *Id.* at para. 173. Francis advocates for global regulatory norms on multiple occasions. *See, e.g.*, *id.* at paras. 54, 174.

[270] American Clean Energy and Security Act, H.R. 2454, 111th Cong. (enacted 2009).

[271] *See* Framework Convention on Climate Change, Draft Decision Copenhagen Accord to Heads of State, Heads of Government, Ministers, and other heads of delegation present at the United States Climate Change Conference 2009, at 1–2, U.N. Doc. FCCC/CP/2009/L.7 (Dec. 18, 2009), http://unfccc.int/resource/docs/2009/cop15/eng/l07.pdf (listing the principles guiding the Copenhagen summit, including that all participants agree that "climate change is one of the greatest challenges of our time," and that cutting global emissions is required to resolve this problem).

leaders would "decide the fate of the world."[272] Despite the dramatic rhetoric, there was a real expectation that world leaders would rise to the occasion and Copenhagen became "Hopenhagen" for those who eagerly anticipated the result of the meeting there.[273]

It did not turn out that way. There was no binding international agreement reached at Copenhagen.[274] In Congress, the House bill was dead-on-arrival in the Senate, and the Senate failed to approve an alternative of its own.[275]

The year 2009 feels like much more than six years ago. Both presidential candidates avoided saying much about climate change in 2012.[276] The House has been more likely to repeal existing climate change regulations than to adopt new ones.[277] The international community keeps looking to the future for the next realistic date for a new international agreement.[278] We will not be seeing "the solution" to climate change any time soon.

And that's a good thing. Not because climate change is a hoax or beyond our control—we need to respond to climate change, and the law needs to play a prominent role in that response. But the pursuit of a single, comprehensive federal statute or international treaty that is intended to solve the climate change problem is misguided. Instead, we should encourage a broad range of incremental and temporary efforts that allow us to address the discrete causes and effects of climate change and to adapt to our evolving scientific and social understandings of the problem. Such an incremental approach allows us to learn from the experience of employing novel legal tools and is less likely to result in the unintended consequences that result from much lawmaking.

---

[272] Bryan Walsh, *How Denmark Sees the World in 2012*, TIME (Aug. 4, 2008), http://content.time.com/time/health/article/0,8599,1828874,00.html.

[273] *See* Daniel Bodansky, *The Copenhagen Climate Change Conference: A Postmortem*, 104 AM. J. INT'L L. 230, 230 (2010) (discussing the summit attendees expectations of passing binding international environmental regulations).

[274] John Vidal & Allegra Stratton, *Low Targets, Goals Dropped: Copenhagen Ends in Failure*, THE GUARDIAN (Dec. 18, 2009, 7:47 PM), http://www.theguardian.com/environment/2009/dec/18/copenhagen-deal.

[275] Daniel J. Weiss, *Anatomy of a Senate Climate Bill Death*, CTR. FOR AM. PROGRESS (Oct. 12, 2010), http://science.time.com/2010/07/26/why-the-climate-bill-died/.

[276] John M. Broader, *Both Romney and Obama Avoid Talk of Climate Change*, N.Y. TIMES (Oct. 25, 2012), http://www.nytimes.com/2012/10/26/us/politics/climate-change-nearly-absent-in-the-campaign.html?_r=0.

[277] STAFF OF H. COMM. ON ENERGY & COMMERCE, 112TH CONG., ON THE ANTI-ENVIRONMENT RECORD OF THE U.S. HOUSE OF REPRESENTATIVES (Comm. Print 2012).

[278] *See The 2015 International Agreement*, EUROPEAN COMMISSION, http://ec.europa.eu/clima/policies/international/negotiations/future/index_en.htm (last visited Sept. 19, 2015) ("U.N. negotiations are under way to develop a new international climate change agreement that will cover all countries.").

D. Permanent Solutions

Francis also presumes that environmental regulations should remain unchanged once they are adopted. He argues that "continuity is essential, because policies related to climate change and environmental protection cannot be altered with every change of government. Results take time and demand immediate outlays which may not produce tangible effects within any one government's term."[279] This ignores the dynamic nature of environmental problems which demand dynamic solutions.

Environmental law shares the broader legal experience of retaining statutes that date from an altogether different era. Why should we still be governed by laws produced during the Nixon Administration, especially when those laws produce consequences unimaginable to their authors? Thomas Jefferson wrote to James Madison that "[t]he earth belongs always to the living generation."[280] Justice William O. Douglas extended that argument to administrative law when he advised President Franklin D. Roosevelt "over and over again that every agency he created should be abolished in ten years" because they were "likely to become a prisoner of bureaucracy and of . . . inertia."[281] This continued reliance on statutes dating from past generations presents an additional challenge for environmental laws that rely on, and seek to respond to, changing understandings of the natural world and our effects on it.

Temporary environmental regulations are the better alternative in many instances. They are surprisingly common, flexible, and effective. And they are all about humility. Temporary laws reflect the limits of our current knowledge and the possibility of evolving environmental values. They offer an opportunity to experiment with different legal tools to determine which ones are best equipped to achieve our desired results. Finally, they are especially respectful of future generations that want to decide their own governing environmental policies.

CONCLUSION

Pope Francis deserves great credit for encouraging greater attention to the environmental challenges that we confront. His moral assertions are more powerful than his regulatory prescriptions, but the lasting legacy of the Encyclical will be the former rather than the latter. Most of all, Francis should be commended for beginning a dialogue. "I would like to

---

[279] *Laudato Si'*, *supra* note 7, at para. 181.

[280] Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* THOMAS JEFFERSON: WRITINGS 963 (1984).

[281] WILLIAM O. DOUGLAS, GO EAST, YOUNG MAN, THE EARLY YEARS: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS 297 (1974).

enter into dialogue with all people about our common home,"[282] he says at the beginning of the Encyclical, and that dialogue is already well underway.

Francis should also be applauded for his humility: "On many concrete questions, the Church has no reason to offer a definitive opinion; she knows that honest debate must be encouraged among experts, while respecting divergent views."[283] That winsome approach is far more likely to earn a respectful hearing than a papal decree of what must be done. This humble attitude is especially valuable because, as I have explained elsewhere, humility provides the best lens for understanding our current environmental debates.

The lesson of *environmental* humility is that we need to restrain ourselves in order to minimize unacceptable impacts on the environment. We do not fully understand the world in which we live, which often causes us to underappreciate its value and to underestimate our impacts on it. The tremendous value of nature—in God's eyes, for the Christian and people of other faiths; or intrinsically, from the perspective of numerous theories of animal rights and nature—should remind us not to act as if the rest of the world does not matter. We need to cultivate "the willingness to leave places alone and to allow them to be maintained and modified by the people who live in them."[284] Humility tells us "not to make excessive demands of any kind upon [nature], not only those to sustain ever-increasing consumption but even those which express our 'love' for it."[285] To be environmentally humble is to live knowing both our own limits and the value of the natural world.

But the need for humility is not limited to environmental humility. The lesson of *legal* humility then is that we should not exaggerate our ability to identify and achieve our desired societal goals. We do not always know enough about a problem, its causes, and the effects of various solutions to produce the results that we seek. Even if we are able to design and implement a law that achieves our goals, that law may also produce unintended consequences that create distinct (and sometimes worse) problems than we sought to solve.[286] Our values may conflict, which can cause unstable laws that depend on fleeting lawmaking majorities. On the

---

[282] *Laudato Si'*, *supra* note 7, at para. 3.

[283] *Id.* at para. 61.

[284] EDWARD RELPH, RATIONAL LANDSCAPES AND HUMANISTIC GEOGRAPHY 162 (1981).

[285] Keekok Lee, *Awe and Humility: Intrinsic Value in Nature. Beyond an Earthbound Environmental Ethics, in* PHILOSOPHY AND THE NATURAL ENVIRONMENT 89, 94–95 (Robin Attfield & Andrew Belsey eds., 1994).

[286] *See, e.g.*, Ann Carlson, *Unintended Consequences and Environmental Policy*, LEGAL PLANET (Apr. 16, 2010), http://legal-planet.org/2010/04/16/unintended-consequences-and-environmental-policy/ (arguing that designers of watering programs in L.A. did not anticipate catastrophic results of the initiative).

other hand, sometimes we are able to employ the law to do exactly what we hoped. Legal humility reminds us to be alert for the possibility of either result.

Humility thus offers seemingly contradictory lessons for environmental law. Humility toward the *environment* emphasizes the need for restraint and for care given our lack of knowledge about the environmental impacts of our action. Humility toward the *law* cautions against exaggerated understandings of our ability to create and implement legal tools that will achieve our intended results. Taken together, these two understandings of humility can ensure that we are equally careful in how we approach both the effects of our actions on the natural environment and the effects of our laws.

Finally, the Encyclical does not say enough about God. That may be an odd claim about a papal encyclical, and it may reflect my own reformed Protestant perspective, but the parts of the Encyclical addressed to Christians fail to prioritize the overriding idea that God is at work in the world. Instead, the Encyclical sometimes sounds far too optimistic about our ability to do the right thing of our own accord: "Human beings . . . are also capable of rising above themselves, choosing again what is good, and making a new start, despite their mental and social conditioning. We are able to take an honest look at ourselves, to acknowledge our deep dissatisfaction, and to embark on new paths to authentic freedom."[287] But the Christian message questions our ability to do all of those good things left to our own devices. Francis hints toward this when he writes that "what they all need is an 'ecological conversion,' whereby the effects of their encounter with Jesus Christ become evident in their relationship with the world around them."[288] More powerfully still, Francis writes:

> A spirituality which forgets God as all-powerful and Creator is not acceptable. That is how we end up worshipping earthly powers, or ourselves usurping the place of God, even to the point of claiming an unlimited right to trample his creation underfoot. The best way to restore men and women to their rightful place, putting an end to their claim to absolute dominion over the earth, is to speak once more of the figure of a Father who creates and who alone owns the world.[289]

Fittingly, the Encyclical ends with two prayers. The first, "[a] prayer for our earth," encourages us to ask God "that we may sow beauty, not pollution and destruction."[290] The second, "[a] Christian prayer in union with creation," beseeches God "for the coming of your Kingdom of justice,

---

[287] *Laudato Si'*, *supra* note 7, at para. 205.

[288] *Id.* at para. 217.

[289] *Id.* at para. 75.

[290] *Id.* at para. 246.

peace, love and beauty."[291] It is God, after all, who created this world and who promises to redeem it—that is why the Encyclical concludes: "Praise be to you!"[292]

---

[291] *Id.*

[292] *Id.*

MARRIAGE AND FAMILY AS THE NEW PROPERTY: *OBERGEFELL*, MARRIAGE, AND THE HAND OF THE STATE

Helen M. Alvaré[*]

INTRODUCTION

In the United States Supreme Court decision announcing a constitutional right to same-sex marriage, *Obergefell v. Hodges*, the majority opinion characterizes marriage as a governmental entitlement of enormous psychic and material importance.[1] It declares that an individual's dignity, liberty, social status, and even personhood is closely bound to the receipt of a requested state license recognizing an emotional and sexual bond with another person as "marriage."[2]

So strong is *Obergefell*'s language and import respecting governmental power to grant or withhold marriage[3] that the majority's opinion immediately brings to mind a variation on the important questions raised both in Professor Charles Reich's 1964 classic, *The New Property*,[4] and Professor Mary Ann Glendon's 1981 classic, *The New Family and the New Property*:[5] What is the significance of the rise of governmental entitlements—a form of "new property" distinguished from traditional private property—as a substantial portion of citizens' security?[6]

Justice Kennedy's opinion for a five-justice majority in *Obergefell* suggests a fresh variation on the question: What is the significance of the Court's stress upon a state-granted marriage license—a form of "new property"[7]—as a leading source of individual dignity and material security? More specifically, what is its significance for human freedom (a question asked by both Reich and Glendon)[8] and for the future of

---

* Professor of Law, George Mason University School of Law. The author is grateful to the Summer Research Grant Program of the George Mason University School of Law and for the research assistance of Lucy Meckley.

1 135 S. Ct. 2584, 2599–2600, 2604–05 (2015).

2 *Id.* at 2593–94, 2601–02.

3 *See id.* at 2598–99, 2601–02 (reviewing and affirming Court precedent holding that marriage is a fundamental right).

4 Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

5 MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1981).

6 *Id.* at 1–2; Reich, *supra* note 4, at 756, 771.

7 Reich, *supra* note 4, at 787.

8 GLENDON, *supra* note 5, at 7 (noting that the economic security and social status of many individuals are increasingly determined by dependency relationships with government); Reich, *supra* note 4, at 756, 771 ("If the day comes when most private ownership is supplanted by government largess, how then will governmental power over

marriage—an institution ironically struggling for relevancy and stability at the same moment that the Supreme Court has ordered states to offer marriage licenses to an additional set of citizens: same-sex couples?[9]

Some may observe immediately that marriage has always been a "governmental entitlement" insofar as the government and no other source has provided the legal recognition and financial benefits that underpin marriage licenses; thus, *Obergefell* marks no great change.[10] This observation, however, overlooks how, in the long history of marriage worldwide and in the United States, marriage was primarily defined by nature and only ratified and made orderly by government.[11] It also overlooks the way in which Justice Kennedy's *Obergefell* opinion both explicitly excises nature from marriage[12] and is peppered with language describing what a marriage license "does" and "gives" to citizens.[13] In the end, *Obergefell* ignores the history of marriage as a pre-governmental, human-instigated union, designed by nature to be the origin and guardian

individuals be contained? . . . What will happen to the Constitution, and particularly the Bill of Rights, if their limits may be bypassed by purchase, and if people lack an independent base from which to assert their individuality and claim their rights?").

[9] *Compare Obergefell*, 135 S. Ct. at 2604–05 (holding that states must allow same-sex couples to marry), *with* Andrew J. Cherlin, Opinion, *In the Season of Marriage, a Question. Why Bother?*, N.Y. TIMES, Apr. 27, 2013, § SR, at 7 (stating that "[t]oday, marriage is more discretionary than ever" because it has become "a status symbol—a highly regarded marker of a successful personal life"), *and* Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, PEW RES. CTR. (Sept. 24, 2014), http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married (noting that an increasing number of Americans are delaying and forgoing marriage).

[10] *Compare* M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 DRAKE L. REV. 1081, 1088, 1092 (2010) (noting that many tax and entitlement benefits are dependent upon a couple being married), *and* Amelia A. Miller, Note, *Letting Go of a National Religion: Why the State Should Relinquish All Control Over Marriage*, 38 LOY. L.A. L. REV. 2185, 2204 (2005) (describing civil marriage as a set of legal protections and benefits from the government based upon issuance of a marriage license), *with Obergefell*, 135 S. Ct. at 2601 (discussing the legal recognition and government benefits exclusively available to married couples).

[11] *See infra* Part I.

[12] *See Obergefell*, 135 S. Ct. at 2599, 2601–02 (stating that "limitation of marriage to opposite-sex couples may long have *seemed* natural and just," but it "is now manifest" that the newly-recognized basic principles undergirding marriage recognition undercut that prior understanding (emphasis added)). To wit: this new understanding of marriage is based upon principles of individual autonomy; the institution's subjective importance to two individuals; the state's interest in communicating to children reared in households with adult same-sex partners that the state regards their families as identical to opposite-sex married homes; and the belief of five Justices on the Court that there is no difference between same- and opposite-sex pairs respecting grounding social order.

[13] *See id.* at 2594, 2599–2602 (majority opinion) (describing a plethora of benefits associated with marriage).

of vulnerable human life.[14] It rather frames marriage as a gateway, opened by the state, to a plethora of economic and emotional benefits.[15]

The implications of shifting our understanding of marriage toward a governmental entitlement are undoubtedly large. They will unfold over time. This Article can only sketch out some initial reflections on the subject, guided at points by the excellent questions about governmental entitlements and family vulnerabilities raised in earlier times by Professors Reich and Glendon.[16] I will take up the subject as follows:

Part I contrasts understandings of marriage in U.S. law during the periods before and after the recent movement for same-sex marriage, which was capped by *Obergefell*. It shows a movement away from the notion that marriage comes "up from nature" and toward the notion that marriage comes "down from the state."

Part II proposes the significance for citizens' freedom of adding "marriage" to the list of entitlements the government offers to some.

Part III considers the significance for marriage and family life of these goods being folded into the category of "new property."

The Conclusion offers a few reflections upon marriage as a form of "new property" in light of one of the most significant problems concerning marriage among vast number of Americans today: the retreat from marriage among the poor and lower-middle-income class.

I. FROM "UP FROM NATURE" TO "DOWN FROM THE STATE"

In the United States, beginning in the colonial era, the meaning of marriage has been largely determined by the citizens undertaking it and based upon the promptings of nature, including human reason and the Christian religion of the Founders.[17] Early understandings of marriage were not derived from marriage laws passed by the states.[18] Marriage was generally understood as the (presumably) lifelong union of one man and

---

[14] *See id.* at 2612–13, 2626 (Roberts, C.J., dissenting) (discussing the historical and traditional understanding of marriage as a method of ensuring that children are raised in the context of a stable, lifelong relationship and criticizing the majority for casting aside this understanding).

[15] *See id.* at 2600–01 (majority opinion) (describing the harm suffered by same-sex couples denied a marriage license in the context of social and economic benefits associated with marital status).

[16] *See* GLENDON, *supra* note 5, at 7 (suggesting that the economic security, social status, and family relationships of many individuals are increasingly determined by dependency relationships with government); Reich, *supra* note 4, at 737, 746–47, 761–62 (discussing how government entitlements create dependencies and make individuals vulnerable to increased government power and oversight).

[17] NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 9–11 (2000) (discussing how early views of marriage in America were influenced by the Founders, moral and political philosophers, church doctrine, and the common law).

[18] *See id.* at 9 (noting that early understandings of marriage were embedded in general political assumptions and common sense).

one woman, the guarantor of the continuity of society through the birth and rearing of children, and a basis for a well-ordered society.[19] There was a great deal of debate among lawmakers, religious leaders, and other prominent intellectuals about the degree to which citizens should be left free to contract marriages between themselves.[20] Affection for individual freedom of contract, combined with growing affection for the "companionate" (versus patriarchal or other hierarchical) model of the family, grounded strong arguments for complete freedom of contract to marry, without any associated requirements of advance public notice, witnesses, or solemnization by a religious or legal figure.[21]

For these reasons, alongside the practical difficulties of public oversight of marriage in far-flung, rural, and sparsely settled places, "common-law marriage" flourished broadly in the United States.[22] Still, even this form of "unlicensed" and "unsolemnized" marriage required a "mutual agreement to be husband and wife made in public or private," ordinarily combined with cohabitation and an agreement to hold themselves out as a married couple.[23]

Even when the community or the state did impose more formal requirements for marriage, they came in the form of processes by which a man and a woman would notify the community about their marriage in order that parents, and sometimes the community, could exercise some oversight (e.g., age, partner suitability) over the would-be spouses' union.[24] Consequently, most colonies, in addition to accepting common-law marriages,[25] required either licenses issued by magistrates,[26] or more likely, a five-step process involving: "espousals, publication of banns, execution of the espousal contract at church, celebration, and sexual consummation."[27] Eventually, over the course of the nineteenth century, almost every state adopted a marriage license law,[28] while some also

---

19 *Id.* at 2–3, 10.

20 *See, e.g.*, MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 71–74, 86 (1985) (reviewing examples of the vigorous public debate concerning the appropriate societal treatment of common-law marriage).

21 *See id.* at 74 (noting that marriage has historically been viewed as a contract, and therefore, the formalities required by nuptial laws were directory in nature, rather than mandatory); STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE, at xvi (1988) (discussing how the companionate family model influenced the public's view of marriage).

22 *See* COTT, *supra* note 17, at 29, 39 (discussing the general acceptance of common-law marriage among communities and the judiciary, especially in sparsely populated areas).

23 GROSSBERG, *supra* note 20, at 65–66, 79.

24 *Id.* at 67.

25 *Id.* at 73.

26 COTT, *supra* note 17, at 28.

27 GROSSBERG, *supra* note 20, at 65, 67.

28 *Id.* at 93.

continued to recognize common-law marriages based upon the couple's explicit consent plus evidence of marital life.[29]

Over the last 200 years and more, remarkably few preconditions have been attached to the receipt of a marriage license across the United States. Those created in early years reflected the social interest in the couple's eligibility for marriage (e.g., the prohibition on bigamy; opposite sexes)[30] and their likely stability (e.g., age).[31] Today, some states have waiting periods for marriage licenses in order to allow the couple to reflect upon their marital intentions.[32] Clerks exert virtually no oversight over the couple.[33] Generally one or both parties merely need to appear and provide information, including names, social security numbers, and statements about marital status, along with a statement about whether the parties are related by any degree of blood or marriage.[34] The license is issued on the same day the application is taken, allowing the marriage to take place immediately or within a few days.[35]

It can be said overall about these processes that their emphases were upon governmental recognition of facts and circumstances in the hands of nature and the couple.[36] It was nature that made two sexes, drew them toward one another with the possibility even of a one-flesh union, and designed their union to lead to new human life, which life needs a great deal of highly-interested care for an extended period of time in order to flourish. In the words of marriage historian Nancy Cott, reflecting upon the leading nineteenth century American family law treatise authored by Joel Prentiss Bishop:

---

[29] GROSSBERG, *supra* note 20, at 101 (noting that common-law marriages remained legal in many states); *see also* COTT, *supra* note 17, at 39 (noting that informal marriages evincing consent of the couple and community acceptance were generally validated by courts).

[30] GROSSBERG, *supra* note 20, at 108, 120.

[31] *Id.* at 105.

[32] *See* Adam Candeub & Mae Kuykendall, *Modernizing Marriage*, 44 U. MICH. J.L. REFORM 735, 751 (2011) (noting that "[w]aiting periods for a [marriage] license are generally nonexistent or minimal"); *see also Marriage Laws*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/table_marriage (last visited Sept. 29, 2015) (listing twenty-six states that have waiting periods associated with marriage licenses and twenty-four that do not).

[33] *See* Candeub & Kuykendall, *supra* note 32, at 751 (noting that a marriage license application requires only "basic personal data").

[34] *Id.* at 751–52; Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1162 (1999).

[35] *See supra* note 32 and accompanying text.

[36] *See* COTT, *supra* note 17, at 40 (noting that state marriage laws were historically viewed as directory, rather than mandatory, because marriage was considered a common right); GROSSBERG, *supra* note 20, at 24 (noting that even after the contractual understanding of marriage began eroding, "[m]arriage law remained wedded to the assumptions that individual choice was the norm [and that] state intervention was only a last resort in special situations").

> Bishop endowed the institution with a more inspired genealogy by adding that "its source is the law of nature." When state legislators went about altering marriage in response to social and economic pressures, they did so with some ambivalence, looking above and behind them as though a more powerful presence were watching.[37]

A constant trait of American marriage recognition law, then, from its earliest period to recently, is that the associated societal or state "processes" constitute a minimal aspect of marriage as compared with the naturally given circumstances and personal choices of the couple seeking marriage.[38]

The Supreme Court acknowledged this reality most specifically in its decisions in *Loving v. Virginia*—overturning an antimiscegenation law[39]—and *Zablocki v. Redhail*—striking down a state's child support payment precondition to marriage.[40] Because the couples otherwise satisfied the legal requirements for marriage, their natural rights to marriage were apparent to the Court.[41] Thus, the *Loving* Court referred to human nature, including the fact of men's and women's procreative potential, when it called marriage "one of the 'basic civil rights of man,' fundamental to our very existence and survival" and "one of the vital personal rights essential to the orderly pursuit of happiness by free men."[42] The *Zablocki* Court referred to similar natural realities when it called marriage of "fundamental importance" to individuals,[43] and referred three times immediately thereafter to its procreative nature.[44]

But with Justice Kennedy's *Obergefell* opinion, there is a decided movement *away* from the notion that marriage emanates from the nature of the couple, and *toward* the notion that marriage is an endowment available from the hand of the state.[45] This is not altered by the Kennedy opinion's repeating of what appears to be a list of plaintiffs'

---

[37] COTT, *supra* note 17, at 47 (quoting 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE 2 (1864)).

[38] *See* GROSSBERG, *supra* note 20, at 24 (noting that marriage laws generally emphasized individual choice over state intervention); *see also id.* at 74 (noting how judges minimized the importance of formal nuptial laws and emphasized the inherently contractual nature of marriage).

[39] 388 U.S. 1, 12 (1967).

[40] 434 U.S. 374, 375, 382 (1978).

[41] *See id.* at 377–78, 384 (holding that government cannot deny the fundamental right to marriage solely because one would-be spouse failed to pay child support); *Loving*, 388 U.S. at 2 (holding that a law prohibiting marriage solely on the basis of race is unconstitutional).

[42] *Loving*, 388 U.S. at 12 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

[43] *Zablocki*, 434 U.S. at 384.

[44] *Id.*

[45] *See Obergefell*, 135 S. Ct. at 2594–98, 2604 (noting marriage's initial contract-based status in America, tracing its evolution in American culture, and concluding that same-sex marriage is now a fundamental right flowing from the Constitution).

"qualifications" for marriage: their mutual romantic emotions and their desires for sexual intimacy and social recognition of their commitment.[46] Justice Kennedy is not seriously positing that such matters are legal preconditions for marriage. In fact, a later portion of his opinion explicitly acknowledges that opposite-sex couples have long been validly marrying for "many personal, romantic, and practical considerations." [47] Furthermore, state and federal courts pre-*Obergefell* have not generally characterized this set of dispositions and feelings (romantic emotions and desires for sexual intimacy and social recognition) as preconditions to the receipt of a marriage license.[48] It is more likely that Justice Kennedy repeated these elements of same-sex couples' relationships to demonstrate a similarity with opposite-sex couples' marital dispositions.[49]

The *Obergefell* opinion emphasizes the "state-given" nature of marriage in a variety of ways. First, the Kennedy opinion frequently, dramatically, and in highly emotional language describes what the majority believes a marriage license will give the same-sex couple.[50] No such language or list is found in pre-*Obergefell* state family codes or in Supreme Court opinions concerning state marriage laws. The Kennedy opinion pronounces, however, that state-sanctioned marriage will provide same-sex *persons* the ability to "define and express their identity,"[51] to experience "nobility and dignity," "unique fulfillment,"[52] a "union unlike any other in its importance to the committed individuals,"[53] and one of "'life's momentous acts of self-definition.'"[54] It will allow same-sex couples to "find other freedoms," including "expression, intimacy, and spirituality."[55]

---

[46] *See id.* at 2594–95, 2597, 2599–2601 (discussing how mutual love and desires for intimacy and societal recognition have influenced same-sex couples to seek married status).

[47] *Id.* at 2607.

[48] *See, e.g.*, DeBoer v. Snyder, 772 F.3d 388, 406 (6th Cir. 2014) ("With love and commitment nowhere to be seen, States will grant a marriage license to two friends who wish to share in the tax and other material benefits of marriage . . . ."), *rev'd sub nom. Obergefell*, 135 S. Ct. 2584; United States v. Orellana-Blanco, 294 F.3d 1143, 1151 (9th Cir. 2002) (holding that a marriage is not invalidated simply because the parties have motives other than love or companionship); *Ex parte* Alabama *ex rel.* Ala. Policy Inst., No. 1140460, 2015 WL 892752, at *33 (Ala. Mar. 3, 2015) ("State governments do not inquire about whether couples love each other when they seek a marriage license, nor do governments have any justifiable reason to do so.").

[49] *See Obergefell*, 135 S. Ct. at 2599–2602 (discussing how same-sex couples have needs and desires similar to opposite-sex couples).

[50] *See id.* at 2593–94, 2599–2602 (describing economic and social benefits associated with marital status).

[51] *Id.* at 2593.

[52] *Id.* at 2594.

[53] *Id.* at 2599.

[54] *Id.* (quoting Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003)).

[55] *Id.*

The *Obergefell* majority opinion not only regularly highlights the claimed psychic benefits of state-recognized marriage,[56] but also emphasizes its material benefits. Writes the Court:

> [T]hroughout our history [governments] made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. Valid marriage under state law is also a significant status for over a thousand provisions of federal law.[57]

Finally, the Kennedy opinion claims that state marriage recognition can improve the lot of children being raised in same-sex households with the two adults who are their legal parents:

> By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." Marriage also affords the permanency and stability important to children's best interests.
>
> . . . .
>
> . . . Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life.[58]

No matter whether evidence could be found now or in the future to validate Justice Kennedy's claims about what marriage licenses offer to same-sex pairs of adults and to children reared in their households, there is no doubt that his opinion is replete with language indicating that state marriage recognition is an extraordinarily valuable government entitlement.[59]

The *Obergefell* decision next emphasizes the government's role in granting marriage by two methods it uses to achieve its holding: its ignoring of the common sense differences between same-and opposite-sex unions; and its unserious due process analysis. Each of these points is sufficient for its own article, but for reasons of length, I can offer only brief reflections on each.

---

[56] *See id.* at 2594–95, 2598–2600 (noting the integrity, dignity, expression, intimacy, and beauty of marriage).

[57] *Id.* at 2601 (citation omitted).

[58] *Id.* at 2600 (citations omitted) (quoting United States v. Windsor, 133 S. Ct. 2694 (2013)).

[59] *See supra* note 50 and accompanying text.

Prior to the recent campaign by interest groups asserting that marriage rights were the *sine qua non* of LGBT equality,[60] it was axiomatic that states took a special interest in opposite-sex marriage because of the state's interest in the continuation of human society (children) and because married couples both procreate children and possess the more stable setting best suited to children's—and therefore society's—needs.[61] In fact, in an unbroken string of Supreme Court decisions from the mid-nineteenth to the late-twentieth century (pre-*Windsor*), the Court consistently affirmed states' interests in marriage and procreation: the birthing and raising of children and the contribution of parenting to society.[62] Despite the ruling in *Obergefell*, the Court's precedent evinces that the union of a man and a woman is still uniquely deserving of attention and support.[63] Justice Kennedy's *Obergefell* opinion, however, devotes just one slim paragraph to the proposition that children are not at all intrinsically tied up with the state's interest in marriage because "it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate."[64] While this is true as far as it goes, it is also clearly a makeweight argument, irrelevant to the actual situation on the ground. Almost ninety percent of married couples have children.[65] Procreation simply is and has always

---

[60] *See* Mary Ziegler, *The Terms of the Debate: Litigation, Argumentative Strategies, and Coalitions in the Same-Sex Marriage Struggle*, 39 FLA. ST. U. L. REV. 467, 479 (2012) (noting that same-sex marriage became "an organizational priority for both gay rights groups and their opponents" in the 1990s).

[61] William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153, 154, 158 (2004).

[62] Troxel v. Granville, 530 U.S. 57, 68–69 (2000); Lehr v. Robertson, 463 U.S. 248, 256–57 (1983); Parham v. J.R., 442 U.S. 584, 602 (1979); Zablocki v. Redhail, 434 U.S. 374, 383, 386 (1978); Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 843–44 (1977); Moore v. City of E. Cleveland, 431 U.S. 494, 503–04 (1977); Boddie v. Connecticut, 401 U.S. 371, 389 (1971) (Black, J., dissenting); Loving v. Virginia, 388 U.S. 1, 8, 12 (1967); Prince v. Massachusetts, 321 U.S. 158, 168 (1944); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Maynard v. Hill, 125 U.S. 190, 205 (1888); Murphy v. Ramsey, 114 U.S. 15, 45 (1885); Reynolds v. United States, 98 U.S. 145, 165 (1878); *see also* Brief of Amicus Curiae Helen M. Alvaré in Support of Hollingsworth and Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal at 9–15, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144) (collecting cases and arguing that "[s]tates have [a] substantial interest in the birth of children" and "the way marriage socializes children").

[63] *See supra* note 62 and accompanying text.

[64] *Obergefell*, 135 S. Ct. at 2601.

[65] *See* GRETCHEN LIVINGSTON & D'VERA COHN, PEW RES. CTR., CHILDLESSNESS UP AMONG ALL WOMEN; DOWN AMONG WOMEN WITH ADVANCED DEGREES 4 (2010), http://www.pewsocialtrends.org/files/2010/11/758-childless.pdf. ("Among 40–44-year-old women currently married or married at some point in the past, 13% had no children of their own in 2008 . . . ."). Furthermore, premarital investigations regarding couples' procreativity would likely run up against barriers of privacy and make accurate information hard to

been closely associated in fact with the type of relationship that men and women have when they marry.[66]

In comparison, a small number of same-sex couples employ medical and social services to rear children obtained via adoption or reproductive technologies, in every case removing the child from one or both of her natural parents.[67] The vast majority of same-sex couples with children in their households naturally procreated those children with a partner of the opposite sex in a prior marriage or other relationship.[68] In short, there is a natural and socially important difference between same- and opposite-sex intimate unions. Justice Kennedy's refusal to confront this in order to give the Supreme Court the power to entitle new groups to marriage licenses emphasizes how much *Obergefell* transforms legal marriage from a naturally given right and privilege into a governmentally-crafted grant.

Finally, the Kennedy opinion casts marriage as governmental largess by its crafting out of whole cloth a substantive due process "analysis" with no apparent connection to the democratically enacted law—the Constitution—it claimed to interpret.[69] Justice Kennedy's lack of respect for legal precedent and lack of seriousness about the Constitution, in the service of redefining what marriage is where marriage licenses are concerned, adds to the sense that he is forcing states to grant a governmental benefit—versus instructing them to respond to a natural human right before which the Constitution must bow.

Even defenders of same-sex marriage lament Justice Kennedy's non-legal, unprincipled, and sloppy mode of "finding" a new due process right to same-sex marriage.[70] The Chief Justice's dissent in *Obergefell* captures

---

gather. *Cf. Obergefell*, 135 S. Ct. at 2599 (discussing marriage in the context of a right to privacy).

[66] John Witte, Jr., *Reply to Professor Mark Strasser, in* MARRIAGE AND SAME-SEX UNIONS 43, 45 (Lynn Wardle et al. eds., 2003).

[67] *See* Garry J. Gates, *Family Formation and Raising Children Among Same-Sex Couples*, NCFR REP., Winter 2011, at F1–F2 (explaining that children of gay and lesbian couples are most often the product of previous different-sex relationships).

[68] *Id.* at F1; Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 SOC. SCI. RES. 752, 756–57 (2012).

[69] *See Obergefell*, 135 S. Ct. at 2597–2602 (finding a fundamental right to marriage in the Due Process Clause based on new insights about the meaning and extent of "liberty"); *see also id.* at 2611–12, 22–24, 26 (Roberts, C.J., dissenting) (arguing that the right announced by the majority's opinion "has no basis in the Constitution" or the "Court's precedent").

[70] *E.g.*, Andrew Koppelman, *The Supreme Court Made the Right Call on Marriage Equality—But They Did It the Wrong Way*, SALON (June 29, 2015), http://www.salon.com/2015/06/29/the_supreme_court_made_the_right_call_on_marriage_equality_—_but_they_did_it_the_wrong_way ("If this is all the explanation they are going to get, then conservatives are right to feel bullied by judicial oligarchs."); Ilya Somin, *A Great Decision on Same-Sex Marriage—But Based on Dubious Reasoning*, WASH. POST (June 26, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/a-great-decision-

the situation most accurately: "The majority's decision is an act of will, not legal judgment;"[71] "[i]t had nothing to do with" the Constitution.[72] It seems impossible to characterize Justice Kennedy's method otherwise.

After first recognizing that there is relevant precedent—*Washington v. Glucksberg*,[73] which "insist[s] that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices"[74]—Kennedy claims without any supporting rationale that this test is inapplicable to marriage questions.[75] He then poses a new test supported by no legal precedent and containing no legal standards; it is based, rather, upon what five Supreme Court Justices believe to be good law at any given time.[76] To wit, Kennedy writes that constitutional rights "come not from ancient sources alone [but also] from a *better informed understanding* of how constitutional imperatives define a liberty that remains urgent in our own era."[77] And what is the result of this "better informed understanding"? Kennedy writes:

- "[T]he necessary consequence [of a challenged law] is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied."[78]
- "Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples."[79]
- "[I]t would disparage their choices and diminish their personhood to deny them this right."[80]

It is pointless to attempt to analyze legally such vague, tautological, emotive, and conclusory language. Its meanings are infinitely malleable and subject to the eye of the beholder. None of the four other Justices in the majority wrote concurrences to strengthen or interpret this logic.[81] It

---

on-same-sex-marriage-but-based-on-dubious-reasoning ("Today's Supreme Court decision on same-sex marriage is a great result, but based on dubious reasoning.").

71 *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting).

72 *Id.* at 2626.

73 521 U.S. 702 (1997).

74 *Obergefell*, 135 S. Ct. at 2602.

75 *Id.*

76 *See id.* at 2602–03 (rejecting an historical approach to analyzing fundamental rights and adopting an approach based on the Court's evolving understanding of liberty); *see also id.* at 2611–12 (Roberts, C.J., dissenting) (criticizing the majority for analyzing fundamental rights based on new constitutional insights rather than established constitutional principles).

77 *Id.* at 2602 (majority opinion) (emphasis added).

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.* at 2591.

unavoidably leaves the reader with the sense that its authors—judges—are willing to legislate to get their way.[82]

At the conclusion of the *Obergefell* majority's substantive due process section, then, an observer knows that while there is nothing in the text of the Constitution about marriage, and nothing in prior due process precedents to confirm a right to same-sex marriage,[83] five Justices feel they have a "better informed understanding" of marriage than any given state legislature, and have the legal power to force every state to act accordingly.[84] This move, in addition to *Obergefell*'s divorcing marriage from its natural foundations, and emphasizing what a marriage license "gives" its recipients,[85] fuels a sense that governmental officials are expending enormous resources, and even burning constitutional bridges, in order to manufacture a new entitlement for certain citizens.

II. THE IMPLICATIONS FOR CITIZENS' FREEDOM WHEN MARRIAGE IS "NEW PROPERTY"

Part I demonstrated that, relative to the time before *Obergefell*, when marriage was legally treated as "up from nature"—a natural, pre-governmental reality to which society and the state contributed some order and stability through recognition and recording—post-*Obergefell*, marriage is a privilege dispensed by the state. What are some of the consequences of such a shift in understanding upon the freedom of citizens? This is a natural or obvious question whenever government assumes a new power. It is an important question especially, however, when government assumes a power to define the meaning and purposes of an institution that existed *prior to* government.

There are several circumstances that render *Obergefell*'s creation of a new legal entitlement to marriage significant for citizens' freedom, beginning with its consequences for citizens' freedom to disagree with the ethical status of same-sex marriage.[86] Mary Ann Glendon noted decades ago that in diverse societies like our own, societies in which "custom and tradition wither and ideas about religion and ethics diverge," it easily happens that "civil law often seems to be the only remaining system of norms common to all or most groups in the population."[87] Same-sex marriage appears to have traveled far to become a "norm" among at least

---

[82] *See id.* at 2611–12 (Roberts, C.J., dissenting) (arguing that the decision to allow same-sex marriage should be made through elected representatives and not through the Court because "this Court is not a legislature[, and] under the Constitution, judges have power to say what the law is, not what it should be").

[83] *Supra* note 69 and accompanying text.

[84] *Supra* note 76 and accompanying text.

[85] *Supra* notes 45–59 and accompanying text.

[86] *Obergefell*, 135 S. Ct. at 2642–43 (Alito, J., dissenting).

[87] GLENDON, *supra* note 5, at 120.

half the American population in very short order.[88] Its trajectory was marked with the same language now deployed in the Supreme Court opinion establishing marriage law in the fifty states—language indicating that dissenters from the new norm aim to "demean[]" and humiliate LGBT people,[89] given that same-sex marriage is inextricably related to LGBT persons' "dignity" and "personhood."[90] Precisely because the law today has become what Glendon suggests—a shorthand reference for moral norms[91]—and because same-sex marriage is not only the law, but clothed quite explicitly in *Obergefell* with normative language,[92] it portends difficulties for citizens even with well-crafted, reasoned religious objections to same-sex marriage.[93]

Obergefell also bids to limit citizen freedom because the structure of our civil rights and nondiscrimination laws pave the way for lawsuits against third parties who do not wish to participate in same-sex marriages.[94] These laws regularly forbid discrimination on the basis of sex,[95] sexual orientation,[96] or marital status.[97] With the legalization of same-sex marriage, courts are more likely to entertain lawsuits claiming one or more of these forbidden grounds of discrimination?[98] Some of these lawsuits might be instituted by same-sex couples against individuals and

---

[88] *See* Emily Swanson, *Major Survey Shows Most in U.S. Now Support Same-Sex Marriage*, SEATTLE TIMES, Mar. 6, 2015, at A4 (stating that fifty-six percent of Americans support the right to same-sex marriage). *But see* Michael J. New, *In the Wake of* Obergefell, *Three New Polls Show Reduced Support for Same-Sex Marriage*, NAT'L REV.: THE CORNER (July 21, 2015, 2:21 PM), http://www.nationalreview.com/corner/421443/obergefell-same-sex-marriage-poll-reduced-support (showing a decline in support for same-sex marriage after *Obergefell*).

[89] *See Obergefell*, 135 S. Ct. at 2601–02 (stating that it "demeans" same-sex couples to deny them marriage licenses).

[90] *Id.* at 2594, 2599, 2602.

[91] GLENDON, *supra* note 5, at 120.

[92] *See Obergefell*, 135 S. Ct. at 2595–97 (discussing how the history of marriage has evolved to support same-sex unions).

[93] *Id.* at 2625–26 (Roberts, C.J., dissenting) (discussing how the majority's decision does not create accommodation for religious convictions).

[94] Emma Green, *Gay Rights May Come at the Cost of Religious Freedom*, THE ATLANTIC (July 27, 2015), http://www.theatlantic.com/politics/archive/2015/07/legal-rights-lgbt-discrimination-religious-freedom-claims/399278.

[95] *E.g.*, GA. CODE ANN. § 8-3-202(a)(1) (LexisNexis, LEXIS through 2015 Reg. Sess.); ME. REV. STAT. ANN. tit. 5, § 4602(1) (West, Westlaw through ch. 238, 268–377, 2015 First Reg. Sess.).

[96] *E.g.*, CAL. EDUC. CODE § 200 (West, Westlaw through ch. 291, 2015 Reg. Sess.); WASH. REV. CODE § 49.60.030 (Westlaw through 2015 Reg. Sess. & First, Second, Third Spec. Sess.).

[97] *E.g.*, COLO. REV. STAT. § 24-34-502(1)(a) (LexisNexis, LEXIS through 2015 First Reg. Sess.); N.Y. EXEC. LAW § 291(1) (McKinney, Westlaw through L. 2015, ch. 1–237).

[98] *See, e.g.*, Alan Blinder & Tamar Lewin, *Clerk Chooses Jail Over Deal on Gay Unions*, N.Y. TIMES, Sept. 4, 2015, at A1 (reporting on a court clerk who was jailed for refusing to grant marriage licenses to same-sex couples).

businesses that desire to avoid cooperating with celebrating the same-sex marriage.[99] On the same legal ground, same-sex married employees might sue religious institutions for whom opposite-sexed marriage constitutes part of the very fabric of their entire theology.[100]

Obergefell has not only strengthened the hands of private citizens to force other citizens to cooperate with their same-sex marriage *and* to bring with them the power of the state; it has also strengthened the already powerful hand of corporations that, even pre-*Obergefell*, used their considerable economic leverage in sometimes economically stressed states to insist that governments allow same-sex marriage and tightly cabin religious freedoms not to cooperate with it. Such was the case with recent struggles over same-sex marriage and religious freedom in states such as Indiana, Louisiana, and Arizona.[101] Multi-million-dollar corporations, using emotional language about same-sex marriage (and conscientious objectors thereto)—language now enshrined as law in *Obergefell*[102]—threatened state lawmakers with drastic economic and employment losses if they passed religious freedom protections in connection with same-sex marriage.[103] Individual citizens are also pressured by their private and public employers for dissenting from legalized same-sex marriage on the

---

[99] *See, e.g.*, Brief of Appellants at 1–2, Odgaard v. Iowa Civil Rights Comm'n, No. 14-0738 (Iowa Aug. 4, 2014) (discussing a case in which a couple was sued for refusing to host same-sex weddings in their art gallery).

[100] *See, e.g.*, Amy Leigh Womack, *Former Mount de Sales Teacher Files Discrimination Suit Against the School*, MACON TELEGRAPH, June 30, 2015, at 1 (reporting on a former teacher who filed suit against a Catholic school alleging that he was fired for planning to marry his same-sex partner).

[101] *Cf.* Eric Bradner, *Bobby Jindal Signs 'Religious Freedom' Order Protecting Same-Sex Marriage Opponents*, CNN (May 20, 2015), http:// www.cnn.com/2015/05/20/politics/bobby-jindal-religious-freedom-louisiana (noting concerns of leaders in New Orleans business and tourism industries over alienation of some visitors and conventions as a result of a law being passed to protect businesses that refuse to serve same-sex marriage couples); Tony Cook et al., *Indiana Governor Signs Amended 'Religious Freedom' Law*, USA TODAY (Apr. 2, 2015), http://www.usatoday. com/story/news/nation/2015/04/02/indiana-religious-freedom-law-deal-gay-discrimination /70819106 (mentioning business leaders' opposition to Indiana's Religious Freedom Restoration Act due to fear that discrimination would be permitted against the lesbian, gay, bisexual, and transgender communities); Tal Kopan, *10 Things to Know: Arizona SB 1062*, POLITICO (Feb. 27, 2014), http://www.politico.com/story/2014/02/arizona-sb1062-facts-104031 (referencing the opposition received from major corporations to an Arizona bill that would have broadened protection for nongovernmental entities in regard to free exercise of religion).

[102] *Obergefell*, 135 S. Ct. at 2594, 2599, 2608.

[103] *See* Nicole Hensley, *Corporations, Cities and Celebrities Drive Push to Boycott Indiana After Governor Signs Controversial Religious Freedom Bill*, N.Y. DAILY NEWS (Mar. 27, 2015), http://www.nydailynews.com/news/politics/pledges-boycott-indiana-grow-religion-bill-passes-article-1.2164482 (reporting that companies such as Apple, Yelp, Gen Con LLC, and SalesForce plan to boycott Indiana's new religious freedom law).

grounds that their behavior is personally harmful to LGBT people in the same way *Obergefell* now asserts.[104]

Obergefell also grants states an enormous set of powers over the lives of children.[105] Historically and still, family law has linked marriage with children.[106] Marriage was naturally linked to children *de facto*, when it was universally understood as an opposite-sex institution due to opposite-sex partners' powers of procreation.[107] Post-*Obergefell*, it seems that marriage is now linked to children *de jure*. While Justice Kennedy's opinion specifically disclaims that procreation is of any special interest to states in the context of their marriage laws,[108] it simultaneously claims that the Court has often described "the varied rights [of childrearing, procreation, and education] as a unified whole: '[T]he right to "marry, establish a home and bring up children" is a central part of the liberty protected by the Due Process Clause.'"[109] Of course, the Court had previously employed this formula because it assumed that marriage was opposite-sexed and therefore generally capable of producing children.[110] But Justice Kennedy seems to be repeating this formula in *Obergefell* to suggest that a right to state-recognized marriage *also* includes a right to children.[111] For same-sex couples this obviously implies a right to legally parent children conceived in prior heterosexual relationships, by adoption, or by collaborative reproduction using the eggs, sperm, and/or wombs of others. This involves, of course, more legal apparatuses in order to enforce various court orders, contracts, or other agreements establishing the parentage of each child, given that gestation and genetic connection or both—the usual markers of parentage—will be absent in every case.[112] In

---

[104] *See, e.g.*, Blinder & Lewin, *supra* note 98 (discussing a Kentucky county clerk who was detained for contempt of court when she refused to issue same-sex marriage licenses); Dave Lee, *Mozilla Boss Brendan Eich Resigns After Gay Marriage Storm*, BBC NEWS (Apr. 4, 2014), http://www.bbc.com/news/technology-26868536 (discussing the resignation of a corporate executive after receiving heavy criticism regarding his opposition to same-sex marriage).

[105] *See Obergefell*, 135 S. Ct. at 2600–01 (discussing how recognizing a fundamental right to same-sex marriage helps protect children).

[106] *See supra* note 62 and accompanying text.

[107] Witte, *supra* note 66, at 45.

[108] *Obergefell*, 135 S. Ct. at 2601.

[109] *Id.* at 2600 (quoting Zablocki v. Redhail, 434 U.S. 374, 384 (1978)).

[110] *Id.* at 2614 (Roberts, C.J., dissenting) (arguing that precedential due process cases were based on a traditional description of marriage as between a man and a woman for the purpose of procreation).

[111] *See id.* at 2600–01 (majority opinion) (discussing the benefits that children receive from marriages recognized by the state).

[112] *See* Alexa E. King, *Solomon Revisited: Assigning Parenthood in the Context of Collaborative Reproduction*, 5 UCLA WOMEN'S L.J. 329, 331–33 (1995) ("[T]he current legal framework fails to reflect the reality of families of consent creating children through

other words, the entitlement to one government benefit—recognized marriage—opens the door to more government power via a need for government action in order to make parentage determinations. Professor Reich already observed this dynamic fifty years ago when he wrote that "government's power grows forthwith; it automatically gains such power as is necessary and proper to supervise its largess."[113]

The further difficulty with the states' new powers respecting children, of course, concerns the potential clash with children's rights. It is a big deal for the state to legally determine one's "heritage" and one's descendants.[114] In the words of one now-grown child reared in a same-sex partner home: parentage determines not just with whom the child must live, but also whom the child is presumably to love, to obey, and even to mourn.[115] Such determinations regularly separate the child from his or her parents, entire ancestry, and all living kin.[116] Although this topic merits a separate paper altogether, it should at least be mentioned here that there are also outstanding questions about children's rights to know and be known by their biological mother and father,[117] raised even by one of the Justices who joined in the *Obergefell* majority.[118] There are also outstanding sociological and psychological questions about how children will fare when reared in same-sex-partner homes.[119]

In short, a same-sex marriage entitlement gives the state enormous authority over additional citizens—all the children who will be reared in same-sex homes.[120] Of course, the state presently has this power

---

collaborative reproduction. Many of these families involve gay and lesbian parents who face a legal system which often refuses to recognize, let alone protect, their families.").

[113] Reich, *supra* note 4, at 746.

[114] *See* Mhairi Cowden, *'No Harm, No Foul': A Child's Right to Know Their Genetic Parents*, 26 INT'L J.L. POL'Y & FAM. 102, 120–21 (2012) ("The state's involvement in the conception of [donor-conceived] children causes it to acquire duties towards them that it does not hold to children at large.").

[115] Robert Oscar López, *The Call of the Child*, *in* JEPHTHAH'S DAUGHTERS: INNOCENT CASUALTIES IN THE WAR FOR FAMILY 'EQUALITY' 19, 21, 26–27 (Robert Oscar López & Rivka Edelman eds., 2015) [hereinafter *The Call of the Child*]; Robert Oscar López, *The Lost Manifesto of Manuel Half*, *in* JEPHTHAH'S DAUGHTERS: INNOCENT CASUALTIES IN THE WAR FOR FAMILY 'EQUALITY', *supra*, at 30, 33.

[116] *The Call of the Child*, *supra* note 115, at 27–28.

[117] Cowden, *supra* note 114, at 107.

[118] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2574, 2582 (2013) (Sotomayor, J., dissenting) (noting that "the biological bond between parent and child is meaningful" and "children have a reciprocal interest in knowing their biological parents").

[119] *E.g.*, AMERICAN PSYCHOLOGICAL ASSOCIATION, LESBIAN & GAY PARENTING 8 (2005).

[120] *See, e.g.*, Dawn Stefanowicz, *A Warning from Canada: Same-Sex Marriage Erodes Fundamental Rights*, PUB. DISCOURSE (Apr. 24, 2015), http://www.thepublicdiscourse.com/2015/04/14899 (discussing the Canadian government's increased power over children since its legalization of same-sex marriage).

respecting children in opposite-sex marriages, but far less often.[121] There are indeed collaboratively reproduced children and children from divorces and adoptions in such homes,[122] but these home are swamped by children whose parentage is not determined by the state, but rather by nature, pre-governmentally—the mother by genetics and gestation, and the father by genetics.[123]

There are two perspectives on whether *Obergefell* represents the kind of new entitlement that will persist—and thus continue to impact citizens' freedom as above described. On the one hand, Justice Kennedy's opinion characterizes this entitlement as touching the very epicenter of human dignity.[124] As such, it is the kind of "status" entitlement that Professor Reich urged should be protected against future removal.[125] Reich wrote that "[s]tatus [entitlements] must therefore be surrounded with the kind of safeguards once reserved for personality."[126] He further described these as including entitlements that affect individual "well-being and dignity in a society where each man cannot be wholly the master of his own destiny."[127] According to this description, *Obergefell* could not have more completely framed a same-sex couple's right to a marriage license as a kind of "status" right,[128] which it might well be politically difficult to undo.

At the very same time, however, Reich highlighted that citizens always remain at risk when government becomes the source of important entitlements, because government can later extinguish the same.[129] This is most certainly the case respecting same-sex marriage, given not only the slim majority by which it cleared the Court (5-4),[130] but also the very politicized way in which Supreme Court Justices are now chosen and

---

[121] *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) (describing the state's ability to intrude on the parent-child relationship as *parens patriae* in limited circumstances).

[122] Gates, *supra* note 67, at F2.

[123] *See* Gary J. Gates, *LGBT Parenting in the United States*, WILLIAMS INST. (Feb. 2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf ("Same-sex couples who consider themselves to be spouses are more than twice as likely to be raising biological, step, or adopted children when compared to same-sex couples who say that they are unmarried partners (31% versus 14%, respectively).").

[124] *See Obergefell*, 135 S. Ct. at 2601–02 (stating that marriage offers dignity to couples and is central to the social order).

[125] Reich, *supra* note 4, at 785.

[126] *Id.*

[127] *Id.* at 786.

[128] *Obergefell*, 135 S. Ct. at 2601.

[129] Reich, *supra* note 4, at 740.

[130] *Obergefell*, 135 S. Ct. at 2591.

confirmed.[131] This entitlement is only one vote away from being overturned.[132]

III. THE IMPLICATIONS FOR MARRIAGE WHEN MARRIAGE IS "NEW PROPERTY"

As described at length above, Justice Kennedy's *Obergefell* opinion posits marriage as less a pre-governmental reality and more a matter of state largess—a governmental guarantee of security and stability, and even happiness and freedom at the material, emotional and spiritual levels. In short, Kennedy makes marriage the kind of "new property" considered by Professors Reich and Glendon.[133] What are some of the consequences of such a development upon marriage? There are at least four.

A first consequence might be as follows. When human nature as a "given" exits the stage where marriage is concerned—to be replaced by positive law only—childbearing goes with it. Thus, *Obergefell* consolidates and "codifies" all that went before it in the same-sex marriage debate insofar as children were concerned: marriage is, by Supreme Court determination, simply not intrinsically concerned with children.[134] Justice

---

[131] *E.g.*, Steven H. Goldberg, *Putting the Supreme Court Back in Place: Ideology, Yes; Agenda, No*, 17 GEO. J. LEGAL ETHICS 175, 180 (2004) (discussing the rise of Supreme Court appointments conforming to political agendas over the last half of the twentieth century).

[132] *See* Jonathan Topaz & Nick Gass, *Republican Presidential Candidates Condemn Gay-Marriage Ruling*, POLITICO (June 26, 2015), http://www.politico.com/story/2015/06/2016-candidates-react-supreme-court-gay-marriage-ruling-119466 (quoting Republicans Rick Santorum, who noted that the minimum five out of nine justices voted in favor of *Obergefell*, and Rick Perry, who said he would appoint Constitutionally conservative justices ostensibly to overrule *Obergefell*); John Yoo, *Judicial Supremacy Has Its Limits*, NAT'L REV. (July 6, 2015), http://www.nationalreview.com/article/420810/obergefell-judicial-supremacy (explaining that opponents of the Court's ruling in *Obergefell* can alter the ruling by changing the members of the Court to a more conservative bench that will restore the states' power to control family law and marriage).

[133] *See supra* notes 3–6, 124–28 and accompanying text.

[134] Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting) ("[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples . . . ? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry."); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 945 (Mass. 2003) ("[I]t is the exclusive and permanent commitment of marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage." (footnote omitted)); *see also* Dale Carpenter, *Bad Arguments Against Gay Marriage*, 7 FLA. COASTAL L. REV. 181, 195 (2005) (summarizing the marriage debate: for opponents of gay marriage, procreation (i.e. children) is the foundation of marriage; for advocates of gay marriage, procreation has never been the deciding factor, as exemplified by marriages between sterile couples, elderly couples, and couples who do not desire to have children); Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573, 593 (2005) (noting that the pro-same-sex marriage debaters would be more successful basing their arguments on equality of gays and lesbians than engaging in their opponents' argument that marriage is inherently about children because opponents of gay

Kennedy affirms this outright in *Obergefell*,[135] but the opinion tries to strengthen its "logical" credibility by arguing that the positive laws of the states have not conditioned the right to marry on childbearing.[136] If one does not look to nature to help determine what marriage is, then it is irrelevant that nature has made sexual intercourse between men and women the source of every human life. As noted above, while the Kennedy opinion claims the well-being of children as one of the justifications for establishing a right to same sex marriage,[137] logically, it refers only to children living in same-sex households by the choice of same-sex pairs who decide—separately from the decision about marriage—to pursue parenting via a custody contest with a prior heterosexual partner, adoption, or collaborative reproductive technologies. Within the specific ambit of a "right" to a marriage license, children have no place.

A second consequence of marriage becoming "new property," is the recent focus on marriage as a means of "getting," versus "giving."[138] While there are brief references in *Obergefell* to married couples' desire to take on responsibilities,[139] these are swamped by the opinion's lengthy and emotive treatment of what is acquired with a marriage license.[140] Among the benefits that a state-recognized marriage brings, Kennedy's opinion of course highlights material benefits, as quoted above.[141] It also highlights—more frequently—the emotional.[142] In fact, Justice Kennedy's opinion is so replete with emotional interpretations of marriage that even supporters of same-sex marriage have wondered aloud at its credibility.[143] Justice

---

marriage who focus on children are mainly concerned with maintaining tradition, not children's welfare); Edward Stein, *The "Accidental Procreation" Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI.-KENT L. REV. 403, 409–14 (2009) (noting that the argument that procreation and children are not the foundation of marriage which arose in the 1970s–1990s strongly influenced the courts to rule in favor of the companionate view of marriage in recent years).

[135] *Obergefell*, 135 S. Ct. at 2601 ("An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate.").

[136] *Id.* at 2600–01.

[137] *See supra* note 58 and accompanying text.

[138] *See supra* notes 50–59 and accompanying text.

[139] *Obergefell*, 135 S. Ct. at 2594, 2606.

[140] *Supra* notes 50–60 and accompanying text.

[141] *Supra* note 57 and accompanying text.

[142] *Supra* notes 51–56 and accompanying text.

[143] *See* Michael Cobb, *The Supreme Court's Lonely Hearts Club*, N.Y. TIMES (June 30, 2015), http://www.nytimes.com/2015/06/30/opinion/the-supreme-courts-lonely-hearts-club.html ("In granting same-sex couples 'equal dignity in the eyes of the law,' Justice Kennedy throws everyone under the 'just married' limo. Dignity—the state of being worthy of honor or respect—is undeniably appealing. One reading of the majority opinion suggests, however, one isn't dignified unless one can be married."); *supra* note 70 and accompanying text.

Kennedy calls state-recognized marriage a "transcendent" reality,[144] an answer to the "universal fear that a lonely person might call out only to find no one there,"[145] and a "profound" union embodying the "highest ideals of love, fidelity, devotion, sacrifice, and family."[146] He writes that to be denied marriage is to be "condemned to live in loneliness, excluded from one of civilization's oldest institutions."[147]

Third, Justice Kennedy's florid prose is reminiscent of a contemporary and unhealthy trend to portray marriage unrealistically as the culmination and infinite experience of a "soul-mate model."[148] A robust body of research indicates that soul-mate expectations are both unrealistic and not conducive to healthy marriages.[149] On the contrary, marriages that emphasize the need for mutual gift-giving and sacrifice appear most successful.[150] Marriages with a "getting" or even a strong "50/50" egalitarian mindset are less likely to last.[151]

Obviously, avoiding a "marriage as getting" mentality will be especially important in marriages that involve children, given that children not only require decades of unselfish care, but also that they rely on the stability of their parents' union for their own educational flourishing and emotional and financial security.[152] Justice Kennedy's emphasis on what couples get from marriage, however, undermines his argument that marriage will further the basic needs of children.

---

[144] *Obergefell*, 135 S. Ct. at 2594.

[145] *Id.* at 2600.

[146] *Id.* at 2608.

[147] *Id.*

[148] *See id.* ("No union is more profound than marriage . . . ."); W. Bradford Wilcox, *The Evolution of Divorce*, 1 NAT'L AFF. 81, 83 (2009) (stating that the contemporary "soul-mate model" of marriage is based on subjective happiness).

[149] Wilcox, *supra* note 148, at 83; *see also* Elizabeth A. Sharp & Lawrence H. Ganong, *Raising Awareness About Marital Expectations: Are Unrealistic Beliefs Changed by Integrative Teaching?*, 49 FAM. REL. 71, 71 (2000) (stating that the soulmate ideal is an extreme romantic belief and higher endorsement of such beliefs is associated with lower satisfaction in marriage); W. Bradford Wilcox & Jeffrey Dew, *Is Love a Flimsy Foundation? Soulmate Versus Institutional Models of Marriage*, 39 SOC. SCI. RES. 687, 688 (2010) (arguing that partners in marriages structured on the soulmate ideal rather than more traditional marriages are more likely to feel unfulfilled and see divorce as inevitable and necessary).

[150] Jeffrey Dew & W. Bradford Wilcox, *Generosity and the Maintenance of Marital Quality*, 75 J. MARRIAGE & FAM. 1218, 1219–20 (2013), http://generosityresearch.nd.edu/assets/119703/gen_and_marriage_equality.pdf.

[151] *See* Alfred DeMaris, *The 20-Year Trajectory of Marital Quality in Enduring Marriages: Does Equity Matter?*, 27 J. SOC. & PERS. RELATIONSHIPS 449, 449 (2010) (stating that "relationships are imbalanced whenever people's rewards are incommensurate with their contributions to the relationship" and that "[s]uch imbalance generates psychological distress, which tends to erode relationship quality.").

[152] *See* Monte Neil Stewart, *Marriage Facts*, 31 Harv. J. L. & Pub. Pol'y 313, 352–53 (2008) (noting that "children receive maximum private welfare when they are raised by a married mother and father in a low-conflict marriage").

Finally, *Obergefell* further contributes to destabilizing marriage, according to contemporary experts, by emphasizing its character as an "individual" entitlement the state gives in deference to the lone citizen's rights to a sense of self, assertion of autonomy, realization of sexual desires, and wish for social validation.[153] Immediately, it is possible to see the irony in this situation: the movement for same-sex marriage, which pursued a legal and social blessing for a union of two persons, is won largely in terms of individual rights.[154] On the one hand, such a conclusion was inevitable because of the virtually complete overlap of the movement for same-sex marriage with the cause of gaining acceptance for homosexual persons and their sexual practices.[155] Individual rights were the terms of the "ask" and have become the terms of the "answer."

The individualistic terms of the same-sex marriage right were also inevitable because the cultural and legal understanding of opposite-sexed marriage had decisively moved in that direction for decades. Quoting Henry Maine, Professor Glendon agreed that "[t]he Individual is steadily substituted for the Family as the unit of which civil laws take account."[156] She further noted more recent cases showing that in the United States "famil[y] rights" are "*individual* powers to resist governmental determination."[157] This was certainly the theme of the *Eisenstadt v. Baird* decision in 1972, in which the Court extended to singles the right to use contraception, which was formerly given only to the married.[158] The Court said, "[y]et the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup."[159]

For both of these reasons, it was nearly inevitable that Justice Kennedy's treatment of marriage for same-sex pairs would highlight

---

[153] *See, e.g.*, ANDREW J. CHERLIN, THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY 87–90 (2009) (charting the gradual change since the 1970s from spouses viewing themselves as partners in a companionship marriage to the current trend of individuals seeking self-development and self-fulfillment from marriage); ISABEL V. SAWHILL, GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE 31–35 (2014) (citing a shift in modern social norms partly attributable to a rise in economic affluence which has resulted in marriage being seen as a vehicle for self-gratification rather than traditionally as a means of economic security or a prerequisite to having children).

[154] *See Obergefell*, 135 S. Ct. at 2605–06 (discussing the importance of protecting fundamental rights).

[155] *See id.* at 2604 (associating the denial of same-sex marriage with "disrespect and subordinat[ion]"); Somin, *supra* note 70 (arguing that the denial of same-sex marriage is discriminatory).

[156] GLENDON, *supra* note 5, at 43 (quoting SIR HENRY SUMNER MAINE, ANCIENT LAW 168 (London, John Murray, Albemarle Street, 1870) (1861)).

[157] *Id.* (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 987 (1978)).

[158] 405 U.S. 438, 453–55 (1972).

[159] *Id.* at 453.

individual rights and wants.[160] At the same time, this is not a neutral development, given how marriage is already suffering from the consequences of excessive individualism[161] and given how "iconic" the language of his *Obergefell* opinion will likely become.

CONCLUSION

The Supreme Court's treatment of marriage as a form of "new property" comes at a critical time for marriage in the United States. Older age at first marriage, higher rates of cohabitation, and higher rates of nonmarriage and divorce among less-educated Americans are raising fundamental questions.[162] Many are asking: Are most men and women even naturally inclined toward marriage? Is there anything fundamentally important, for human and social progress, about stable marriage? Will high or even higher numbers of women continue to have children without marriage? How will those children fare? If the children born outside of marriage are suffering, what is the solution? Do we actually care about children's rights and interests, or far more about adults? If we care about children, is the solution more marriage or more governmental transfers, or both? Is stable marriage for the poor even a reasonable possibility without a significant and very difficult-to-obtain closing of the current and scandalous gap between the well-off and the poor?

As mentioned above, Americans are increasingly inclined to understand marriage as an individual accomplishment, a "capstone" to economic, career, and other personal achievements. It appears that the consequences of such a view include less marriage and more marital instability, particularly for the least privileged. With *Obergefell*, the Supreme Court has planted its flag in the territory where marriage is largely about "getting" and "achieving."

---

160 *See supra* notes 51–57 and accompanying text.

161 *See supra* notes 153–56 and accompanying text.

162 *See generally* CHARLES MURRAY, COMING APART: THE STATE OF WHITE AMERICA, 1960–2010, at 155–57, 160–61, 163–66 (2012) (providing data on changing marriage trends among lower- and middle-income demographics and discussing the ramifications on United States communities and families).

RIGHTS, PRIVILEGES, AND THE FUTURE OF MARRIAGE LAW

*Adam J. MacLeod**

INTRODUCTION

On the occasion of its final triumph, has the cause of marriage equality fallen short? As the smoke clears from the Supreme Court of the United States' decision in *Obergefell v. Hodges*, requiring states to extend legal marriage recognition to same-sex couples, the precise implications of the decision for state marriage laws are yet to be revealed.[1] What is the future of marriage law in this new constitutional order? A tentative answer might be gleaned from the laws of states in which same-sex relations have been given the legal status of "marriage" for some time.[2] A close examination of those laws reveals significant inequalities of duties, rights, presumptions, and other incidents of marriage.[3] Many of the incidents of natural marriage that are codified in positive law have proven strikingly persistent,[4] despite the proliferation in the last decade of

---

* Associate Professor, Faulkner University, Thomas Goode Jones School of Law. This paper grew out of simultaneous conversations with two Jims. James Stoner challenged me to consider the nature of the rights of biological parents at the same time that I was serving as a special Deputy Attorney General of Alabama, advising Assistant Attorney General James Davis about the constitutionality of state marriage laws and discussing the nature of the marriage right. During that work I learned much from Alabama's designated experts, Sherif Girgis and Loren Marks. All four helped me to clarify my thoughts. James Stoner also read a draft and supplied very helpful comments. The *Regent University Law Review* editors provided excellent editorial assistance and I am grateful for their invitation to submit this article to them. The errors are all my own.

1 Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015).

2 *E.g.*, ME. REV. STAT. ANN. tit. 19-A, § 806 (West, Westlaw through ch. 238, 268–306, 2015 1st Reg. Sess.) (governing proceedings between a husband and wife, using sex-specific terms); MASS. GEN. LAWS ANN. ch. 207, §§ 1–2 (West, Westlaw through ch. 68, 2015 1st Annual Sess.) (prohibiting incestuous marriages in opposite-sex relationships); Marriage Equality Act, ch. 95, § 2, 2011 N.Y. Sess. Laws 723, 723 (McKinney) (requiring that same-relationships be treated as marriage in New York).

3 *See* Sacha M. Coupet, *"Ain't I a Parent?": The Exclusion of Kinship Caregivers from the Debate Over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 630 (2010) (contrasting the parental status of married parents, kinship caregiver, and same-sex partners); Jeffrey A. Parness & Zachary Townsend, *Procreative Sex and Same Sex Parents*, 13 GEO. J. GENDER & LAW 591–92, 603 (2012) (noting that "when there are children born of sex, equality and sameness [between same-sex couples and natural marriages] are impossible").

4 *E.g.*, ME. REV. STAT. ANN. tit. 19-A, § 806 (West, Westlaw through ch. 238, 268–306, 2015 1st Reg. Sess.) (Maine statute governing proceedings between a husband and wife); MASS. GEN. LAWS ANN. ch. 209C, § 6 (West, Westlaw through ch. 67, 2015 1st Annual Sess.)

judicial decisions and statutes declaring that natural marriage and same-sex marriage must be treated equally.[5]

Consider Massachusetts.

- Michael and Wilma are married and reside in Massachusetts. Wilma is unfaithful and becomes pregnant while Michael is away on business. She gives birth to a child. Michael denies that the child is his. Under the presumption of paternity in Massachusetts law,[6] Michael is nevertheless deemed the father, severing the rights and duties of the biological father. All of the rights and duties bound up in the jural relation between father and child now pertain between Michael and Wilma's biological child.
- Wanda and Wolanda are married and reside in Massachusetts. Wolanda is unfaithful and becomes pregnant while Wanda is away on business. She gives birth to a child. Wanda denies that the child is hers.[7] Wanda is neither a "man" nor a "father" within the meaning of the statute,[8] but is she presumed the second parent? The law is unclear.
- Matthew and Mark are married and reside in Massachusetts. Mark is unfaithful while Matthew is away on business and impregnates Wendy, who gives birth to a child. Wendy is the child's legal mother because the paternity presumption statute does not terminate her rights and duties.[9] Is Matthew or Mark the legal father, or someone else? If Mark is the legal father, then it would be by virtue of his biological parentage; he is not married to Wendy, so the presumption does not operate.[10] It seems absurd

---

(Massachusetts paternity presumption statute); N.Y. DOM. REL. LAW § 5 (McKinney, Westlaw through L.2015, ch. 1–235) (New York incest prohibition).

[5] *E.g.*, ME. REV. STAT. ANN. tit. 19-A, § 650-A (West, Westlaw through ch. 238, 268–306, 2015 1st Reg. Sess.); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 482 (Conn. 2008); Garden State Equal. v. Dow, 82 A.3d 336, 367–68 (N.J. Super. Ct. Law Div. 2013).

[6] MASS. GEN. LAWS ANN. ch. 209C, § 6(a)(1) (West, Westlaw through ch. 68, 2015 1st Annual Sess.).

[7] If Wolanda conceived by artificial insemination with Wanda's consent, then Wanda is deemed by law to be the child's second parent, severing any rights of the biological father. Hunter v. Rose, 975 N.E.2d 857, 861–62 (Mass. 2012); Della Corte v. Ramirez, 961 N.E.2d 601, 602–03 (Mass. App. Ct. 2012).

[8] The statute identifies the case in which "a man is presumed to be the father of a child." § 6(a) (Westlaw). Perhaps those terms would be interpreted to include a second mother married to the biological mother on the ground that such a construction would serve the statute's purpose of making illegitimate children legitimate. § 1 (Westlaw). On the other hand, the fiction that both biological parents are in the marriage will be difficult to maintain once the child reaches the age of understanding.

[9] Ops. of the Justices to the Senate, 802 N.E.2d 565, 577 n.3 (Mass. 2004) (Sosman, J., dissenting).

[10] § 6(a)(1)–(3) (Westlaw).

to suppose that legal paternity would attach to Matthew at all. The presumption of paternity has no application to this couple.

More than a decade after the Massachusetts Supreme Judicial Court ruled that it was irrational for Massachusetts to set marriage and same-sex couples apart from each other,[11] those categories remain persistent in Massachusetts law for these purposes.[12] Unless both the biological father and presumed parent consent, the rights and duties of fathers do not necessarily apply to half of same-sex couples, and the rights and duties of mothers do not apply to the other half, but both complexes of jural relations attach to man-woman marriages.[13]

Or consider New York. The legislation creating same-sex marriage in that state declaims, "[i]t is the intent of the legislature that the marriages of same-sex and different-sex couples be treated equally in all respects under the law."[14] By calling same-sex marriage and opposite-sex marriage by different names, the statute treats them at least nominally unequally. And the difference is more than nominal; the entire scheme of norms attaching to marriage presupposes natural marriage, and the rationality of many of those norms drops out if marriage is something other than the union of a man and woman.[15] Recently, the high court of New York interpreted New York's incest prohibition in light of its rational basis that incest carries a risk of genetic defects in potential biological offspring.[16] That justification, too, makes no sense if two men or two women have exactly the same rights and duties of "marriage" as a man and a woman.[17] If the incest norm is to apply to same-sex couples then it must rest on some other rationale.

As in New York, the incest prohibition in Massachusetts positive law[18] is defined by its opposite-sex predicates.[19] It would be hasty to

---

[11] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003).

[12] *See* § 6(a)(1)–(5) (Westlaw) (listing circumstances under which "a man is presumed to be the father of a child" based on traditional marriage assumptions).

[13] *Id.*

[14] Marriage Equality Act, ch. 95, § 2, 2011 N.Y. Sess. Laws 723, 723 (McKinney).

[15] *Cf.* George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 582 (1999) (arguing that several rationales for the legal recognition of marriage apply only to natural marriages, particularly protection of children).

[16] Nguyen v. Holder, 21 N.E.3d 1023, 1026 (N.Y. 2014) (Smith, J., concurring) (explaining a rationale for the court's brief holding).

[17] Mark Strasser, *The Future of Same-Sex Marriage*, 22 U. HAW. L. REV. 119, 140 (2000).

[18] MASS. GEN. LAWS ANN. ch. 272, § 17 (West, Westlaw through Ch. 68, 2015 1st Annual Sess.). Massachusetts also retains its polygamy prohibition. Ch. 207, § 4 (Westlaw).

[19] "No man shall marry his mother, grandmother, daughter, granddaughter, sister . . . ." § 1 (Westlaw). "No woman shall marry her father, grandfather, son, grandson, brother . . . ." § 2 (Westlaw).

suppose that these formal differences between marriage and same-sex marriage in state laws are *merely* formal. Despite the lack of any rational basis for applying the incest prohibition to same-sex couples, New York continues to apply it to naturally-married couples.[20] The nature of marriage as a man-woman union makes the anti-incest norm coherent as a norm, and supplies its rational basis.[21] In New York and Massachusetts, married couples and same-sex married couples are distinctly unequal in some respects, and those differences appear to be grounded in fundamental *reasons*.

So, the result of extending legal recognition to same-sex couples has been to make such couples equal to married couples with respect to some incidents of marriage, but not others. Indeed, despite redefinition of marriage, there remain at least (not accounting for additional revisions to the definition that might be required in the future to meet claims by bisexual and transsexual individuals) three different categories of marriage: man-woman marriages, man-man marriages, and woman-woman marriages.[22]

I. FUNDAMENTAL RIGHTS AND CONCESSIONS OF PRIVILEGE

Why have the rights of marriage not distributed completely equally? It seems that lawmakers and courts have thus far overlooked many of the rights and duties of marriage. I suggest that part of the explanation is found in the nature of the rights claims that have been asserted by proponents of marriage equality and were recently affirmed by the Supreme Court.[23] Marriage revisionists and some defenders of natural marriage definitions in law appear to have succumbed to the positivist fallacy.[24] And many rights and duties of marriage are not creations of positive law.

---

[20] *E.g.*, *Nguyen*, 21 N.E.3d at 1024 (applying the incest prohibition to an opposite-sex couple, but finding that it was not violated in that particular instance); People v. Burch, 684 N.Y.S.2d 101, 101–02 (N.Y. App. Div. 1998) (rejecting the defendant's argument that the prosecution failed to prove a sexual assault perpetrator was not married to his alleged victims because under the incest prohibition such a marriage would be void).

[21] *See, e.g.*, *Nguyen*, 21 N.E.3d at 1026 (explaining that a primary purpose of incest prohibitions is to prevent genetic defects in offspring).

[22] *Cf.* Dale Carpenter, *A Traditionalist Case for Gay Marriage*, 50 S. TEX. L. REV. 93, 101 (2008) (referring to man-woman, man-man, and woman-woman marriages separately).

[23] *Obergefell*, 135 S. Ct. at 2604–05.

[24] *E.g.*, James L. Musselman, *What's Love Got to Do with It? A Proposal for Elevating the Status of Marriage by Narrowing Its Definition, While Universally Extending the Rights and Benefits Enjoyed by Married Couples*, 16 DUKE J. GENDER L. & POL'Y 37, 86–87 (2009); Vincent J. Samar, *Privacy and Same-Sex Marriage: The Case for Treating Same-Sex Marriage as a Human Right*, 68 MONT. L. REV. 335, 360–61 (2007).

Though advocates for extending legal marriage recognition to same-sex couples use the language of rights,[25] their reasoning presupposes that the right to marry is a creation of positive law: lawmakers have crafted marriage laws to include only opposite-sex couples; they are able to (and should, in justice) re-craft marriage laws to include same-sex couples.[26] Different lawyers might scrutinize differently the state interests justifying any particular definition of marriage, but it is taken for granted that the jural relations constituting civil marriage are open to alteration because they emanate from positive legal enactments,[27] and that they should be altered if they cannot be justified on the basis of sufficiently weighty interests.[28]

The *United States v. Windsor* majority ratified the positivist view of marriage laws when it characterized the same-sex marriage right as a product of New York's positive laws, enacted by the state's sovereign will in the exercise of its "power in defining the marital relation."[29] Thus, "the state's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import."[30] The equal status of marriage and same-sex marriage is, in this account, not inherent in the individuals or in the nature of the relations themselves, but rather "conferred by the States in the exercise of their sovereign power."[31]

The *Obergefell* majority replaced the sovereignty of states with the supremacy of a newly-discovered "fundamental right," an extension of the right of intimate association announced in *Lawrence v. Texas*,[32] to enable same-sex couples to define themselves by employing state law in their acts of commitment to each other.[33] This new right, like the *Windsor* Court's characterization of the old marriage right, is a creation of positive law rather than nature, custom, or some source of normativity external to governmental powers.[34] In the Court's characterization of their claim, the *Obergefell* plaintiffs sought "equal dignity in the eyes of the law."[35] The Constitution now confers that dignity on same-sex couples by creating for

---

25 Samar, *supra* note 24, at 360–61.

26 *Id.* at 337, 360–61.

27 *See id.* (stating that marriage is nothing more than "a social construction," and that because the state grants opposite-sex couples the right to marry, that right can and should be extended to same-sex couples).

28 *Id.* at 360–61.

29 133 S. Ct. 2675, 2692 (2013).

30 *Id.*

31 *Id.* at 2693. The Court thus rehabilitated a long-discredited jurisprudence of state sovereignty over the norms of domestic relations. *See infra* Part II.E.

32 539 U.S. 558 (2003).

33 *Obergefell*, 135 S. Ct. at 2604–05.

34 *Id.* at 2602.

35 *Id.* at 2608.

them the possibility of making "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[36]

According to this reasoning, the right to marry emanates from the will of the sovereign lawmaker, either the state or the Court itself. Of course, rights that the sovereign power creates the sovereign power can also destroy. If they are not authorized and specified by nature, custom, universal reason, or some source of authority other than the sovereign power, then marriage rights are in a parlous position.[37] Because they impose on the sovereign power no obligation, marriage rights on this account are not properly considered rights at all, but rather what Jeremy Bentham called "concessions of privileges,"[38] which bind the sovereign only insofar as a sovereign can be bound "who has the whole force of the political sanction at his disposal."[39] In short, from the perspective of the sovereign, "they are not *laws*."[40]

To be sure, the *Obergefell* decision requires that marriage *equality* is an obligation binding the sovereign—in this context, the states.[41] Precisely because the Court views the dignity and importance of marriage as emanating from state laws, that dignity and importance cannot be denied to same-sex couples, the Court insists.[42] But the requirement of equality does not entail that there must be any privileges of marriage, much less does it specify what such privileges shall be; only that any privileges created by positive law must be distributed equally.[43] The challenge for marriage revisionists is to show that natural marriage and same-sex marriage can and must be made equal without eliminating all the

---

[36] *Id.* at 2597.

[37] *Cf.* James C. Dobson, *Marriage is the Foundation of the Family*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1, 1–2 (2004) ("If we are willing to entertain the idea that marriage is a human creation, then we must also accept the notion that it is subservient to and pliable by the State.").

[38] JEREMY BENTHAM, OF LAWS IN GENERAL (H.L.A. Hart ed.,1970) *reprinted in* THE COLLECTED WORKS OF JEREMY BENTHAM 1, 16 (J.H. Burns ed., 1970).

[39] *Id.*

[40] *Id.*

[41] *Obergefell*, 135 S. Ct. at 2604–05.

[42] *See id.* at 2608 (stating that the petitioners seek "equal dignity in the eyes of the law," that this is a right granted by the Constitution, and holding that dignity must be given to them by extending the positive law definition of marriage to include same-sex couples).

[43] *See* Michael W. Dowdle, Note, *The Descent of Antidiscrimination: On the Intellectual Origins of the Current Equal Protection Jurisprudence*, 66 N.Y.U. L. REV. 1165, 1203–04 (1991) (arguing that positive law privileges do not have to be granted at all, but equal protection requires that they be distributed equally if they are granted); *see also Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting) (noting that the Constitution requires marriage laws to be applied equally, but the question remains as to how marriage is to be defined).

essential norms of marriage. We must inquire whether that can be accomplished, and what would be the implications.

A. Modern Fundamental Rights

The Supreme Court of the United States described marriage rights quite differently before its *Windsor* decision. While it has not treated marriage and family norms as fully-conclusive reasons binding the practical deliberations of lawmakers, the Court has nevertheless approached many rights of marriage as if they exist prior to their declaration, codification, and specification within positive law.[44] The Court's marriage jurisprudence prior to *Windsor* consistently expressed or assumed the presupposition that the norms of marriage preceded their declaration and codification in positive law.[45] They were grounded not in paucital jural relations between two people asking for a marriage license, but rather in multital jural relations among parents and between parents and children,[46] which correlate with each other, are mutually dependent, and give rise to duties of non-interference in those who are outside the family.[47]

This complex of jural relations is vested in a discrete group of people—the family, comprised of father-mother-children—to which governments give recognition but did not create and are not free to rearrange.[48] The integrity of the family is a source of obligation that does not owe its existence to positive law, and that fact constrains the freedom of lawmakers to alter positive laws governing the family.[49] The Court has located the foundation of the family's liberty in the freedom to "marry and reproduce[, which] is 'older than the Bill of Rights.'"[50] Therefore, "the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'"[51] This, the Court has explained, is the fundamental difference between "the

---

[44] *E.g.*, Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 845 (1977).

[45] *E.g.*, *id.*; Loving v. Virginia, 388 U.S. 1, 12 (1967); Griswold v. Connecticut, 381 U.S. 479, 486 (1965); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

[46] *See* Troxel v. Granville, 530 U.S. 57, 65–66 (2000) (explaining the rights and duties of parents to their children); *Smith*, 431 U.S. at 845 (describing "the liberty interest in family privacy"); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (noting that parents have a primary role in the nurture and upbringing of their children).

[47] Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion).

[48] *Smith*, 431 U.S. at 845; *Moore*, 431 U.S. at 499.

[49] *Smith*, 431 U.S. at 845.

[50] *Id.* (quoting *Griswold*, 381 U.S. at 486).

[51] *Id.* (footnote omitted) (quoting *Moore*, 431 U.S. at 508).

natural family" and "the foster family," which, unlike the natural family, has its origins in "state law and contractual arrangements."[52]

Thus, it is not "within the competency of the State" to infringe on fundamental rights of the natural family.[53] For example, to usurp the authority of a parental right-bearer is excluded from the state's "general power" because the "child is not the mere creature of the State."[54] The liberty of parents in the "care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court."[55] The Court has explained, "[o]ur decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[56] No government created the family, and governments are not free to intrude within its domain.

Does this make the rights of marriage and the natural family fundamental? The use of the term "fundamental rights" in contemporary American constitutional law is ambiguous.[57] In the idiosyncratic sense employed by the Supreme Court in recent years, particularly the line of decisions following *Lawrence*,[58] the term refers to an often-abstract, two-term liberty interest (*A* has the right to do *x*), that is not a conclusive right, but that can be burdened only to serve a compelling state interest and only if the law burdening the liberty is narrowly tailored—is the least restrictive means—to achieve that interest.[59] An interest given that designation is said to be a "fundamental right" for purposes of the substantive due process emanating from the Fourteenth Amendment.[60]

Yet the norms of marriage preceded substantive due process doctrine by several centuries, and they were declared part of our fundamental law long before the *Lawrence* decision.[61] For purposes of understanding the Court's marriage jurisprudence, the recent idiosyncratic usage of "fundamental right" is not as interesting or important as the broader jurisprudential phenomenon of rights deemed so fundamental that

---

52 *Id.*

53 Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).

54 *Id.* at 535.

55 Troxel v. Granville, 530 U.S. 57, 65 (2000).

56 Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion).

57 *See* Wendy E. Parmett, *Due Process and Public Health*, J.L. MED. & ETHICS, Winter 2007, at 33, 34 (noting a long-running debate within Supreme Court precedent as to what constitutes a fundamental right).

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

59 Kerry v. Din, 135 S. Ct. 2128, 2133 (2015); Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977).

60 Chavez v. Martinez, 538 U.S. 760, 775 (2003).

61 Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 845 (1977).

governments and positive lawmakers are not at liberty to infringe or abrogate them at will. That rights grounded in the Bill of Rights and the Fourteenth Amendment do not exhaust the category of fundamental rights is proven by the existence of the Ninth Amendment, which provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[62]

Whatever its particular doctrinal significance, a fundamental right for present purposes is one that is part of our fundamental law. In the Court's language, a fundamental right is so "'deeply rooted in this Nation's history,'" "'traditions,'" and "'conscience'" that it is "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist'" if governments were free to eliminate it from positive law or burden its exercise.[63]

This is precisely the approach to fundamental rights that the Court expressly bracketed in *Obergefell*, explaining that, however appropriate it might be in the context of assisted suicide, a different approach is required to define rights of intimate association.[64] The Court explained, "[t]he right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[65] Whose understanding is that? The Court in *Obergefell* was relying on its understanding, specifically its "understanding of what freedom is and must become."[66] The liberty interest in intimate association runs parallel to the fundamental marriage norms; it does not grow out of them.[67]

How does this new liberty become what the Court now understands it should be? Only by changing positive law. It is a privilege created by the sovereign lawmaking power of the Supreme Court of the United States.[68]

---

[62] U.S. CONST. amend. IX; *see also* Jeffrey D. Jackson, *Blackstone's Ninth Amendment: A Historical Common Law Baseline for the Interpretation of Unenumerated Rights*, 62 OKLA. L. REV. 167, 171 (2010) (arguing that the unenumerated rights referred to in the Ninth Amendment should be understood with reference to a common law baseline, especially as specified in Blackstone's Commentaries).

[63] Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)); Palko v. Connecticut, 302 U.S. 319, 324–26 (1937); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[64] *Obergefell*, 135 S. Ct. at 2602.

[65] *Id.*

[66] *Id.* at 2603.

[67] *See* Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U. L. REV. 1, 52 (1996) (noting that the concept of marriage is rooted deeply in history and tradition, while the right of intimate association in the context of same-sex relationships is not).

[68] *Obergefell*, 135 S. Ct. at 2629 (Scalia, J., dissenting).

(Exactly what that power is and where it is found in the Constitution remains unclear.)[69] The new liberty privilege of intimate association specified in *Lawrence*, *Windsor*, and *Obergefell* would not exist but for its specification in law; if not statutory law, then decisions of the Supreme Court hastening the development of legislative enactments.[70] The understanding is a *new* understanding; the privilege is a *new* privilege.[71] It would not exist but for the sovereign lawmaker's—in these cases, the Court's—expression of the new understanding.

By contrast, rights that are grounded in our ancient customs, traditions, and conscience are recognized as rights precisely because they precede and transcend positive law.[72] So there are at least two strands of fundamental rights jurisprudence in the Court's decisions.[73] In one strand, traceable through *Lawrence*, *Windsor*, and *Obergefell*, to understand whether a liberty interest is fundamental one must anticipate the Court's evolving understanding of liberty.[74] In the other strand, discernable in *Troxel v. Granville*,[75] *Moore v. City of East Cleveland*,[76] *Loving v. Virginia*,[77] and *Washington v. Glucksberg*,[78] to understand whether a right is fundamental one must look at that part of our law that originates in our nation's history, traditions, and conscience.[79]

B. Ancient, Rooted Fundamental Rights

Compared to the privileges declared in the *Lawrence-Obergefell* line of cases, a right that is fundamental is a right that originates not in

---

69 *Id.* at 2624, 2626 (Roberts, C.J., dissenting).

70 Nancy Catherine Marcus, *The Freedom of Intimate Association in the Twenty First Century*, 16 GEO. MASON U. CIV. RTS. L.J. 269, 280 (2006).

71 *Id.* (describing the origin of the "new" doctrine of intimate association that the Court created in *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

72 *Cf.* Patrick McKinley Brennan, *The Place of "Higher Law" in the Quotidian Practice of Law Herein of Practical Reason, Natural Law, Natural Rights, and Sex Toys*, 7 GEO. J.L. & PUB. POL'Y 437, 473 n.150 (2009) ("[T]radition is ordinarily the only—not just one possible—source of insight into the rights that people by nature possess, *assuming* that the object of inquiry via tradition is what precedes tradition, to wit, natural law and natural rights. Until recently, it went without saying that tradition was the courts' entrée to resolving novel questions regarding rights.").

73 *Compare Obergefell*, 135 S. Ct. at 2602–04, *and* Lawrence v. Texas, 539 U.S. 558, 578–79 (2003), *with* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997), *and* Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion).

74 *Obergefell*, 135 S. Ct. at 2602; United States v. Windsor, 133 S. Ct. 2675, 2692–93 (2013); *Lawrence*, 539 U.S. at 578–79.

75 530 U.S. 57, 65 (2000).

76 *Moore*, 431 U.S. at 503.

77 388 U.S. 1, 12 (1967).

78 *Glucksberg*, 521 U.S. at 720–21.

79 *Id.*

positive law, but rather in other sources of authority, which lawmakers disregard at their, and our, peril.[80] In our Anglo-American legal tradition, those sources are primarily divine law, natural law, and customs so ancient that "the memory of man runneth not to the contrary."[81] Rights and duties that are natural, divinely ordained, or part of our ancient traditions and customs are part of our fundamental law.[82] They would be rights and duties—they would have the authority of law—even if no sovereign lawgiver ever recognized them as law or codified them in statutes or constitutions.[83] To the extent that positive law incorporates those rights and duties, it is not creating them or giving them any additional normative directiveness.[84] Rather, positive law is, in Blackstone's parlance, merely "declaratory" of those norms.[85]

Many of those norms, though not all, are beyond the reach of positive law, particularly those specified by divine and natural law.[86] In his *Commentaries on the Laws of England*, Blackstone insisted that the municipal lawgiver's power to declare law is constrained:

> [N]o human legislature has power to abridge or destroy [natural rights], unless the owner shall himself commit some act that amounts to a forfeiture. Neither do divine or natural *duties* (such as, for instance, the worship of God, the maintenance of children, and the like) receive any stronger sanction from being also declared to be duties by the law of the land. The case is the same as to crimes and misdemeanors, that are forbidden by the superior laws, and therefore stiled *mala in se*, such as murder, theft, and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature. For that legislature in all these cases acts only, as was before observed, in subordination to the great lawgiver, transcribing and publishing his precepts. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and intrinsically right or wrong.[87]

The legal doctrines declaratory of those norms, along with the customary law of England, were brought to the American colonies and formed the basis of our laws at the time of the Founding, with some modifications to

---

[80] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *54 (St. George Tucker ed., Augustus M. Kelley 1969) (1803).

[81] *Id.* at *54, *63, *76.

[82] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 148, 151–53, 157–58 (1968) (holding that a right to trial by jury is a fundamental right applicable to the states because it is rooted in American tradition and customs).

[83] 1 BLACKSTONE, *supra* note 80, at *54.

[84] *Id.*

[85] *Id.* at *42.

[86] *Id.* at *54.

[87] *Id.*

reflect the change from monarchy to republican government.[88] And what Blackstone called "superior" law[89] emerges as part of the "fundamental" law in a definite strand of the Supreme Court's rights jurisprudence, which the Court summarized in *Moore*[90] and especially in *Glucksberg*.[91]

Thus, divine and natural rights and duties, along with ancient general and local customs—and not merely our written Constitution—form our fundamental law. James Stoner has explained:

> Supposing that law is the decree of the sovereign power, or a social rule made according to a rule of recognition, or public policy written and formalized, we think of the Constitution as fundamental because it establishes the rules by which laws are made, as well as rules that limit lawmaking. At the time of the Founding, by contrast, common or unwritten law was the basis of the law in all the colonies, with legislation understood as its supplement or its corrective.[92]

After independence, the states chose to retain and adopt the common law, adapting it to the customs and practices of their own people.[93] The foundational legal order underlying state constitutions and the United States Constitution was established by common law norms and institutions.[94] "Political discontinuity overlay a basic continuity of legal order . . . ."[95]

As Stoner observes, not everyone uses the term "fundamental law" today to mean what it meant at the Founding.[96] Yet, the older strand of reasoning about fundamental law, firmly grounded in our conscience, traditions, and customs, persists in the Supreme Court's fundamental rights jurisprudence, somewhat uncomfortably, alongside its better-known cousins—substantive due process doctrine and Supremacy Clause jurisprudence.[97] As Justice Powell noted in *Moore*, the Court's due process jurisprudence strikes a balance between our fundamental legal continuity with the common law and the overlying political discontinuity from England, adopting "'what history teaches are the traditions from which

---

[88] JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING AMERICAN CONSTITUTIONALISM 15 (2003).

[89] 1 BLACKSTONE, *supra* note 80, at *54.

[90] Moore v. City of E. Cleveland, 431 U.S. 494, 503–04 n.10–12 (1977) (plurality opinion).

[91] Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997).

[92] STONER, *supra* note 88, at 79.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *See supra* notes 73–79 and accompanying text.

[our nation] developed as well as the traditions from which it broke.'"[98] American legal tradition reflects both of those developments. "'A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound.'"[99]

In *Glucksberg*, for example, the Court rejected a claim that the Constitution contains a fundamental right to assistance in committing suicide[100] in large part because our unbroken common law tradition condemns suicide as *malum in se*, a crime that is inherently wrong, not merely because positive law prohibits it.[101] There can be no fundamental right to receive assistance in suicide because the law declares the pre-existing divine and natural duties not to kill oneself and not to assist another's self-destruction.[102] The states did not adopt the forfeiture and dishonor that English common law imposed upon suicides because the burden of those punishments fell not on the suicide, but on his family, victimizing them a second time for an act they did not commit.[103] The progression of this tradition moves upon the continued unbroken validity of laws prohibiting someone from *assisting* another's suicide.[104]

This broad, ancient, and rooted understanding of fundamental rights presupposes domains of authority outside the competency of the state.[105] Those domains of authority settle and specify the jural relations—both paucital (e.g., wife's right to husband's fidelity, landlord's right to receive rent from tenant)[106] and multital (e.g., father-mother-children's right to remain a family, joint tenants A-B-C-Ds' right to exclude non-owners from Blackacre)[107]—of those within the domains, subject to the norms and institutions that the common law has devised to impose boundaries of

---

98 Moore v. City of E. Cleveland, 431 U.S. 494, 501 (1977) (plurality opinion) (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

99 *Id.* (quoting Poe v. Ullman, 367 U.S. at 542 (Harlan, J., dissenting)).

100 Washington v. Glucksberg, 521 U.S. 702, 735 (1997).

101 *Id.* at 711–12; 4 BLACKSTONE, *supra* note 80, at *189.

102 4 BLACKSTONE, *supra* note 80, at *189.

103 *Glucksberg*, 521 U.S. at 713.

104 *Id.* at 716.

105 1 BLACKSTONE, *supra* note 80, at *54.

106 WESLEY NEWCOMB HOHFELD, *Fundamental Legal Conceptions as Applied in Judicial Reasoning II*, *in* FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 70, 72 (Walter Wheeler Cook ed., 1923).

107 *Id.*

reasonableness on the norms.[108] Even the state, a government of general jurisdiction, has no power to usurp the authority of these domains.[109]

The authorities giving rise to fundamental rights might be unwritten or intangible authorities such as conscience,[110] custom or common law,[111] maxims and other background principles of common law,[112] natural rights and duties,[113] right reason or "immutable principles of justice";[114] or they might be more concrete, such as a jury verdict in a civil action[115] or a parent's decisions concerning the education of her children.[116] Someone other than the government generates the norms on which fundamental rights are grounded, and the government has a duty to leave those norms in place, except for very particular and strong reasons and perhaps without exception at all.[117] What reasons count as sufficiently strong (or, in particular Fourteenth Amendment terminology, "compelling")[118] and which governments owe the duty (governments of general jurisdiction, such as states, or enumerated powers, such as the national government) is beyond the scope of this Article. In other words, that a right is fundamental within my analysis does not entail that it has been incorporated against the states by the Fourteenth Amendment. Nor does it entail that it is absolute.

What this Article calls "fundamental rights" (and "fundamental duties") are akin to, but more particular than, the common law concept of

---

[108] *See* ADAM J. MACLEOD, PROPERTY AND PRACTICAL REASON 239, 241 (2015) (arguing that property as a common law institution is governed only secondarily by the authority of positive law, and primarily by private ordering through the exercise of practical reason).

[109] 1 BLACKSTONE, *supra* note 80, at *54.

[110] *See* Wisconsin v. Yoder, 406 U.S. 205, 218 (1972) (holding that a law could not compel an individual to act in a manner "at odds" with his or her fundamental religious beliefs); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) (explaining that the Constitution protects the freedom to worship "according to the dictates of one's conscience").

[111] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[112] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029–30 (1992).

[113] *Meyer*, 262 U.S. at 399–400.

[114] Powell v. Alabama, 287 U.S. 45, 71 (1932) (quoting Holden v. Hardy, 169 U.S. 366, 389 (1898)).

[115] *See* FED. R. CIV. P. 38 (preserving the right to a trial by a jury and detailing the procedure for demanding a jury trial in a civil suit).

[116] *Meyer*, 262 U.S. at 399–400.

[117] *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) (holding both that fundamental rights are "deeply rooted in . . . history and tradition" and that fundamental rights may only be infringed upon if the infringement is "narrowly tailored to serve a compelling state interest" (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion); Reno v. Flores, 507 U.S. 292, 302 (1993)).

[118] *Reno*, 507 U.S. at 301–02.

fundamental law.[119] Both ideas share exclusionary reasons for action—"rules of action" in common law terminology[120]—that emanate from sources of authority other than the state's sovereignty to enact positive laws.[121] Fundamental rights are not "civil rights," as opposed to "social rights," as that distinction appears in some nineteenth-century jurisprudence;[122] it is not a matter of rights having the force of law rather than mere social pressure. Fundamental rights are legal rights, like civil rights and privileges codified in positive law. The domains of authority in the common law tradition are plural, and therefore law-making and law-infringing authorities are plural.[123] It is not only state action that can specify a right or duty over which it has authority, or trample a right or duty over which it has no authority.[124] The common law doctrine of public accommodations, for example, supposes that patrons enjoy a license not to be excluded without a good reason.[125] The owner of the public accommodation, though not a state actor, specifies the right by his invitation to the public, and is forbidden to infringe the right.[126]

This Article uses the term "fundamental right" to refer to a liberty secured by immunities and claim-rights, a claim-right, a power, or some other right that imposes upon some government, positive lawmaker, or other external domain of authority duties limiting that authority's or sovereign's power to act. Generally, a fundamental right is secure as a right because it forbids the external authority's or sovereign's power to impose new reasons for action on the right holder. The duty might consist of a categorical (though not always absolute) requirement not to disrupt the jural relations that the claim-right secures.[127] The jural relations within the domain might not yet be fully specified, but the holders of the liberty retain the authority to act on the basis of the underlying norms

---

[119] STONER, *supra* note 88, at 79.

[120] 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW *472 (O.W. Holmes, Jr., ed., 12th ed. 1873).

[121] *See supra* notes 92–95 and accompanying text.

[122] The Civil Rights Cases, 109 U.S. 3, 22 (1883) (explaining that the Thirteenth Amendment did not modify social rights, but rather fundamental rights). These fundamental rights were called civil rights. *Id.*

[123] *See supra* notes 105–08 and accompanying text.

[124] 4 BLACKSTONE, *supra* note 80, at *5 (explaining the distinction between a public wrong, or violation of the law, and a private wrong, in which one individual infringes upon the rights of another).

[125] 3 BLACKSTONE, *supra* note 80, at *212; *see also* Coger v. Nw. Union Packet Co., 37 Iowa 145, 153 (1873) (explaining that race is not a sufficient reason to exclude a patron from a place of business).

[126] 3 BLACKSTONE, *supra* note 80, at *212.

[127] *See supra* notes 105–09 and accompanying text.

and to specify new norms within the boundaries of their authority.[128] Those boundaries are marked by the limitations inherent in their authority (e.g., the right of a mother to instruct her own children but not someone else's children),[129] the fundamental rights of other domains of authority (e.g., prohibitions against nuisance),[130] and those external limitations that the state lawfully places on the exercise of one's liberty (e.g., the uncontroversial criminal prohibitions against *malum in se* offenses such as murder, theft, and enslavement).[131]

In short, there are fundamental rights because law-making, law-adjudicating, and law-executing sovereigns have duties. So, for example, in *Troxel v. Granville*, the Court struck down a state statute authorizing any person "to subject any decision by a parent concerning visitation of the parent's children to state-court review," on the ground that the statute violated the "fundamental parental right" to direct the upbringing of the parent's child.[132] The constitutional infirmity resulted from authorizing a petitioner and a judge to substitute their own judgment for the parent's, so that the parent's judgment about the well-being of the child had no normative force.[133] The Court explained:

> Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests.[134]

The fundamental parental right means that non-parents, including judges, are not free to intrude into the deliberations and decisions of a fit parent.[135] The judgment of the parent about the child's well-being and the rights and duties that arise from that judgment operate as an exclusionary reason for action of some binding force.[136]

---

[128] *See supra* note 108 and accompanying text.

[129] 1 BLACKSTONE, *supra* note 80, at *447.

[130] 3 BLACKSTONE, *supra* note 80, at *216.

[131] *See* 4 BLACKSTONE, *supra* note 80, at *5 (explaining that crimes are public wrongs that are a breach of one's duty to the entire community).

[132] 530 U.S. 57, 67 (2000).

[133] *See id.* (holding that a state statute that does not give any presumptive weight to a parent's decision regarding the visitation interest of a child violates that parent's fundamental rights).

[134] *Id.*

[135] *Id.* at 66–68.

[136] *Id.*

C. Concessions of Privilege

Though legal scholars have largely neglected this broader, common law understanding of fundamental rights over the last century or so, the distinction between fundamental rights and concessions of privilege performs real work for lawyers, and its persistent currency testifies to its utility.[137] Consider how different property incidents are treated for constitutional purposes in Anglo-American law. When a government deprives an owner of the use of his land, the law forbidding the use is a taking of property unless the use was ruled out of the owner's estate by background principles of property law.[138] A law that simply codifies rights and duties previously settled by common law norms and institutions disturbs no property rights,[139] while a law that eradicates incidents of the owner's use not prohibited by common law norms and authorities alters the estate of ownership and is reviewed under whatever scrutiny is applied to the particular expropriation of property.[140] At common law, the government has no right to deprive the owner of property that existing law has not already denied to the owner, unless the government pays just compensation, even if it lawfully exercises a recognized power.[141] In other words, governments take property rights and duties as they find them, and they must internalize the costs of altering those jural relations that comprise private property.

Again, this is not a point about the doctrinal significance of property rights under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments. In other words, to say that a right is grounded in law more fundamental than positive law is not to say that its abrogation or burdening by state action should be reviewed with any particular level

---

[137] *See, e.g.*, Sherwin v. Mackie, 111 N.W.2d 56, 60–61 (Mich. 1961) (noting the distinction between vested rights protected by the Due Process Clause and concessions or privileges, which may be withheld by the state); Pa. Game Comm'n v. Marich, 666 A.2d 253, 255–57 (Pa. 1995) (holding that a hunting license is a privilege that can be revoked by the state, not a property interest protected under the Due Process Clause); King v. Wyo. Div. of Criminal Investigation, 89 P.3d 341, 350–52 (Wyo. 2004) (holding that a concealed weapons permit is not a fundamental right protected under the Due Process Clause, but rather a privilege granted by the state).

[138] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029–30 (1992).

[139] *See id.* (explaining that compensation is not required when a state law was merely making explicit what was already understood under the common law); Hadacheck v. Sebastian, 239 U.S. 394, 410–11 (1915) (holding that a city may broadly exercise police power in limiting land use within a city).

[140] *Lucas*, 505 U.S. at 1029–30; Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

[141] Sinnickson v. Johnson, 17 N.J.L. 129, 137 (1839); People v. Platt, 17 Johns. 195, 202 (N.Y. Sup. Ct. 1819); Gardner v. Trs. of Newburgh, 2 Johns. Ch. 162, 164 (N.Y. Ch. 1816); Burmah Oil Co. v. Lord Advocate [1964] AC 75, 83; Attorney-General v. De Keyser's Royal Hotel, Ltd. [1920] AC 508, 519.

of judicial scrutiny. The point is limited to the observation that state and federal governments are constrained in their power to usurp the authority of common law institutions of ordering—owners, civil juries, customs, licensees and tenants, etc.—to settle and specify the jural relations governing the use and management of things, at least insofar as their exercise of power must be consistent with reason.[142]

Not all incidents of property ownership are property rights; some are concessions of privilege.[143] These include equitable and statutory privileges of redemption.[144] The equity of redemption in English law was extended only at the discretion of a court in equity upon terms that could not be established a priori,[145] but which were generally quite favorable to the mortgagor.[146] In American law, the foreclosure of mortgages developed as a summary proceeding and the terms of redemption were much more circumscribed.[147] To ameliorate the plight of mortgagors, state legislatures have from time-to-time created statutory redemption privileges, especially during times of economic hardship.[148] During various depressions, legislatures enacted extended redemption periods, which were repealed after the depressions ended without constitutional incident.[149]

Today, a state's redemption statute might designate something called a "right of redemption,"[150] but actually create a privilege. So, for example, one statute expressly provides:

> The statutory rights of redemption given or conferred by this article are mere personal privileges and not property or property rights. The privileges must be exercised in the mode and manner prescribed by statute and may not be waived in a deed of trust, judgment, or mortgage, or in any agreement before foreclosure or execution sale. The right of privilege conferred under this article is not subject to levy and sale under execution or attachment nor is it subject to alienation except in the cases provided for in this article; but if the right or privilege is perfected by redemption as provided in this article, then, and not until

---

142 *See supra* notes 105–09 and accompanying text.

143 *See, e.g.*, Hamilton v. Hamilton, 154 P. 717, 723–24 (Mont. 1916) (holding that the right of redemption is not subject to sale because it is a personal privilege and not a property right); *cf.* Stevenson v. King, 10 So. 2d 825, 826 (Ala. 1942) (stating that a compulsory arbitration statute was "a mere personal privilege and not a property right" and therefore could be regulated by the legislature).

144 *Stevenson*, 10 So. 2d at 826; *Hamilton*, 154 P. at 723–24.

145 Campbell v. Holyland, [1877] 7 Ch D 166, 172.

146 Sheldon Tefft, *The Myth of Strict Foreclosure*, 4 U. CHI. L. REV. 575, 587 (1937).

147 *Id.* at 588.

148 *Id.* at 589.

149 *Id.*

150 *E.g.*, ALA. CODE § 6-5-248 (West, Westlaw through 2015 Reg. and 1st Special Sess., Act 2015-520).

> then, it becomes property or rights of property subject to levy, sale, alienation, or other disposition, except as is expressly authorized by statute.[151]

The significance of this distinction between right and privilege relates primarily to private law duties: a property right is alienable, while the privilege of redemption is not.[152] But the distinction also has constitutional significance. A constitutional right to a civil jury trial does not extend to vindication of the redemption privilege.[153] Because redemption is a privilege and not a property right, it must be exercised in whatever proceeding the legislature provides:

> No such right existed in common law. It was entirely within the competency of the Legislature to determine the conditions upon which the right could be granted. The right of trial by jury, according to the forms of the common law, does not include newly created rights to be effectuated by statutory proceedings.[154]

Furthermore, the Supreme Court of the United States has held that an *extension* of the privilege of redemption does not violate constitutionally protected rights,[155] suggesting that, whatever might be true of the right to foreclose, any entitlement to summary foreclosure proceedings held by the mortgagee is also a privilege, and not a fundamental right.[156]

Private usufructs in state-owned property are also exercised as privileges, not rights.[157] Where the government is the owner of property, any private liberties to use the resource are revocable at the government's will; private citizens do not enjoy legal claims to the incidents of ownership.[158] Thus, a government that forbids a use of public land previously made by private citizens deprives no one of property rights.[159] "[T]he government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute

---

[151] § 6-5-250 (Westlaw).

[152] Stevenson v. King, 10 So. 2d 825, 826 (Ala. 1942).

[153] *Id.*

[154] *Id.*

[155] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 415–16, 447–48 (1934).

[156] *See id.* at 446–47 (noting redemption is a statutory construction that is altered through the court's equity only if it is determined that the restriction falls outside of the state's protective power).

[157] *Cf.* Kate Shelby, *Taking Public Interests in Private Property Seriously: How the Supreme Court Short-Changes Public Property Rights in Regulatory Takings Cases*, 24 J. LAND USE & ENVTL. L. 45, 51–53 (2008) (explaining that water ways are often owned by the state and individual rights to such state owned property is subject to the overriding community interest).

[158] *See, e.g.*, Moore v. MacMillan [1977] 2 NZLR 81 (SC) at 82, 90–91 (N.Z.) (discussing the impossibility of individual rights in Crown-owned land).

[159] Light v. United States, 220 U.S. 523, 535 (1911).

trespassers. It may deal with such lands precisely as a private individual may deal with his farming property."[160]

As these examples show, it is simplistic to say of property that it is always a fundamental right, just as it is simplistic to say that it is merely a privilege that the state allows owners to exercise and that can be completely defeased where private uses "cease to serve the public interest."[161] Some property rights are fundamental (whatever their doctrinal significance under takings and due process rules) in the sense of being established and settled by authorities other than the state,[162] while some are entirely products of positive law, and are properly considered mere concessions of privilege.[163]

II. FUNDAMENTAL RIGHTS AND CONCESSIONS OF PRIVILEGES IN MARRIAGE AND PARENTAGE

Why is the right to marry considered a fundamental right in American constitutional jurisprudence? It is not an absolute right, nor was it included in the famous due process trio of life, liberty, and property. According to Blackstone and the other common law jurists, not all civil rights and duties are fundamental, though some are.[164] Civil rights to life and limb, liberty of movement, and private property ownership are protected by law in exchange for the subject's relinquishment of the rights he would have enjoyed in a state of nature.[165] Blackstone and American jurists, such as James Kent, called these "absolute rights,"[166] meaning that no person could be deprived of them except according to the law of the land, and only after being afforded that process which is due to one whose absolute rights are placed in jeopardy by the institution authorized to adjudicate the entitlement.[167]

---

[160] Camfield v. United States, 167 U.S. 518, 524 (1897).

[161] KEVIN GRAY & SUSAN FRANCIS GRAY, ELEMENTS OF LAND LAW 109–12, 112 n.2 (5th ed. 2009).

[162] MACLEOD, *supra* note 108, at 198–99.

[163] *Compare* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1736–37, 1765–66 (2012) (arguing that the distinction between vested rights and positive privilege is a result of separation of powers), *with* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 423–27, 446–52 (2010) (showing an antecedent to fundamental-rights jurisprudence in vested rights and natural right jurisprudence protecting property from legislative expropriation).

[164] 1 BLACKSTONE, *supra* note 80, at *123.

[165] *See id.* at *125 (noting that when individuals subject themselves to society they surrender certain natural rights).

[166] *Id.*; 2 KENT, *supra* note 120, at *1.

[167] 2 KENT, *supra* note 120, at *12–13.

A. History of Rights and Duties

The rights and duties of marriage and biological parentage (to which American jurists such as Kent added religious liberties of religious opinion, worship, and sanctity of conscience)[168] are even more directly fundamental than civil rights of life, liberty, and property.[169] They are not civil rights; they are among those divine and natural rights and duties that positive law merely declares, and does not create.[170] Civil marriage is a species of contract, Blackstone explained, but the rights and duties of civil marriage do not exhaust the rights and duties of marriage.[171] Most of the rights and duties of marriage are settled and specified by ecclesiastical courts and other religious authorities, and by nature and nature's God.[172]

Thus, the entire complex of jural relations among husband, wife, and children within the biological family is what we would today call fundamental. For Blackstone, "the most universal relation in nature" is that between biological parent and child, and it proceeds from the first natural relation, that between husband and wife.[173] "The main end and design of marriage" is "to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong . . . ."[174]

So, in our Anglo-American legal tradition, the marital relation comprises divine and natural rights and duties (which are fundamental by virtue of being part of our fundamental law), and rights and duties by virtue of being specified as conclusive reasons for action by authorities other than the state. The municipal law adds secondary securities to those rights and duties by vesting in the family a right not to have its integrity harmed by outsiders.[175] In addition to parental rights, the common law developed actions for alienation of affections, as well as actions for kidnapping, spousal privileges, and other legal incidents that stand guard around the marital and parental relations.[176] The right of marriage is the

---

168 *Id.* at *34, *75.

169 1 BLACKSTONE, *supra* note 80, at *41, *433, *446.

170 2 KENT, *supra* note 120, at *75.

171 *See* 1 BLACKSTONE, *supra* note 80, at *433, *442, *444 (explaining the civil marriage but noting that the "holiness" of marriage is left to ecclesiastical law as the civil courts do not have the ability to make judgments on all aspects of marriage).

172 *Id.* at *433–34, *442, *444.

173 *Id.* at *446.

174 *Id.* at *455.

175 *Id.* at *441.

176 Michele Crissman, *Alienation of Affections: An Ancient Tort—But Still Alive in South Dakota*, 48 S.D. L. REV. 518, 518 (2003); John L. Diamond, *Kidnapping: A Modern Definition*, 13 AM. J. CRIM. L. 1, 1 (1985); Martin D. Litt & Susan B. Dussault, *The Spousal Privileges*, COLO. LAW., Jan. 1997, at 61.

right to honor one's marital and parental obligations free from outside interference.[177]

B. Modern Jurisprudence

In the nineteenth and twentieth centuries, the most comprehensive threat to the family's integrity came not from adulterers and kidnappers but from a growing regulatory state, which claimed increasing power to regulate family life.[178] So it is no surprise that the family's right of integrity came to be asserted against government in cases such as *Meyer v. Nebraska*[179] and *Loving v. Virginia*.[180] Those cases rest upon the broad common law understanding of fundamental rights as pre-existing positive law, which merely declares and does not create them.[181] The fundamental rights of marriage and parentage impose upon governments a duty not to disrupt the integrity of the biological family,[182] except where the members of the family have relinquished their rights by neglecting or violating their natural duties to each other, and then only after they have been afforded due process.[183]

In this more recent jurisprudence, the fundamental right of marriage continues to secure the integrity of the intact, biological family—a phenomenon that the state encounters and does not create.[184] The relations within the biological family give rise to natural duties.[185] These arise out of the nature of the family group, "consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization."[186] Because the duties are grounded in nature and not the will

---

[177] Griswold v. Connecticut, 381 U.S. 479, 495–96 (1965).

[178] *See* Ann Laquer Estin, *Family Governance in the Age of Divorce*, 1998 UTAH L. REV. 211, 213, 215 (1998) (explaining that despite the claim that the family is a private institution, during the nineteenth century the state began to substantially regulate many aspects of the family, including courtship, marriage, and divorce).

[179] 262 U.S. 390, 399 (1923).

[180] 388 U.S. 1, 12 (1967).

[181] *Id.*; *Meyer*, 262 U.S. at 399–401.

[182] *Griswold*, 381 U.S. at 495–96; *Meyer*, 262 U.S. at 399.

[183] Note, *Child Neglect: Due Process for the Parent*, 70 COLUM. L. REV. 465, 465, 470 (1970).

[184] Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[185] *Meyer*, 262 U.S. at 400.

[186] Murphy v. Ramsey, 114 U.S. 15, 45 (1885). Recently a rich scholarly literature has grown up around this conception of the family using the term "conjugal marriage." *See, e.g.*, ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW 139, 141 (1999); PATRICK LEE & ROBERT P. GEORGE, CONJUGAL UNION: WHAT MARRIAGE IS AND WHY IT M ATTERS 5 (2014); Sherif Girgis, Robert P. George & Ryan T. Anderson, *What is Marriage?*, 34 HARV. J.L. & PUB. POL'Y

of the lawmaker, the state has no power to reconstitute the family at will.[187] Thus, the collective families proposed by Plato and practiced in Sparta are "wholly different from those upon which our institutions rest."[188]

Before *Windsor* and *Obergefell*, the Supreme Court consistently and continually re-affirmed this understanding of the marriage right as grounded in the nature of the biological relations, even in recent decades.[189] The biological family and the network of extended kinship that radiates out from it are "venerable" and "deserving of constitutional recognition."[190] The rights securing the family's integrity are "intrinsic human rights" that are deeply rooted in our "Nation's history and tradition."[191] The "biological bond between parent and child is meaningful," and the right of a biological parent "is an interest far more precious than any property right."[192]

This is why the Court has said that it is not "within the competency of the State" to infringe the fundamental rights of marriage and the natural family.[193] It was this tradition, grounded in the much older Anglo-American common law tradition, that the Court referred to in *Loving v. Virginia*, when it struck down Virginia's law burdening the fundamental right of a man and woman of different races to marry.[194]

The biological mother-father-child triad has a fundamental claim-right to legal recognition, which correlates with a fundamental duty of the state to extend that legal recognition.[195] So, altering the jural relations within the biological family is not entirely within the police powers of the state (much less the enumerated powers of the United States government).[196] Those powers have limits because the rights of natural

---

245, 262–63 (2011); Patrick Lee & Robert P. George, *What Sex Can Be: Self-Alienation, Illusion, or One-Flesh Union*, 42 AM. J. JURIS. 135, 135 (1997).

[187] *See Meyer*, 262 U.S. at 399–400 (holding that the state has no authority to interfere with an individual's fundamental rights, which includes the individual's right to privacy in his or her family life).

[188] *Id.* at 401–02.

[189] *See infra* notes 301–06 and accompanying text.

[190] Moore v. City of E. Cleveland, 431 U.S. 494, 504 (1977).

[191] Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 845 (1977) (quoting *Moore*, 431 U.S. at 503).

[192] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2574–75 (2013) (Sotomayor, J., dissenting) (quoting Santosky v. Kramer, 455 U.S. 745, 758–59 (1982)).

[193] Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

[194] 388 U.S. 1, 12 (1967).

[195] *See* Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942) (recognizing marriage and procreation are fundamental rights that the state must protect while holding that Oklahoma's law sterilizing criminals was unconstitutional).

[196] *Id.*

marriage and biological parenting are among "the basic civil rights of man" and governments are not free to alter or abridge them.[197]

For example, a state cannot constrain the rights of marriage by adding a duty not to marry a person of a different race.[198] The stated explanation for this limit might appear to be merely prudential: "Marriage and procreation are fundamental to the very existence and survival of the race."[199] But human procreation can continue with or without marital norms. The Court's linking of marriage and procreation is not merely to ensure that humans will be born in the future, but to ensure that they will be born in a distinct institutional and cultural setting that has its own multital jural relations.[200] The Court leaves those jural relations intact because it is *obligated* to do so in its role as fiduciary of the political community.[201] This makes the rights of marriage and parentage unlike the privilege of adoption and the incident of the paternity presumption in an important sense (though not all senses, as shown below).[202]

C. Privileges and Positive Incidents of Familial Relations

While the fundamental relations constituting marriage and biological parenting existed radically prior to the state and to positive law, the jural relations of adoption are entirely products of positive law.[203] As the Eleventh Circuit Court of Appeals has stated, "[u]nlike biological parentage, which precedes and transcends formal recognition by the state, adoption is wholly a creature of the state."[204] Therefore, the practice of adoption is not a fundamental right, but rather a privilege created by state law.[205]

Similarly, the presumption of paternity is a privilege created by positive law.[206] The common law presumption was a legal fiction designed to strike a balance between marital stability and the fundamental rights and duties of biological fathers to their children.[207] When the fiction could

---

[197] *Id.*

[198] *Loving*, 388 U.S. at 12.

[199] *Skinner*, 316 U.S. at 541.

[200] Roberts v. U.S. Jaycees, 468 U.S. 609, 618–19 (1984).

[201] *See Skinner*, 316 U.S. at 536, 541–42 (explaining that marriage and procreation are fundamental rights and applying strict scrutiny to protect those rights).

[202] *See* Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 809 (11th Cir. 2004) (explaining that adoption is not a fundamental right like marriage and parentage but rather the product of state law).

[203] *Id.*

[204] *Id.*

[205] *Id.* at 811–12.

[206] Veronica Sue Gunderson, *Personal Responsibility in Parentage: An Argument Against the Marital Presumption*, 11 U.C. DAVIS J. JUV. L. & POL'Y 337–42 (2007).

[207] *Id.* at 343–44, 347.

not be maintained, as when the husband was away at the time of birth and for more than a year prior, the presumption could be overcome.[208] Modern statutory paternity presumptions, such as the Massachusetts statute discussed above[209] and the Uniform Parentage Act,[210] take the fiction farther. They place both substantive and procedural limitations upon the rights of the biological father (and therefore on the rights of the child to have legal recognition of the biological father).[211] The resulting status of the husband as father is propped up by positive rules designed to maintain an artificial but stable relation, in large part to serve the well-being of the child.[212]

Yet even in the realm of privileges, fundamental rights and duties exert normative force in shaping the positive privileges and obligations.[213] The privileges of adoption (and their correlative duties) mimic the fundamental rights of man-woman marriage and biological parentage.[214] As the United States Supreme Court noted in *Smith v. Organization of Foster Families for Equality & Reform* and the Eleventh Circuit noted in *Lofton v. Secretary of Department of Children & Family Services*, by operation of state law, adoption is the "legal equivalent of biological parenthood."[215] For this reason and others, all family structures other

---

[208] *Id.* at 341.

[209] MASS. GEN. LAWS ANN. ch. 209C, § 6(a)(1) (West, Westlaw through ch. 92, 2015 1st Ann. Sess.).

[210] UNIF. PARENTAGE ACT §204(a) (2000) (amended 2002).

[211] § 204; Paula Roberts, *Biology and Beyond: The Case for Passage of the New Uniform Parentage Act*, 35 FAM. L. Q. 41, 57–60 (2001) (discussing the codification of the presumption of paternity).

[212] Roberts, *supra* note 211, at 42–43.

[213] In one state, Alabama, the positive enactments that either expressly codify or presuppose the fundamental law of marriage as the union of a man and a woman include statutes governing marital and domestic relations, *e.g.*, ALA. CODE § 30-4-9 (West, Westlaw through Act 2015-520, 2015 Reg. & 1st Spec. Sess.); the presumption of paternity, § 26-17-204 (Westlaw); other rules for establishment of the parent-child relationship, § 26-17-201 (Westlaw); laws governing consent to adopt, § 26-10A-7 (Westlaw); all other laws governing adoption, § 26-10A (Westlaw); termination of parental rights, § 12-15-319 (Westlaw); all laws that presuppose different people occupying the positions of "father," "mother," "husband," and "wife," e.g., § 40-7-17 (Westlaw); laws governing intestate distribution, the spousal share, § 43-8-41 (Westlaw), and the share of pretermitted children, § 43-8-91 (Westlaw); legal protections for non-marital children, § 26-17-202 (Westlaw); registration of births, § 22-9A-7 (Westlaw); conflict-of-interest rules and other ethical standards prohibiting marital relations, § 45-28-70(f)(1) (Westlaw); as well as laws presupposing biological kin relations, § 38-12-2(c)(1) (Westlaw).

[214] Lynn D. Wardle, A Critical Analysis of Interstate Recognition of Lesbigay Adoptions, 3 AVE MARIA L. REV. 561, 564 (2005).

[215] Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 812 (11th Cir. 2004) (quoting Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 844 n.51 (1977)).

than the biological family that receive recognition in state laws have historically been arranged to privilege those that most closely resemble the biological family, either by substituting biological kin for missing parents or substituting a second parent in the same office as the missing parent.[216]

To illustrate, consider the adoption laws of a state that has not redefined marriage to include same-sex couples. Alabama law provides for parallel adoption schemes in order to provide for the loss of either one or both parents.[217] Both schemes are designed to approximate, to the greatest extent possible, the intact, biological family structure.[218] The statute allows either an "adult person" or a "husband and wife jointly who are adults" to petition a court for authority to adopt a minor.[219] (By contrast, "[a]ny adult may petition the court to adopt another adult . . . .")[220] A step-parent may also adopt a minor if he or she is married to the child's parent and the biological parent of the same office (father or mother, respectively) has died or relinquished the rights and duties of parentage.[221] Thus, the adoption statute incorporates by reference Alabama's definition of marriage.

Where one biological parent is missing in the life of the child, Alabama law will recognize in place of that missing parent an adult who can step into the same office—mother or father—and is married to the present biological parent.[222] For example, where a child's biological father is missing, the law will allow a man who marries the biological mother to adopt the child. Where the child's biological mother is missing, the law will allow a woman who marries the biological father to adopt the child. Where both biological parents are missing, the law facilitates adoption by a single person or married couple who will most closely approximate the intact, biological family.[223] Where a married man and woman are willing, fit, and available to adopt, the state considers this a better alternative than leaving the child in foster care or the state's custody.[224] Where a

---

[216] *See id.* at 809–14 (discussing the Supreme Court's historic preference for biological families in discussing the parent-child relationship within adoption).

[217] § 26-10A-5 (Westlaw).

[218] *See generally* In re Adoption of K.R.S., 109 So. 3d 176, 176–78 n.1 (Ala. Civ. App. 2012) (preventing a same-sex spouse from adopting her wife's child under Alabama Code § 26-10A-27, for many reasons including that the mother had not relinquished her parental rights).

[219] § 26-10A-5(a) (Westlaw).

[220] § 26-10A-5(b) (Westlaw).

[221] §§ 26-10A-7, 26-10A-10, 26-10A-27 (Westlaw).

[222] § 26-10A-27 (Westlaw).

[223] § 26-10A-5(a) (Westlaw).

[224] Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 810, 818 (11th Cir. 2004).

married man and woman are not available or not fit, adoption by a single person is sometimes the best option.[225]

To extend adoption to same-sex couples is not as simple as redefining marriage because Alabama's adoption statutes maintain distinct and separate offices for father and mother, and presuppose no more than one of each.[226] Father is defined in the statute as, "[a] male person who is the biological father of the minor or is treated by law as the father."[227] Mother is defined as, "[a] female person who is the biological mother of the minor or is treated by law as the mother."[228] These two offices are distinct in the adoption statutes in part because of the requirement of obtaining consent from biological parents and the presumed father (if he is not the biological father) to an adoption.[229] And those requirements incorporate, among other incidents, the presumption of paternity.[230] Only where a marriage with a child ends and the wife marries a man who claims to be (and is) the child's biological father, the consent of the first husband is not required to allow the biological father to adopt the child.[231] In other words, only a biological father can terminate the rights and duties of a presumed father without the presumed father's consent.[232]

The right of the presumed or biological father to withhold consent from adoption of his children is the right that Justice Sotomayor characterized as "an interest far more precious than any property right."[233] The duty that it imposes upon both the state and would-be parents is justified on the basis of the duties that the father owes to the

---

[225] *Id.* at 810, 820.

[226] *See* § 26-10A-5 (Westlaw) (stating that a single adult or a jointly married husband and wife may adopt a child while any adult may adopt another adult); § 26-10A-27 (Westlaw) (stating that any spouse may adopt his or her spouse's child).

[227] § 26-10A-2(5) (Westlaw).

[228] § 26-10A-2(8) (Westlaw).

[229] § 26-10A-7(a)(2)–(3) (Westlaw).

[230] § 26-10A-7(a)(3) (Westlaw).

[231] The provision states:

> Provided however, in cases, where one who purports to be the biological father marries the biological mother, on petition of the parties, the court shall order paternity tests to determine the true biological father. If the court determines by substantial evidence that the biological father is the man married to the biological mother, then the biological father shall be allowed to adopt the child without the consent of the man who was married to the biological mother at the time of the conception or birth of the child, or both, when the court finds the adoption to be in the best interest of the child.

§ 26-10A-5(a)(3) (Westlaw).

[232] *See* § 26-17-204 (Westlaw) ("A presumption of paternity established under this section may be rebutted only . . . by a court decree establishing paternity of the child by another man.").

[233] Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2574–75 (2013) (Sotomayor, J., dissenting).

child.[234] "Corresponding to the right of control, it is the natural duty of the parent" to the child.[235] The fundamental right to the integrity of the family is inseparable from this "high duty" that parents owe to their children.[236] Both duty and right are fundamental and radically prior to their recognition in positive law.[237] The state is not free to disregard or infringe on the father's right because it must not interfere with the father's duties.[238] Witness the persistently separate offices in Massachusetts law for "father" and "mother"[239] nearly twelve years after the Massachusetts high court redefined marriage in state law.[240]

The offices of "father" and "mother" cannot, in reason, be fully fungible for each other in a state's adoption laws because the rights and duties of biological parents are fundamental. The creation of a non-biological, legal parent-child relationship must proceed in two steps. First, the biological parent must (if living) consent to breaking the fundamental jural relations with the child.[241] This requirement of consent is an incident of the parent's fundamental right.[242] Second, the state must consent to recognizing a new parental relationship, vesting the jural relations of parent-child in the adoptive or presumed parent.[243] This requirement of consent is an incident of the state's power as the source of the concession of privilege.[244] If the state decides to substitute a second mother for a father in the concession of privilege, then it has the power to do so, as

---

[234] Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

[235] Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

[236] *Pierce*, 268 U.S. at 535.

[237] *See* Troxel v. Granville, 530 U.S. 57, 66 (2000) (recognizing the fundamental rights of parents to make decisions about the care, custody, and control of their children).

[238] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[239] *Compare* MASS. GEN. LAWS ANN. ch. 209C, § 6(a)–(b) (West, Westlaw through 1998 Main Vol.) (assuming the stations of mother and father as of 1998), *with* MASS. GEN. LAWS ANN. ch. 209C, § 6(a)–(b) (West, Westlaw through ch. 1–45, 47–67 of 2015 1st Ann. Sess.) (stating identical provisions assuming stations of mother and father).

[240] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

[241] 1 DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN § 6:5, Westlaw (2d ed., database updated Nov. 2014).

[242] *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981) (explaining that parents have a "commanding" interest for accuracy and justice when terminating their parental rights).

[243] *See* Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 810–11 (11th Cir. 2004) (explaining that the state is responsible for determining whether a child will be placed with an adoptive family).

[244] *See id.* at 809–10 (explaining that the state is responsible for determining the placement of a child as a function of its role as the child's stand-in parent).

Massachusetts has shown.[245] But it does not have the power to destroy the fundamental rights of the biological parents.[246]

D. Fundamental Rights of the Child

The common law has long tied the rights of the children to the marital rights of the biological parents as security for the natural duties that parents owe to their children.[247] Blackstone and Kent understood parental rights and parental duties to be inextricably bound to each other and grounded in prior obligations to God.[248] The law did not create the family; it supported it.[249] This view informed the framers of the United States Constitution, who "saw it as a vice that monarchy transgressed against the integrity of life's separate realms and sought to make the king the father of the State."[250]

For Blackstone, the source of parental authority was the trio of natural duties that married parents owe to their children: maintenance, protection, and education.[251] The "most universal relation in nature" is that between biological parent and child, and it proceeds from the first natural relation, that between husband and wife.[252] "The main end and design of marriage" is to "ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong."[253] The right of marriage is thus grounded in parental *obligation*, which in turn is grounded in the fixed nature of a fundamental human relation—the union of a man and a woman.[254] That is a radically different conception of the right of marriage than the right announced in *Obergefell*—a right of individuals to employ positive

---

[245] Adoption of Tammy, 619 N.E.2d 315, 315–16, 319 n.5 (Mass. 1995).

[246] *See supra* notes 182–83 and accompanying text.

[247] 1 BLACKSTONE, *supra* note 80, at *446–47; 2 KENT, *supra* note 120, at *189–90, 193.

[248] 1 BLACKSTONE, *supra* note 80, at *446–47; 2 KENT, *supra* note 120, at *203 n.(c) (explaining that parental rights arise from the law of nature and that it is the "will of God" that they exercise their duty as parents).

[249] Stoner explains that for common law jurists, "no human law could make a family Christian, but the law was designed to protect the Christian family or, at the very least, was not intended to unsettle or undermine it." STONER, *supra* note 88, at 83. This conception of the family was commonly understood at the time of the American founding and the adoption of the Constitution. David F. Forte, *The Framers' Idea of Marriage and Family*, *in* THE MEANING OF MARRIAGE: FAMILY, STATE, MARKET, AND MORALS 100, 102 (Robert P. George & Jean Bethke Elshtain eds., 2003) ("[T]o the men and women of that generation, the family was a given: its structure, its stability, roles, and values accepted by all.").

[250] STONER, *supra* note 88, at 83.

[251] 1 BLACKSTONE, *supra* note 80, at *446, *452.

[252] *Id.* at *433, *446.

[253] *Id.* at *455.

[254] *Id.* at *446–47.

marriage laws in their acts of self-definition and companionship, a "two-person union unlike any other in its importance to the committed individuals."[255] Positive marriage laws produce new options and new opportunities to define oneself by entering officially-sanctioned bonds to the person of one's choice.[256]

For Blackstone and Kent, the norms of marriage are not created by individual choice for individual ends, nor by positive law. Rather, the duties are duties of natural law,[257] providence,[258] and "the voice of nature."[259] Positive law is only a security for preexisting duties.[260] The "municipal laws of all well-regulated states have taken care to enforce" the natural duties of parents to their children by putting particular legal powers in the parents' hands;[261] these enable parents to better discharge their natural duties.[262] And the positive law is a *secondary* security for parental duties to children, for "providence has done it more effectually than any laws, by implanting in the breast of every parent that natural . . . insuperable degree of affection, which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children, can totally suppress or extinguish."[263]

Recently, some have read these authorities to suggest that biological parents do not have fundamental rights to the relationship with their children, but instead hold custody as a privilege, a trust conceded to them by the state.[264] For example, Jeffrey Shulman argues that parents hold custody of their children as trustees of the state, and therefore the rights and duties bound up in the parent-child relation are subsidiary to the parents' duties to the state.[265] He reads these propositions into common

---

[255] *Obergefell*, 135 S.Ct. at 2599.

[256] *Id.* at 2597.

[257] 1 BLACKSTONE, *supra* note 80, at *446–47.

[258] *Id.* at *447; 2 KENT, *supra* note 120, at *189.

[259] 2 KENT, *supra* note 120, at *189.

[260] *See* 1 BLACKSTONE, *supra* note 80, at *447 (explaining that municipal law reinforces natural parental obligations); 2 KENT, *supra* note 120, at *189 (explaining that the natural responsibilities of a parent are reinforced by civil law).

[261] 1 BLACKSTONE, *supra* note 80, at *447.

[262] *Id.* at *452.

[263] *Id.* at *447; *see also* 2 KENT, *supra* note 120, at *190 ("The obligation of parental duty is so well secured by the strength of natural affection, that it seldom requires to be enforced by human laws."). Today this security is known as "kin altruism." Don Browning & Elizabeth Marquardt, *What About the Children? Liberal Cautions on Same-Sex Marriage*, *in* THE MEANING OF MARRIAGE, *supra* note 249, at 29, 36.

[264] *See* Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and* Pierce *and the Child as Property*, 33 WM. & MARY L. REV. 995, 1001–02 (1992) (arguing that children should have individual rights and a relationship to "the national family").

[265] Jeffrey Shulman, *The Parent as (Mere) Educational Trustee: Whose Education Is It, Anyway?*, 89 NEB. L. REV. 290, 299 (2010).

law jurists such as Blackstone, Kent, and Story.[266] A moment's reflection reveals the implausibility of this reading. The state cannot create children—governments do not procreate—and politicians and bureaucrats lack the parents' natural incentives to provide for the well-being of their children.[267] And anyone who thinks that the state is in a better position to direct the upbringing of children than the children's parents would do well to contemplate why the state does not simply make all children its wards.

The fundamental right of the child is not a right to turn out to be an educated, useful citizen for the state or a useful laborer for its workforce,[268] but a concrete right to have formalized and secure relations with her biological parents or, failing that, with her mother and mother's husband.[269] The "establishment of the parent-child relationship is the most fundamental right a child possesses to be equated in importance with personal liberty and the most basic of constitutional rights."[270] Indeed, it is "a child's most fundamental right next to life itself."[271]

Shulman's argument is made to look plausible by a sleight of hand. In the common law treatises that he cites, parents of course *do* hold custody of their children, and not property rights in them.[272] They are custodians of their children in a manner analogous to a bailment of tangible goods or trustees of an estate.[273] But to suggest that they hold children as bailees for the state is to neglect or ignore the very first duty of the common law, which of course, runs to nature's God and his laws, and the very first duty of parents, which runs to their biological children.[274] This is plain in the authorities that Shulman cites.[275] Shulman inexplicably portrays the notion of a primary duty to God as a *departure*

---

[266] *Id.* at 305–09.

[267] *See* 1 BLACKSTONE, *supra* note 80, at *447 (explaining that biological parents are more likely to fulfill their parental duties because of a God-given affection for their children instead of municipal law).

[268] I thank James Stoner for this latter phrase. As he pointed out to me, this is most often what the state seems to want.

[269] *See supra* notes 251–54 and accompanying text.

[270] Ruddock v. Ohls, 154 Cal. Rptr. 87, 91 (Cal. Ct. App. 1979).

[271] *Id.* at 92.

[272] *See* 1 BLACKSTONE, *supra* note 80, at *448; *see also* 2 KENT, *supra* note 120, at *193.

[273] *Compare Bailment*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining a relationship where property is held for a specific purpose), *with* 1 BLACKSTONE, *supra* note 80, at *446–47 (stating that parents voluntarily entered into an obligation when they begot their child, creating a responsibility to provide for them).

[274] 1 BLACKSTONE, *supra* note 80, at *42,*433, *446.

[275] *See, e.g.*, Shulman, *supra* note 265, at 306 nn.88–93 (citing both Blackstone and Kent repeatedly).

from Blackstone and Kent.[276] Whatever one might think about Blackstone's theology, one cannot attribute Shulman's politics to Blackstone.

Parents hold custody of children as bailees of God, as common law jurists have taken pains to explain, because God alone enjoys sovereignty over all human norms and relations.[277] One can construct a statist account of children's rights only by ignoring the most important features of the authorities on which that account is constructed. For Blackstone, all human sovereignty is subject to God's sovereignty and is held and exercised on God's behalf, including both the authority of parents and the sovereignty of the state.[278] For Kent, divine sovereignty is a more impersonal "Providence," but the natural rights and duties of the father-mother-child triad are grounded in it.[279] Blackstone explained that the authority of parents over their children is derived from their natural duties.[280] Those duties, in turn, are derived from the law of nature,[281] which is "superior in obligation" to any human law, and given to humans by God to govern their deliberations.[282] God is necessarily sovereign over all human affairs because humans are dependent upon him for their existence.[283]

Shulman's account also misses the nature of the jural relations themselves. The right that correlates to the parents' natural duties is held by the *child*, not by the state.[284] The nature of the child's fundamental right is precisely a right to have a legal connection with his or her biological *parents*, which secures parental duties to support and educate the child.[285] The state steps in on the child's behalf only where the child's well-being is seriously jeopardized.[286] The state does not have power to substitute its own judgment for parents' judgment when it deems its own

---

[276] *See id.* at 300 (positing it is anachronistic to read Blackstone and Kent in support of an absolute, sacred parental right to educate children).

[277] 1 BLACKSTONE, *supra* note 80, at *38–39, 446–47.

[278] *Id.* at *41.

[279] 2 KENT, *supra* note 120, at *189.

[280] 1 BLACKSTONE, *supra* note 80, at *452.

[281] *Id.* at *446–47, *450.

[282] *Id.* at *41.

[283] *Id.* at *39.

[284] *See id.* at *452–53 ("A father has no other power over his son's *estate*, than as his trustee or guardian . . . ."); 2 KENT, *supra* note 120, at *194 (writing that, where a father attempts to remove his child from the custody of a third person by habeas corpus, the child will decide the dispute if the child has reached sufficient maturity to judge for himself).

[285] *See* 1 BLACKSTONE, *supra* note 80, at *446–47, *450 (stating that children have a right to be maintained by the parents who beget them and who have a duty to educate them).

[286] Santosky v. Kramer, 455 U.S. 745, 760 (1982).

judgment superior because it is not a party to the multital jural relation of which the family consists.[287]

The common law's treatment of the parent-child relationship, as rooted in fundamental law, is not arbitrary or grounded only in theological commitments.[288] Philosopher Melissa Moschella has argued that parental authority is primary and pre-political because it "has an independent source in the nature of the parent-child relationship itself."[289] The relationship between a child and each of her biological parents is unique and non-fungible, and at least some of the child's needs can be met only by her biological parents.[290] The special, personal obligations of parents to their natural children is grounded in their interconnections at the bodily level—the parents are the but-for causes of the child's bodily existence—and are fulfilled at the psychological, intellectual, and volitional levels by the provision of that unique love that is *parental* love.[291]

The state thus has strong *reasons* to respect and encourage strong ties between children and their natural parents.[292] Those reasons will not be conclusive in cases of abuse and severe neglect, but they are strong reasons nonetheless.[293] The state has a particularly keen interest in deferring to the biological mother, who nurtures the child from conception.[294] Often overlooked is the state's duty to defer to the jural relation between father and child.[295] That the state benefits from giving legal recognition to the father's rights and duties is not what brings the rights and duties into being.[296] But the state does have strong reasons to recognize the father's rights and duties.[297]

In other words, it is not only positive law that orders marital and familial relations in society, but also rights and duties arising out of norms

---

[287] *Supra* notes 48–53 and accompanying text.

[288] *See, e.g.*, 1 BLACKSTONE, *supra* note 80, at *447 (explaining that the common law established the institution of marriage based on the need to readily ascertain who is obligated to provide for a child).

[289] Melissa Moschella, *Natural Law, Parental Rights and Education Policy*, 59 AM. J. JURIS. 197, 201 (2014).

[290] *Id.* at 204–05.

[291] *Id.* at 207–08. Adoptive parents can voluntarily assume such obligations, though adoptive parental duties are not pre-political in the same way.

[292] Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944).

[293] Troxel v. Granville, 530 U.S. 57, 68–69 (2000).

[294] *See* Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941, 996 (Mass. 2003) (Cordy, J., dissenting) (articulating that the mother has a relationship with her child originating from pregnancy and childbirth).

[295] *See id.* (noting that there is no corollary process for the father-child relationship like the mother-child relationship).

[296] 1 BLACKSTONE, *supra* note 80, at *446–67; 2 KENT, *supra* note 120, at *189–90.

[297] Roberts, *supra* note 211, at 53–54 (listing reasons for which the presumption of fatherhood is in place that primarily concern the welfare of the child).

and institutions of ordering other than the state.[298] Governments disrupt those rights and duties at their peril. The best way for the state to enable parents to honor their natural duties to their children is to secure the fundamental right of parents to direct the upbringing of their children and to encourage parents and potential parents to be and remain committed to each other.[299]

E. Obergefell *Invocations*

In contrast to the fundamental rights and duties of the natural family, which have proven persistent despite their inconsistency with full equality between marriage and same-sex marriage,[300] the doctrine of *Windsor* and *Obergefell* appears unstable. It rests upon legal doctrines that were overturned before in American history. Most of the authorities invoked in *Obergefell* actually contradict the Court's positivist assumptions, and those that do support the doctrine are not authorities with which *Obergefell*'s supporters should want to be associated.

The fundamental-law jurisprudence of the *Meyer-Pierce-Loving-Smith-Moore-Troxel* line of cases was echoed in other decisions, such as *Zablocki v. Redhail*,[301] *Turner v. Safley*,[302] *M.L.B. v. S.L.J.*,[303] and *Cleveland Board of Education v. LaFleur*.[304] As the *Obergefell* majority conceded, all of those cases either declared or accepted the definition of the marriage right to be a man-woman union.[305] They affirmed that the contours of marriage are derived from the nature of procreation and propagation of the human race, that it is a pre-political institution rather than a creation of positive law, and that it is therefore beyond the competence of courts and legislatures to alter.[306] Only by re-imagining the reasoning of those cases could the *Obergefell* majority have recast the conception of the marriage right declared in those cases as an individual right to make "personal choice regarding marriage" in the exercise of

---

[298] 1 BLACKSTONE, *supra* note 80, at *447.

[299] *See supra* notes 200–01 and accompanying text.

[300] *See supra* notes 239–40 and accompanying text (discussing the rights still associated with the terms "mother" and "father" after Massachusetts recognized nearly a decade earlier same-sex marriage).

[301] 434 U.S. 374, 383–84, 386 (1978).

[302] 482 U.S. 78, 94–96 (1987).

[303] 519 U.S. 102, 116–17 (1996).

[304] 414 U.S. 632, 639–40 (1974).

[305] *Obergefell*, 135 S. Ct. at 2598.

[306] *See, e.g.*, *Zablocki*, 434 U.S. at 383–84, 386–87.

personal "autonomy,"[307] which the Court found state lawmakers have sovereign power to confer.[308]

The *Obergefell* majority acknowledged those precedents, but ultimately eschewed the jurisprudence because it found "other, more instructive precedents," namely the Court's reproductive-rights and sexual-intimacy cases.[309] Of course, none of those cases challenged the definition of marriage as a man-woman union.[310] Ultimately, the "other, more instructive precedents" boil down to dicta taken selectively from the *Zablocki* decision and the Court's nineteenth-century decision in *Maynard v. Hill*,[311] which the *Obergefell* majority opinion draws heavily upon.[312]

This is a thin foundation, as most of the *Zablocki* opinion treats marriage as a natural and pre-political institution.[313] Yet, the *Zablocki* Court briefly alluded to the doctrine of *Maynard*,[314] a decision of the Supreme Court that nationalized the state-sovereignty jurisprudence of the antebellum and Civil War periods.[315] And the *Obergefell* majority expressly endorses *Maynard*'s characterization of marriage as "'a great public institution,'" which the polity governs.[316]

Maynard adopted the earlier reasoning of state high courts, which asserted an unfettered sovereignty of state lawmakers to settle, specify, and even to create and abrogate the rights and duties of domestic and social relations, including marriage, parentage, and slavery.[317] That doctrine had currency during the periods leading up to and during the Civil War.[318] The idea was that domestic relations are governed exclusively by the positive laws of nations and states, so that the rights,

---

[307] *See, e.g.*, *Obergefell*, 135 S. Ct. at 2599 (connecting an individual right to marriage through *Loving* and *Zablocki*).

[308] *See id.* at 2604–05 (holding "same-sex couples may exercise the fundamental right to marry" and discussing the democratic discourse leading to the decision).

[309] *Id.* at 2598–99.

[310] *See* M.L.B. v. S.L.J., 519 U.S. 102, 106–07 (1996) (challenging the right to appeal from a termination of parental rights); Turner v. Safley, 482 U.S. 78, 81 (1987) (challenging a prohibition on marriage between male and female inmates); *Zablocki*, 434 U.S. at 375 (challenging a statute that forbade marriage when child support went unpaid); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974) (challenging a school board rule that imposed mandatory maternity leave).

[311] 125 U.S. 190 (1888).

[312] *Obergefell*, 135 S. Ct. at 2598–601.

[313] *Zablocki*, 434 U.S. at 383–84.

[314] *Id.* at 384.

[315] *See Maynard*, 125 U.S. at 204–09 (finding that the competency to enact legislation relating to marriage, slavery, and parentage remained in the purview of the state).

[316] *Obergefell*, 125 S. Ct. at 2601 (quoting *Maynard*, 125 U.S. at 213).

[317] *Maynard*, 125 U.S. at 204–09.

[318] *Id.*

duties, and obligations of husband-wife, father-child, and master-slave can be created and abrogated by the sovereign lawmaker at will.[319]

As the high court of Rhode Island expressed the doctrine, the rights and duties governing marriage, parent-child relations, and slavery are entirely within the "exclusive sovereignty and jurisdiction" of every "nation and state," which may "except so far as checked by constitution or treaty, create by law new rights in, or impose new duties upon, the parties to these relations, or lessen both rights and duties, or abrogate *them*, and so the *legal* obligation of the relation which involves them, altogether."[320] The Rhode Island court conceded that the analogy between slavery and marriage was not exact; a nation's or state's sovereignty over the slavery relation was even *more* comprehensive than its sovereignty over the norms of marriage.[321] The court reasoned "that slavery is a partial and peculiar institution, not generally recognized by the policy of civilized nations; whereas marriage, in some form, is coextensive with the race."[322] Therefore, the sovereign power of any nation or state to create and abolish the rights and duties of marriage is limited by its obligation to respect the rights and duties of the citizens of other nations and states.[323]

By invoking *Maynard*, the *Obergefell* majority put itself at odds with the jurisprudence of *Loving*. The *Loving* Court expressly rejected the *Maynard* doctrine as inconsistent with the Fourteenth Amendment.[324] *Maynard* could be read only for the narrow proposition that the norms of the marital relation are subject to a state's police power and the *Maynard* doctrine itself could not be sustained after the Court's decisions in *Meyer* and *Skinner*.[325]

---

[319] The Maine court expressed this positivist view with some emphasis, asserting that the rights of marriage "are determined by the will of the sovereign" so that the rules governing marriage "are such as the law determines from time to time, and none other." Adams v. Palmer, 51 Me. 481, 483 (1863). The high court of Kentucky likewise reasoned:

> Of the nature of the marriage contract—which, sui generis, differs from all other contracts; and can not be dissolved by the parties; but may be by the sovereign power, exercised in legislative or judicial form, as the cause may justify, with or without the consent of both parties; and is not within the constitutional inhibition of legislative acts impairing the obligation of contracts.

Maguire v. Maguire, 37 Ky. (7 Dana) 181, 184 (1838), *abrogated by* Rowley v. Lampe, 331 S.W.2d 887 (Ky. 1960).

[320] Ditson v. Ditson, 4 R.I. 87, 101–02 (1856).

[321] *Id.* at 102.

[322] *Id.* at 102–03.

[323] *Id.*

[324] Loving v. Virginia, 388 U.S. 1, 7 (1967).

[325] *Id.* ("While the state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power, *Maynard v. Hill*, 125 U.S. 190 (1888), the State does not contend in its argument before this Court that its powers to regulate marriage are unlimited notwithstanding the commands of the Fourteenth Amendment. Nor could it do so

It is not difficult to see why the *Maynard* doctrine fell out of favor. And it is curious, to say the least, that the Court has once again adopted a view of sovereign power over social relations that has long been viewed with opprobrium. Yet, the *Obergefell* majority's invocation of *Maynard* does not look like a coincidence; something like the *Maynard* doctrine is necessary to the premise that the marital relation can be redefined by state positive law (*Windsor*) or federal judicial decision (*Obergefell*).[326]

And the *Obergefell* majority goes beyond *Windsor* and *Maynard*. It arrogates the power to constitutionalize not only a positivist conception of the marriage right's source and authority, but also the very contours of the relation itself drawn by the states that the Court favors and against the states whose laws it disfavors.[327] Chief Justice Roberts pointed out in his *Obergefell* dissent that the Court first arrogated this power in *Dred Scott v. Sandford*.[328] And the Court's same-sex marriage jurisprudence seems unstable in the way that its *Dred Scott* decision was unstable. *Dred Scott*'s assertion of judicial supremacy met the resistance of Abraham Lincoln, who rejected the Court's unlawful arrogation of the power of judicial supremacy.[329] *Obergefell* rests upon the same conception of the judicial power.

CONCLUSION

It is not just *Obergefell*'s conception of judicial power that renders the ruling unstable. The *Maynard-Windsor-Obergefell* conception of rights and duties as concessions of privilege created (and destroyed) by the

---

in light of *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Skinner v. Oklahoma*, 316 U.S. 535 (1942).").

[326] Chief Justice Roberts described the majority's ruling as "an act of will, not legal judgment," that "orders the transformation of a social institution that has formed the basis of human society for millennia, for the Kalahari Bushmen and the Han Chinese, the Carthaginians and the Aztecs. Just who do we think we are?" *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting).

[327] *See Obergefell*, 135 S. Ct. at 2617–18 (Roberts, C.J., dissenting) (quoting Ferguson v. Skrupa, 372 U.S. 726, 730 (1963)) ("'The doctrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely,' we later explained, 'has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.'").

[328] *Id.* at 2616–17 (citing Dred Scott v. Sandford, 19 How. 393 (1857)). The Chief Justice pressed a different substantive due process analogy at greater length, concluding that ultimately, "only one precedent offers any support for the majority's methodology: *Lochner v. New York*." *Id.* at 2620–21 (citing Lochner v. New York, 198 U.S. 45 (1905)); *cf.* Sherif Girgis, Windsor*: Lochnerizing on Marriage?*, 64 CASE W. RES. L. REV. 971, 995 (2014) (arguing that the Court heavily relied on *Lochner* when it found the Defense of Marriage Act to be unconstitutional).

[329] Abraham Lincoln, Lincoln's First Inaugural Address (March 4, 1861), *in* 1 DOCUMENTS OF AMERICAN HISTORY 385, 387 (Henry Steele Commager ed., 1973).

sovereign powers of nations and states leaves the institution of same-sex marriage vulnerable to constitutional challenge, and even to modest changes in positive law.[330] Concessions of privileges can be abrogated, and one Court's understanding of dignity and autonomy can be discarded by a later Court, particularly where it stands in tension with rights and duties grounded in fundamental law—history, tradition, and conscience.[331] In this light, it is instructive that the privileges of slave owners to treat other human beings as "property" were abrogated without affecting any vested rights or implicating any constitutional protections for property and contract.[332] Because slavery is anathema to the fundamental norms of the common law, the existence of that peculiar institution owed its existence entirely to positive law and could be limited and even abolished without legal consequence.[333] The Thirteenth Amendment restored the pre-political rights and duties of our fundamental law,[334] which persisted in spite of efforts by slave states and the Supreme Court to expand the definition of "property" to include blacks.[335]

This raises challenging questions for the marriage equality project. If marriage revision entails making the privileges of marriage and same-sex marriage equal, and if the rights and duties of biological marriage and natural parentage are fundamental rights, then what does marriage equality mean? Even though a majority of the United States Supreme Court declared unconstitutional all remaining state laws which presuppose marriage by its natural and historical contours as the union of a man and woman,[336] the fundamental rights and duties of marriage and the privileges of same-sex marriage are likely to co-exist for some time. States simply cannot eliminated the fundamental norms of the biological family. This co-existence is likely to be uncomfortable both for persons in same-sex marriages and for individuals and groups that adhere

---

[330] *See supra* notes 29–43, 317 and accompanying text.

[331] *See supra* notes 37–40 and accompanying text.

[332] Buckner v. Street, 4 F. Cas. 578, 581–82 (E.D. Ark. 1871).

[333] Forbes v. Cochrane, (1824) 107 Eng. Rep. 448, 453–54; Somerset v. Stewart (1772) 98 Eng. Rep. 499, 510.

[334] U.S. CONST. amend. XIII.

[335] Dred Scott v. Sandford, 19 How. 393, 406, 408 (1857).

[336] *Obergefell*, 135 S.Ct. at 2607–08. *But cf.* COLO. REV. STAT. § 14-2-104 (LexisNexis, LEXIS through 1st Reg. Sess., 70th Gen. Assemb., 2015); GA. CODE ANN. § 19-3-3.1 (LexisNexis, LEXIS through 2015 Reg. Sess.); LA. CIV. CODE ANN. art. 86 (West, Westlaw through Tit. 1, 2, 4, 5, 7, 8, 10, 16, 19, 20, 21, 24, 41, 50, 52, 53, 54, and 55, of 2015 Reg. Sess.); ME. REV. STAT. ANN. tit. 19-A, § 650 (West, Westlaw through ch. 238, 268, through ch. 377, 1st Reg. Sess., 2015); MISS. CODE ANN. § 93-1-5 (LexisNexis, LEXIS through 2015 Reg. Sess.); N.D. CENT. CODE § 14-03-01 (LexisNexis, LEXIS through 2015 Reg. Leg. Sess.).

to the historical definition of marriage for moral or religious reasons, not to mention for children.[337]

What additional concessions of privilege can be extended to make this new marriage experiment more tolerable for all? Perhaps, as some scholars have suggested, marriage will no longer be a unitary institution, valid (or not) for all purposes, but instead states will differentiate different incidents for different marital and marriage-like institutions.[338]

Yet that seems unlikely in the short term. The burden of crafting such fine-tuned norms and institutions would fall most heavily on legislatures.[339] And the absence of any sense, much less consensus, about the ends or purposes of various romantic unions prevents coherent political action at present.[340] It seems more likely that the fundamental norms of the common law—the natural duties and rights of the mother-father-child triad—will reassert themselves by necessity as states come to grips with the devastating consequences of fatherlessness in our post-marriage culture. President Obama has noted:

> We know the statistics—that children who grow up without a father are five times more likely to live in poverty and commit crime; nine times more likely to drop out of schools and 20 times more likely to end up in prison. They are more likely to have behavioral problems, or run away from home or become teenage parents themselves. And the foundations of our community are weaker because of it.[341]

Justice Cordy explained in his *Goodridge* dissent how the natural rights and duties of fatherhood address this concern: "Whereas the

---

[337] *See, e.g.*, Elane Photography, L.L.C. v. Willock, 309 P.3d 53, 59–61 (N.M. 2013) (holding that a commercial photography business was liable for discrimination on the basis of sexual orientation, regardless of the business owner's religious belief that marriage is a man-woman union and despite undisputed evidence that the owners were willing to serve same-sex attracted persons); *See generally* RYAN T. ANDERSON, TRUTH OVERRULED: THE FUTURE OF MARRIAGE AND RELIGIOUS FREEDOM (2015) (discussing the ramifications of marriage and freedom of religion in light of *Obergefell*).

[338] Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1971 (1997).

[339] *See Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting) (explaining that it is historically the responsibility of the state legislatures to define marriage).

[340] *See* Laura Meckler, *New Gay-Rights Push Faces Uphill Climb in Congress*, WALL ST. J. (Jul. 7, 2015), http://www.wsj.com/articles/new-gay-rights-push-faces-uphill-climb-in-congress-1436313522 (reporting insufficient support in Congress to pass legislation prohibiting sexual orientation discrimination in jobs, financial transactions, housing, and other aspects of public life); Justin Wm. Moyer, *Bobby Jindal Promises Executive Order Critics Say Allows Discrimination Against Same-Sex Couples*, WASH. POST (May 20, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/05/20/bobby-jindal-promises-executive-order-allowing-discrimination-against-same-sex-couples (discussing the failed Louisiana Marriage and Conscience Act).

[341] Politico Staff, *Text of Obama's Fatherhood Speech*, POLITICO (Jun. 15, 2008, 1:40 PM), http://www.politico.com/news/stories/0608/11094.html.

relationship between mother and child is demonstratively and predictably created and recognizable through the biological process of pregnancy and childbirth, there is no corresponding process for creating a relationship between father and child."[342] Marriage, with its attendant complex of jural relations between father and children, fills the gap "by formally binding the husband-father to his wife and child, and imposing on him the responsibilities of fatherhood. The alternative, a society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected processes, would be chaotic."[343]

That chaos must create incentives to reconsider whether the baby has been tossed out with the bathwater. Years after eliminating the distinctions between mother and father from their definitions of marriage, states such as Massachusetts and New York have not fully come to terms with the implications of their experimentation on marriage and family law.[344] And, it is significant that those states have not eliminated the incidents of marriage that presuppose the natural duties of biological parents.[345]

This will be even more apparent if states get out of the marriage licensing business altogether, as some are proposing.[346] The elimination of positive laws governing marriage will not leave a vacuum. The fundamental incidents of marriage pre-existed state licensing schemes, and the repeal of those schemes need not deprive courts of the resources that the common law developed over centuries to address the practical problem of tying fathers to the mother-child dyad and securing the rights of men and woman to honor their obligations to each other and to their children.

---

[342] Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941, 996 (Mass. 2003) (Cordy, J., dissenting).

[343] *Id.* (citations omitted).

[344] *See, e.g., id.* at 963 (expressing that the jurisprudence for incidentals involved in the dissolution of same-sex marriage is undeveloped); Q.M. v. B.C., 995 N.Y.S.2d 470, 474 (N.Y. Fam. Ct. 2014) ("Thus, while the language of Domestic Relations Law § 10–a requires same-sex married couples to be treated the same as all other married couples, it does not preclude differentiation based on essential biology.").

[345] *See, e.g.*, MASS. GEN. LAWS. ANN. ch. 209C, § 6 (West, Westlaw through ch. 92, 2015 1st Annual Sess.); N.Y. DOM. REL. LAW § 5 (McKinney, Westlaw through 2015, Chs. 1 to 235).

[346] *See* Sheryl Gay Stolberg, *Kentucky Clerk Defies Court on Marriage Licenses for Gay Couples*, N.Y. TIMES (Aug. 13, 2015), http://www.nytimes.com/2015/08/14/us/kentucky-rowan-county-same-sex-marriage-licenses-kim-davis.html?_r=0 ("In Alabama, probate judges in 13 of 67 counties are . . . declining to issue marriage licenses to anyone . . . . And State Senator Greg Albritton is calling for the state to get out of the marriage license business.").

FEDERAL RULE OF EVIDENCE 704(B): A REMEDY IN NEED OF A CURE

INTRODUCTION

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.[1]

These words, written over a century ago by Justice Oliver Wendell Holmes, aptly capture the effect that the 1982 trial of John Hinckley Jr. had on the law.[2] In that trial, Hinckley was found "not guilty by reason of insanity" for the attempted assassination of President Reagan.[3] The Hinckley case was both great, difficult, and, as Holmes predicted, it resulted in particularly bad law.[4] In reaction to the outcome of this trial,[5] Congress amended Federal Rule of Evidence 704 by adding to it Rule 704(b).[6] This amendment partially reinstated a prohibition on expert testimony in trials known as the "ultimate issue" rule.[7] The "ultimate issue" rule had been previously rejected by federal courts[8] because it was "unduly restrictive, difficult of application, and . . . deprive[d] the trier of fact of useful information."[9] Thus, what was formerly clear became muddled as the "ultimate issue" rule returned to federal courts in a new form, despite all of its noted problems.

It is therefore unsurprising that Rule 704(b) revives many of the same problems that were the impetus for the abolition of the original

---

1 N. Sec. Co. v. United States, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting).

2 *See infra* Part I.B.

3 Hinckley v. United States, 140 F.3d 277, 279 (D.C. Cir. 1998).

4 *See infra* Part I.B.

5 Anne Lawson Braswell, Note, *Resurrection of the Ultimate Issue Rule: Federal Rule of Evidence 704(b) and the Insanity Defense*, 72 CORNELL L. REV. 620, 624 (1987).

6 S. REP. NO. 98-225, at 230 (1983). The text of the new amendment states: "In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone." FED. R. EVID. 704(b).

7 Braswell, *supra* note 5, at 620. The "ultimate issue" rule was a common law development that prohibited any witness, whether expert or lay, from giving an opinion regarding issues, such as guilt and innocence, which were the exclusive province of the jury to decide.

8 *Id.* at 623.

9 FED. R. EVID. 704 advisory committee's note to 1972 proposed rule. In codifying the abolition of the rule, the committee noted that many modern decisions had already abandoned the rule completely. *Id.*

"ultimate issue" rule: Rule 704(b) is unduly restrictive,[10] creates confusion in federal courts as to the Rule's application,[11] and strips juries of some of the most useful testimony an expert can offer.[12] Part I of this Note discusses the history behind the abolition of the "ultimate issue" rule and the events that catalyzed its reanimation in the form of Rule 704(b). Part II examines the impact of Rule 704(b) on federal courts and concludes that, in addition to failing to remedy the problems Congress proffered it would solve, the Rule actually creates more problems for the evidentiary system. Part III analyzes several proposed solutions to the problems created by Rule 704(b) and recommends that the Rule be repealed.

I. THE ORIGINS OF RULE 704

Federal Rule of Evidence 704 is titled "Opinion on an Ultimate Issue," and is currently composed of two subsections:

> (a) In General—Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.
>
> (b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.[13]

Thus, while 704(a) articulates that it is not inherently impermissible for a witness to state an opinion that reaches the ultimate issue of a case, 704(b) counters that such opinions are indeed prohibited in certain situations.

A. Rule 704(a)—The Life and Death of the Ultimate Issue Rule

To understand the regressive nature of Rule 704(b), it is first important to understand the history behind the rule it altered, Rule 704(a). Rule 704(a) embodies the modern consensus of courts that any witness's opinion, whether lay or expert, should be admitted at trial when helpful to the trier of fact.[14] Historically, however, expert opinion was not always universally allowed.[15]

---

[10] *Id.*

[11] *See* DAVID H. KAYE ET AL., THE NEW WIGMORE: A TREATISE ON EVIDENCE EXPERT EVIDENCE § 2.2.3.b (2d ed. 2011) (discussing the three main approaches adopted by courts when determining the admissibility of nonpsychological expert testimony).

[12] *See* Daniel J. Capra, *A Recipe for Confusion: Congress and the Federal Rules of Evidence*, 55 U. MIAMI L. REV. 691, 697–98 (2001) (arguing that Rule 704(b) allows juries to have general information about a defendant's mental disorder without sufficiently explaining how the mental disorder impacts the defendant's actions regarding the alleged crime).

[13] FED. R. EVID. 704.

[14] FED. R. EVID. 704 advisory committee's note to 1972 proposed rule.

[15] *See* Ric Simmons, *Conquering the Province of the Jury: Expert Testimony and the Professionalization of Fact-Finding*, 74 U. CINCINNATI L. REV. 1013, 1016–17 (2006) (observing that expert opinion was prohibited in early common law).

Some expert opinion testimony was permitted in courts as early as the end of the eighteenth century.[16] Expert opinion was treated differently from lay witness opinion in that the expert did not need to have first-hand knowledge of the events at issue to provide an opinion in court.[17] Testimony from an expert who did not have first-hand knowledge was permitted only if the expert witness was skilled in the particular subject on which he testified[18] and the "jury would really be aided by the expert's opinion."[19] As expert witnesses became more common at trial, some judges grew concerned about experts testifying on the ultimate issue to be decided in the case.[20] It was thought that such testimony would invade the province of the jury, who would simply accept the expert's conclusion and not consider the other evidence at trial.[21] This logic led to the development of the "ultimate issue" rule, which excluded expert opinion on factual issues that were the responsibility of the jury to decide.[22]

In the twentieth century, the frequency of expert testimony in trials increased as litigated issues grew in complexity and required judges and juries to rely on specialists to understand those issues.[23] Judges often faced difficult line-drawing decisions as to whether expert testimony was an opinion that concerned an ultimate question.[24] Beginning in the 1930's and as the century progressed, some courts rejected the "ultimate issue" rule out of necessity—they needed the information experts provided.[25] Courts and critics alike decried the rule, asserting that it had virtually no sound basis and was one of the greatest contributors of "useless appeals."[26] By the mid-1960's, most jurisdictions had rejected the "ultimate issue" rule[27] as "unduly restrictive, difficult of application, and generally

---

[16] *Id.*

[17] Fireman's Ins. v. J. H. Mohlman Co., 91 F. 85, 87 (2d Cir. 1898) ("Expert witnesses are permitted to give their opinion upon a given state of facts hypothetically presented, whether personally cognizant or not of some or all of the facts of the particular case.").

[18] At common law, an expert was "a person possessed of science or skill respecting the subject-matter; one who has made the subject upon which he gives his opinion a matter of particular study, practice or observation." Maury R. Olicker, *The Admissibility of Expert Witness Testimony: Time to Take the Final Leap?*, 42 U. MIAMI L. REV. 831, 833 (1988).

[19] Simmons, *supra* note 15, at 1016–17.

[20] *Id.* at 1018. It is not clear exactly when these concerns first arose, but it is likely that it was in the mid-nineteenth century. Olicker, *supra* note 18, at 850.

[21] Paul R. Rice & Neals-Erik William Delker, *A Short History of Too Little Consequence*, 191 F.R.D. 678, 711 (2000).

[22] *Id.*

[23] Simmons, *supra* note 15, at 1024.

[24] Braswell, *supra* note 5, at 622; Simmons, *supra* note 15, at 1024.

[25] Braswell, *supra* note 5, at 622–23; Simmons, *supra* note 15, at 1024 (stating that "frequently the ultimate issue itself . . . could not be resolved without the aid of experts").

[26] Braswell, *supra* note 5, at 623–24.

[27] *Id.*

serv[ing] only to deprive the trier of fact of useful information."[28] The rule was finally abolished in federal courts in 1975 with the codification of the Federal Rules of Evidence.[29]

Federal Rule of Evidence 704 specifically overturned the "ultimate issue" rule[30] by providing that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[31] The Advisory Committee to the Rules noted that expert opinion should be admitted whenever helpful to the trier of fact.[32] The Committee also indicated, however, that the abolition of the "ultimate issue" rule did not mean that all expert opinion was admissible—such testimony would still need to conform to the other Federal Rules of Evidence.[33] Concerns that the new Rule would allow experts to testify without restriction were therefore ameliorated by adopting other Rules of Evidence.[34]

This issue was thus resolved in federal courts for nearly a decade before Congress amended Rule 704 in 1984.[35] Why then did Congress resurrect a rule that, for much of the twentieth century, was recognized as "unduly restrictive, difficult of application, and . . . [which] deprive[d] the trier of fact of useful information"?[36] The answer lies in one great case thrust into the public eye in 1982[37] that caused even "well settled principles of law [to] bend."[38]

---

28 FED. R. EVID. 704 advisory committee's note to 1972 proposed rule; *see also* 7 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1921 (2d ed. 1923) (discrediting the "ultimate issue" rule for the under-inclusiveness and over-breadth that results when the rule is applied).

29 Braswell, *supra* note 5, at 623.

30 FED. R. EVID. 704 advisory committee's note to 1972 proposed rule.

31 Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926, 1937 (1975) (enacting the Federal Rules of Evidence). Prior to the Rule's amendment in 1984, there were no subdivisions and what is currently Rule 704(a) represented the entire Rule. *See* S. REP. NO. 98-225, at 230 (1983) (discussing the proposed amendment that became Rule 704(b)). However, Rule 704(a) was subsequently modified to now read: "An opinion is not objectionable just because it embraces an ultimate issue." FED. R. EVID. 704(a).

32 FED. R. EVID. 704 advisory committee's note to 1972 proposed rule.

33 *Id.*

34 For instance, Federal Rule of Evidence 702(a) qualifies the admissibility of expert testimony by allowing an expert to testify only if "the expert's scientific, technical, or other specialized knowledge will *help* the trier of fact to understand the evidence or to determine a fact in issue." FED. R. EVID. 702(a) (emphasis added). Therefore, opinions that "merely tell the jury what result to reach" are excluded under Rule 702 as not being helpful to the jury's understanding of the evidence. FED. R. EVID. 704 advisory committee's note to 1972 proposed rule. Similarly, an expert opinion that makes unfounded legal conclusions is excluded. *Id.*

35 Rice & Delker, *supra* note 21, at 711–12.

36 FED. R. EVID. 704 advisory committee's note to 1972 proposed rule.

37 Braswell, *supra* note 5, at 623–24.

38 N. Sec. Co. v. United States, 193 U.S. 197, 401 (1904) (Holmes, J., dissenting).

B. Rule 704(b)—The Ultimate Issue Rule Reanimated

On a gray and rainy spring afternoon in Washington, D.C., John Hinckley, Jr. waited outside the Washington Hilton where President Reagan was scheduled to appear.[39] He hoped that by killing the President he would impress actress Jody Foster.[40] When President Reagan emerged from the hotel, Hinckley opened fire and wounded four people including the President.[41] In the highly publicized trial that followed, Hinckley was found not guilty by reason of insanity.[42] The nation was outraged by the verdict.[43] Meanwhile, media coverage surrounding the outcome of the trial concentrated on the contradicting opinions of the psychiatric experts who evaluated Hinckley and testified at trial.[44] Critics blamed the result of the trial on, among other things, the faulty procedural system that had allowed such contradictory expert opinion to evidently confuse the jury into rendering such a verdict.[45] In this politically charged climate, Congress decided that the best solution was to reform the trial system that had allowed such an "injustice."[46]

Following the Hinckley trial, Congress passed the Insanity Defense Reform Act.[47] This comprehensive Act was intended to "modernize the Federal criminal code"[48] with regard to the insanity defense and, ostensibly, to ensure that the results of the Hinckley trial were not repeated. A component of this reform, Rule 704(b),[49] amended Federal Rule of Evidence 704.[50] In drafting the amendment, Congress used broad

---

[39] Jonathan B. Sallet, *After Hinckley: The Insanity Defense Reexamined*, 94 YALE L.J. 1545, 1548 (1985); Howell Raines, *Reagan Wounded in Chest by Gunman; Outlook 'Good' After 2-Hour Surgery; Aide and 2 Guards Shot; Suspect Held*, N.Y. TIMES (Mar. 30, 1981), http://www.nytimes.com/learning/general/onthisday/big/0330.html#article.

[40] Sallet, *supra* note 39, at 1548.

[41] Raines, *supra* note 39; *see also* Dana R. Hassin, Comment, *How Much is Too Much? Rule 704(b) Opinions on Personal Use vs. Intent to Distribute*, 55 U. MIAMI L. REV. 667, 670 (2001) (noting that President Reagan, Press Secretary James Brady, and two others were shot as part of the attempted assassination of President Reagan).

[42] David Cohen, Note, *Punishing the Insane: Restriction of Expert Psychiatric Testimony by Federal Rule of Evidence 704(b)*, 40 U. FLA. L. REV. 541, 542 (1988).

[43] *See id.*

[44] Braswell, *supra* note 5, at 623–24.

[45] *Id.* at 624.

[46] Capra, *supra* note 12, at 691.

[47] Insanity Defense Reform Act of 1984, 18 U.S.C. § 20 (1984), *amended by* 18 U.S.C. §§ 17, 4241 (1988); *see also* S. REP. NO. 98-225, at 230–31 (1983) (explaining the purpose behind the Rule 704 amendment to was limit the scope of mental health expert testimony); Braswell, *supra* note 5, at 623–24 (stating Congress passed the Act in response to criticism after the trial).

[48] S. REP. NO. 98-225, at 222.

[49] FED. R. EVID. 704(b).

[50] S. REP. NO. 98-225, at 230.

language that reached far beyond the issue at hand[51] and, in part, reanimated the dead "ultimate issue" rule.[52]

II. THE LEGACY OF RULE 704(B)

As detailed below, Rule 704(b) is beset with many flaws.[53] However, if the Rule actually fixed the problem Congress intended to remedy, perhaps an argument could be made that the Rule is warranted regardless of the additional problems it creates. As discussed in Part II.B, the Rule cannot even be justified on that basis because it fails to solve even the alleged issue it was designed to correct: jury confusion.[54]

A. Rule 704(b) Creates the Same Problems as the Ultimate Issue Rule

It might be expected that a reanimation of the "ultimate issue" rule in criminal cases would cause the same problems in those cases that plagued courts under the original "ultimate issue" rule. The Advisory Committee for the Federal Rules of Evidence noted a few of the major problems with the "ultimate issue" rule.[55] The Committee observed that the rule was "unduly restrictive, difficult of application, and . . . deprive[d] the trier of fact of useful information."[56] Predictably, these same problems have haunted the courts since Rule 704(b) brought the "ultimate issue" rule back from the dead.

1. Unduly Restrictive

Just as the "ultimate issue" rule was unduly restrictive, Rule 704(b) unjustifiably restricts witness testimony because of its overly broad reach.[57] Statistics demonstrate that the insanity defense is rarely used and even more rarely used successfully.[58] Yet, because of the Hinckley

---

[51] *See infra* Part II.A.1.

[52] *See* Braswell, *supra* note 5, at 621 (noting that Rule 704(b) will reinstate some of the traditional prohibitions on the use of expert testimony).

[53] *See infra* Part II.A.

[54] *See infra* Part II.B.

[55] FED. R. EVID. 704 advisory committee's note to 1972 proposed rule.

[56] *Id.*

[57] *See* Hassin, *supra* note 41, at 672 (asserting that 704(b) encompasses all expert testimony).

[58] *See* Lisa A. Callahan et al., *The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study*, 19 BULL. AM. ACAD. PSYCHIATRY & L. 331, 335, tbl.1 (1991) (citing a survey of forty-nine counties across eight states that showed an insanity defense plea rate of as low as 0.93% and an acquittal rate of only 26.27% of that number); Stephen G. Valdes, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. PA. L. REV. 1709, 1723 (2005) (citing a study that reported the occurrence and later success rates for insanity defense pleas at 0.87% and 23.55%, respectively). These articles survey insanity pleas and success rates across state jurisdictions. However, while there are no statistics available on insanity pleas and success rates in federal courts, it is widely agreed that the defense is not

trial, Congress ignored the actual rarity of insanity pleas and amended Rule 704 using needlessly broad language that reached well beyond the issue at hand.[59] The language certainly functioned to limit psychiatric expert testimony in cases involving an insanity plea, but also carelessly and inadvertently restricted non-psychiatric expert testimony that in no way involved a defense of insanity.[60]

Courts recognize that the "purpose of [R]ule 704(b) is to prevent a jury adjudicating an insanity claim from becoming thoroughly confused by medical experts' testimony about the ultimate legal issues."[61] Indeed, historical evidence indicates that Congress intended the Rule to apply only to psychiatric testimony on the ultimate issue in the case.[62] Despite this, some courts hold that the Rule is not limited to mental health experts, but applicable to *all* expert witnesses who offer an opinion on whether a defendant had the requisite mental state.[63] This is because the rules of statutory construction given by Supreme Court precedent require this application.[64] If the meaning of a statute is plain and unambiguous, the statute must be applied according to its terms.[65] Additionally, if the

---

common. William French Smith, *Limiting the Insanity Defense: A Rational Approach to Irrational Crimes*, 47 MO. L. REV. 605, 606 & n.1 (1982).

[59] *See* S. REP. NO. 98-225, at 230 (1983) (stating that the amendment was intended to limit expert psychiatric testimony on the ultimate issue in insanity defense cases).

[60] *See, e.g.*, United States v. Morales, 108 F.3d 1031, 1036 (9th Cir. 1997) (holding that "[t]he language of Rule 704(b) is perfectly plain. It does not limit its reach to psychiatrists and other mental health experts. Its reach extends to all expert witnesses.").

[61] United States v. Kristiansen, 901 F.2d 1463, 1466 (8th Cir. 1990).

[62] Both the Senate and House reports on this issue indicated that the amendment was intended only to reach psychiatric testimony. The Senate Report clearly stated that Rule 704 was amended to create limitations on "the scope of expert testimony by psychiatrists and other mental health experts," and went on to say that, "[u]nder this proposal, *expert psychiatric testimony* would be limited to presenting and explaining their diagnoses, such as whether the defendant had a severe mental disease or defect and what the characteristics of such a disease or defect, if any, may have been." S. REP. NO. 98-225, at 230 (emphasis added). Similarly, the House Report read, "with regard to the ultimate issue, the *psychiatrist, psychologist* or other *similar expert* is no more qualified than a lay person." H.R. REP. NO. 98-577, at 16 (1983) (emphasis added). The Senate report specified that the rationale for excluding *psychiatric* expert testimony on ultimate issues was not limited only to the insanity defense but also included other mental states. S. REP. NO. 98-225, at 230. However, nowhere in either report does Congress indicate there was concern with non-psychiatric expert testimony. Inexplicably, the plain language of the Rule failed to reflect Congress's narrow concern on the effect of expert *psychiatric* testimony.

[63] *Morales*, 108 F.3d at 1036.

[64] The Supreme Court holds that the Federal Rules of Evidence should be interpreted in the same manner as any other statute, Daubert v. Merrell Dow Pharm., 509 U.S. 579, 587 (1993), and thus the first interpretive step is to consider the plain meaning of the statute, Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163 (1988). If the meaning is unambiguous, no further steps need to be taken to apply another meaning to the statute. Carcieri v. Salazar, 555 U.S. 379, 387 (2009).

[65] *Carcieri*, 555 U.S. at 387.

meaning is unambiguous, the Court will not "restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself."[66]

The language of Rule 704(b) is unambiguous: "an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense."[67] The language of the Rule is not limited to psychiatric or psychological expert testimony, although this is most likely what Congress intended,[68] but rather, broadly extends to all expert testimony. Therefore, as the language of Rule 704(b) is unambiguous, no further steps are taken to re-interpret it,[69] regardless of Congress's intent.

The result is that most federal courts, bound by the Supreme Court's requirements for interpretation, dutifully apply this broadly-written rule to encompass *all* expert opinion on a defendant's requisite mental state. This interpretation of Rule 704(b), while faithful to the plain meaning of the Rule's text and required by Supreme Court precedent, is unduly restrictive, as it limits expert testimony not only beyond what Congress originally intended,[70] but also beyond what is necessary to attain the result Congress set out to achieve.[71]

2. Difficulty in Application

Since the adoption of Rule 704(b), courts have also struggled to delineate the Rule's scope and determine its application.[72] As the Rule's broad language encompasses cases in which either a psychological expert or a non-psychological expert testify, courts have had to decide what type of testimony to allow from each type of expert. For cases involving expert

---

66 Brogan v. United States, 522 U.S. 398, 403 (1998).

67 FED. R. EVID. 704(b).

68 *See supra* note 62.

69 Ratzlaf v. United States, 510 U.S. 135, 147–48 (1994) (noting that the Court does "not resort to legislative history to cloud a statutory text that is clear.").

70 United States v. Morales, 108 F.3d 1031, 1036 (9th Cir. 1997) (stating that the legislative history behind Rule 704(b) indicates that "Congress intended to limit the reach of Rule 704(b) to psychiatrists and other mental health experts.").

71 *See infra* Part III.

72 *See, e.g.*, 3 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL, § 704.02[5]–[6] (10th ed. 2015) (illustrating the difficulty courts have in drawing lines between permissible expert testimony and conclusions on the defendant's mental state by examining *United States v. West*, 962 F.2d 1243 (7th Cir. 1992)); Charles W. Ehrhardt, *The Conflict Concerning Expert Witnesses and Legal Conclusions*, 92 W. VA. L. REV. 645, 653, 655 (1990) (asserting that results of expert testimony admission have been inconsistent).

psychological testimony, courts typically adopt either a simple "stops-short" approach[73] or a discretionary approach.[74]

The "stops-short" approach looks almost exclusively at the words used by the expert.[75] Expert testimony is admissible under this approach as long as the testimony stops short of stating that the defendant did or did not have the mental state or intent required by the law.[76] Conversely, the discretionary approach is much more fluid and it is not always clear when expert testimony will be admissible under such an analysis. This second approach is often utilized when concerns arise over a hypothetical scenario posed to a psychological expert. The expert's response is typically admissible if it describes the intent and mental states of persons in general, but inadmissible if the testimony goes to the intent of the specific defendant.[77] Where the hypothetical involves a fact pattern that mirrors the facts of the case, it is less certain whether testimony will be admitted. However, expert testimony is typically allowed as long as it leaves a further inference regarding the mental state of the defendant for the jury to decide.[78] Although these two approaches have been distilled here as

---

[73] KAYE ET AL., *supra* note 11, § 2.2.3(b).

[74] The discretionary approach is not a categorically definable one, but has been given such a designation by the Author to encompass courts that handle expert testimony in a way that does not fall squarely into the other categories of approaches. While some general rules do seem to exist under this approach, the decision to admit evidence appears to be largely at the discretion of the judge.

[75] KAYE ET AL., *supra* note 11, § 2.2.3(b).

[76] *Id.*

[77] *Id.* at § 2.2.3(a). Under the discretionary approach, there does not appear to be any bright-line test for when testimony is inadmissible. *Compare* United States v. Brown, 32 F.3d 236, 239 (7th Cir. 1994) (noting that under Rule 704(b), "testimony may be adduced exploring the particular characteristics of the mental disease and whether those characteristics render one afflicted with the disease able to appreciate the wrongfulness or the nature and quality of his behavior"), *with* United States v. Manley, 893 F.2d 1221, 1222 (11th Cir. 1990) (noting that, after a hypothetical example closely reflecting the defendant's case was given, it was impermissible under Rule 704(b) for counsel to ask the psychiatric expert, "would that person as described be able to appreciate the nature and quality or the wrongfulness of their actions?").

[78] United States v. Goodman, 633 F.3d 963, 970 (10th Cir. 2011). In this case, the court held that where the "prosecution posed hypothetical facts that mirrored the charged robberies and asked the experts whether the hypothetical robber's actions were consistent with the behavior of someone with PTSD," it did not violate Rule 704(b). *Id.* The court specified that "hypothetical questions mirroring the fact patterns of the trial case [are] permissible when the answering testimony still allows the fact finder to make an additional inference as to whether the defendant had the mental state or condition constituting an element of the crime charged." *Id.*; *see also* United States v. Dixon, 185 F.3d 393, 401 (5th Cir. 1999) (noting that under Rule 707(b) a majority of circuits that exclude expert testimony that leads to necessary inferences about the requisite mental state).

fairly straightforward rules, in practice, it is far from clear exactly when testimony becomes inadmissible.[79]

Insanity pleas are rare.[80] Therefore, most disputes involving expert testimony under Rule 704(b) center around testimony from experts in non-psychological fields such as law enforcement and even accounting.[81] For cases where the testifying expert is a non-psychological expert, courts have generally adopted one of three widely-varying approaches for interpreting and applying the Rule.[82] These have been termed the "stops-short" approach,[83] the "necessarily-follows" test, and the "probes-the-mind" test.[84] The vague nuances of these approaches and the fine line-drawing performed by courts indicate just how difficult Rule 704(b) is to apply in practice.[85] In fact, even within the same jurisdiction, the lines between the various approaches frequently blur.[86]

As discussed previously, jurisdictions that follow the "stops-short" approach for non-psychological expert testimony look almost exclusively at the words used by the expert and admit testimony as long as it stops short of stating that a defendant did or did not have the mental state or intent required by law.[87] This approach is used by the Second,[88] Tenth,[89]

---

79 *See* Capra, *supra* note 12, at 699–700 (summarizing cases that illustrate just how fine of a line it often is between admissible and inadmissible expert testimony).

80 *See* sources cited *supra* note 58.

81 *See* KAYE ET AL., *supra* note 11, § 2.2.3(b) (compiling cases involving expert testimony under Rule 704(b) where the vast majority are non-psychological experts).

82 *Id.*

83 The "stops-short" test appears to be the only approach that is used by courts for both psychological expert testimony and non-psychological expert testimony. This can be seen by a comparison of two criminal cases from the Tenth Circuit. *See* United States v. Goodman, 633 F.3d 963, 970 (10th Cir. 2011) (analyzing psychological expert testimony in insanity plea under the "stops-short" test); United States v. Richard, 969 F.2d 849, 855 (10th Cir. 1992) (analyzing non-psychological expert testimony under the "stops-short" test).

84 KAYE ET AL., *supra* note 11, § 2.2.3(b).

85 Capra, *supra* note 12, at 698–99.

86 KAYE ET AL., *supra* note 11, § 2.2.3(b).

87 *Id.*

88 United States v. DiDomenico, 985 F.2d 1159, 1165 (2d Cir. 1993) ("The plain language of the rule, however, means that the expert cannot expressly 'state the inference,' but must leave the inference, however obvious, for the jury to draw.").

89 United States v. Richard, 969 F.2d 849, 854 (10th Cir. 1992).

and Eleventh Circuits[90] as well as arguably the Fifth[91] and D.C. Circuits.[92] Illustrative of this approach is the Tenth Circuit opinion of *United States v. Richard*.[93]

In *Richard*, an undercover law enforcement agent posed as a drug supplier and set up a drug deal with the defendants to purchase 300 pounds of marijuana.[94] The defendant brought four men with him to the drug deal and all five men were subsequently arrested.[95] At trial, the undercover agent testified as an expert witness that, "[n]o drug dealer of a drug deal this size is going to have four persons that don't know anything about it."[96] The defendants argued that this testimony violated Rule 704(b) because the expert stated an inference about the mental state of the defendants that was an ultimate issue in the case.[97] The court disagreed and held that the agent's testimony was admissible as it only implied an opinion that the defendants were aware of the nature of the transaction and did not specifically state that conclusion for the jury.[98] The court ruled that "Rule 704(b) only prevents experts from expressly stating the final conclusion or inference as to a defendant's actual mental state. The rule does not prevent the expert from testifying to facts or

---

[90] United States v. Alvarez, 837 F.2d 1024, 1031 (11th Cir. 1988) (holding that where a DEA agent stated that it would be unlikely for crew members aboard a vessel carrying drugs to be unaware of the cargo, his testimony did not violate Rule 704(b) because he did not "expressly state a conclusion that the defendant did or did not have the requisite intent.").

[91] United States v. Dotson, 817 F.2d 1127, 1132 (5th Cir. 1987) (holding that a tax expert's testimony that consecutive increases in defendant's net worth "is indicative, and based on my experience shows to me, that he willfully and intentionally increased his income knowing full well that he had not reported the taxes due thereon," did not violate Rule 704(b) because the expert merely stated these actions were "indicative" and not that he certainly knew that was the defendant's intent), *vacated in part on reh'g*, 821 F.2d 1034 (5th Cir. 1987). *But see* United States v. Dixon, 185 F.3d 393, 400 (5th Cir. 1999) (holding that "[a]n expert is therefore free to testify as to whether the defendant was suffering from a severe mental illness at the time of the criminal conduct; [but] . . . prohibited . . . from testifying that this severe mental illness does or does not prevent the defendant from appreciating the wrongfulness of his actions."). The conflict in these holdings illustrates the struggle courts have in consistently applying Rule 704(b). As shown here, even within the same circuit, courts will sometimes interpret the Rule differently for expert psychological testimony than they do for other expert testimony.

[92] United States v. Williams, 980 F.2d 1463, 1466 (D.C. Cir. 1992) (holding that expert opinion on whether possession of plastic bags containing cocaine indicated that the drugs were intended to be distributed rather than personally consumed was permissible under the Rule because it did not directly refer to defendant's intent, but instead referred generally to anyone possessing that number of small bags of cocaine).

[93] *Richard*, 969 F.2d at 854–55.

[94] *Id.* at 851.

[95] *Id.* at 852.

[96] *Id.* at 854.

[97] *Id.*

[98] *Id.* at 855.

opinions from which the jury could conclude or infer the defendant had the requisite mental state."[99]

The "necessarily follows" test, like the "stops-short" approach, excludes expert testimony that states the final conclusion as to a defendant's mental state.[100] The "necessarily-follows" test is more restrictive, however, as it also excludes any expert opinion that leads to a necessary inference by the jury.[101] The "necessarily-follows" test excludes testimony if the inference left to the jury is too obvious.[102] The Ninth Circuit seems to be the lone circuit that has interpreted Rule 704(b) in this way.[103]

The Ninth Circuit provided a clear example of this approach in *United States v. Morales*, where the defendant was convicted of willfully making false entries in a union ledger.[104] A critical issue in the case was whether the false entries were a result of the defendant's ignorance of proper bookkeeping or whether she had intentionally falsified the records.[105] The defendant proffered expert testimony from a certified public accountant on whether the defendant understood bookkeeping principles, but the trial court would not allow it.[106] The court of appeals reversed,[107] stating that Rule 704(b) "allows testimony supporting an inference or conclusion that the defendant did or did not have the requisite *mens rea*, so long as the expert does not draw the ultimate inference or conclusion for the jury and the ultimate inference or conclusion does not *necessarily follow* from the testimony."[108]

The third interpretation of Rule 704(b) that courts have adopted is the "probes-the-mind" test.[109] Under this approach, the court asks if the expert testimony on the issue comes from expertise in psychology, psychiatry, or similar fields.[110] If it does not, then Rule 704(b) does not

---

[99] *Id.* at 854–55.

[100] KAYE ET AL., *supra* note 11, § 2.2.3(b).

[101] *Id.*

[102] *Id.*

[103] *See* United States v. Morales, 108 F.3d 1031, 1038 (9th Cir. 1997) (explaining and adopting the "necessarily follows" test); United States v. Dela Cruz, 358 F.3d 623, 626 (9th Cir. 2004) (continuing to apply the test from *Morales*); KAYE ET AL., *supra* note 11, § 2.2.3(b) (noting *Morales* is the case frequently cited for the approach); *supra* notes 88–92 and accompanying text (discussing the different approach adopted by the Second, Tenth, Eleventh, Fifth, and D.C. Circuits); *infra* note 113 and accompanying text (discussing an alternative approach adopted by the Seventh and Eight Circuits).

[104] *Morales*, 108 F.3d at 1033.

[105] *Id.* at 1034.

[106] *Id.*

[107] *Id.* at 1033.

[108] *Id.* at 1038 (emphasis added).

[109] KAYE ET AL, *supra* note 11, at §2.2.3(b).

[110] *Id.*

apply.[111] If the testimony does involve one of these fields, then Rule 704(b) precludes the expert only from testifying that she has special knowledge of the defendant's mental processes.[112] The Seventh and Eighth Circuits currently adhere to this approach.[113]

A good example of this approach is the Eighth Circuit case, *United States v. Wells*.[114] In *Wells*, the defendant was convicted of manufacturing methamphetamine.[115] A special agent with the Drug Enforcement Agency testified that "the patterns he identified in the pseudoephedrine [purchase] logs were consistent with someone who was purchasing pseudoephedrine pills for use in the manufacture of methamphetamine"[116] and that "[t]his pseudoephedrine [was] being purchased to be used in the manufacturing of methamphetamine."[117] The court held that the testimony was admissible because the expert did not claim expert knowledge of the defendant's mental state, but merely described the defendant's pseudoephedrine purchases as "consistent with someone who was purchasing the pills to manufacture methamphetamine."[118]

As indicated by these divergent approaches among the circuits and even among courts within the same circuit, Rule 704(b) requires courts to draw very fine lines. While this is not conclusive of its difficult application, the conflicting opinions are certainly good evidence of the great difficulty courts have in applying this Rule. Thus, as the "ultimate issue" rule did before it,[119] 704(b) creates significant difficulty for courts attempting to apply the Rule.

3. Deprives Jury of Useful Information

The final "ultimate issue" problem that Rule 704(b) mirrors is the suppression of information that is helpful to the jury. Under the "ultimate issue" rule, the jury was often denied information that was useful and even critical to their task as fact-finder.[120] The exclusion of this

---

[111] *Id.*

[112] *Id.*

[113] See *United States v. Lipscomb*, 14 F.3d 1236, 1241–42 (7th Cir. 1994), and *United States v. Wells*, 706 F.3d 908, 913–14 (8th Cir. 2013), for examples of this approach.

[114] *See Wells*, 706 F.3d at 914 (holding that where an expert witness testified showing that the pseudoephedrine logs showed patterns consistent with the purchase of the drug for the manufacturing of methamphetamine, such testimony was admissible under Federal Rule of Evidence 704(b) because the testimony was based on the expert's "knowledge of the purchasing patterns of someone using pseudoephedrine to manufacture methamphetamine, rather than on any special knowledge of [the Defendant's] thought processes.").

[115] *Id.* at 911.

[116] *Id.* at 912.

[117] *Id.* at 913–14.

[118] *Id.* at 914.

[119] *See supra* Part I.A.

[120] FED. R. EVID. 704 advisory committee's note to 1972 proposed rule.

information was based on the concern that juries would simply accept an expert's opinion as true without considering the other facts.[121] However, this assumption underestimates the jury's ability to separate expert opinion from the ultimate issue and was correctly recognized as hollow logic.[122] Rule 704(b), by relying on this same faulty logic, essentially reinstates the "ultimate issue" rule for criminal cases and creates the same problem of keeping helpful information from juries.[123]

Juries are frequently required to make a distinction between an expert's subjective opinion and the ultimate issue to be decided in the case.[124] Yet, in most cases, expert opinion is not withheld from the jury simply because it touches an ultimate issue in the case.[125] Indeed, Rule 704(a) explicitly permits expert opinion on ultimate issues.[126] For instance, juries are permitted to hear expert forensic testimony to determine the cause of death[127] and even hear expert psychological testimony on the *victim's* mental state in child abuse trials.[128] According to the rationale of Rule 704(b), it is only in the case of expert testimony on a *defendant's* mental state that the jury is thought incompetent to distinguish between the expert's opinion and the ultimate issue. Far from being innocuous, this miscalculation "denies juries the specialized

---

[121] Rice & Delker, *supra* note 21, at 711; Cohen, *supra* note 42, at 555.

[122] Rice & Delker, *supra* note 21, at 711; *see also* Cohen, *supra* note 42, at 555–58 (discussing the natural tendencies and capabilities of the jury that demonstrate the logical flaws of the "ultimate issue" rule in the context of Rule 704(b)).

[123] Rice & Delker, *supra* note 21, at 712 ("The only testimony that [Rule 704(b)] eliminates from the trial is the most useful testimony the expert could offer–the expert's opinion about the defendant's state of mind at the time the crime was committed").

[124] For example, consider a hypothetical child abuse trial where the victim has alleged physical, emotional, and mental abuse. At trial, a psychological expert testifies regarding the child's mental and emotional abuse. The jury must still determine whether to accept the expert's opinion and whether it was the defendant who caused the abuse. In this situation, the jury is trusted to hear such opinion from the expert witness on the *victim's* mental state and to separate that opinion from their verdict. This is true despite such opinion touching on an ultimate issue: whether the child suffered emotional or mental trauma. *See* Braswell, *supra* note 5, at 630–31 (providing examples of recorded cases where expert testimony on ultimate issues was permitted).

[125] *See, e.g.*, United States v. Lockett, 919 F.2d 585, 590 (9th Cir. 1990) ("A witness is not permitted to give a direct opinion about the defendant's guilt or innocence. . . . [H]owever, an expert may otherwise testify regarding even an ultimate issue to be resolved by the trier of fact.").

[126] FED. R. EVID. 704(a).

[127] Moses v. Payne, 543 F.3d 1090, 1106 (9th Cir. 2008) (holding that the expert opinion of a medical examiner that the victim died as a result of a homicide is permissible).

[128] Abshier v. Workman, No. CIV-02-1138-D, 2010 WL 3259817, 2010 U.S. Dist. LEXIS 85061, at *80 (W.D. Okla. Aug. 18, 2010) (holding that "expert testimony [is permitted] to assist the jury in understanding child abuse evidence").

knowledge of experts in just the type of complex case in which it is most useful."[129]

When a jury is permitted to hear from a psychological expert that the defendant has a mental illness, but is not permitted to hear from that expert whether those afflicted by the illness can understand the wrongness of their actions, it creates a hole in the jury's understanding. This missing information is some of the most useful a jury could obtain for deciding how to apply the expert's testimony in the case at hand. In place of this valuable information, the jury is merely left with a picture of the defendant's problems, but no tools to determine whether those problems have any legal significance.[130] If the testimony is helpful to the jury, why should it be excluded by Rule 704(b) simply because it goes to the ultimate issue to be decided by the jury?[131] The jury is always free to accept or reject the expert's opinion. Instead, Rule 704(b) does not trust the jury to do this and creates the bizarre situation where an expert can give a diagnosis, but not explain to the jury what the diagnosis means.

Consider the Seventh Circuit case of *United States v. West*.[132] In *West*, the defendant was caught on videotape robbing a bank and was later apprehended by police while still wearing a mask, carrying a gun, and holding the stolen money.[133] Left with few other options as a defense, the defendant pled insanity.[134] A psychiatric expert examined the defendant and prepared his written report for trial that the defendant suffered from "a severe mental disease or defect, specifically a schizoaffective disorder, and that [the defendant] was suffering from that disorder on the day he robbed the bank."[135] However, the expert also concluded that despite the defendant's mental condition, the defendant still understood that his actions were wrong.[136] The first part of the expert's testimony identifying the defendant's disease was unquestionably admissible under Rule 704(b) because it did not address the mental state of the defendant constituting an element of the defense.[137] On the other hand, the expert's conclusion that made sense of the diagnosis for the jury—that the defendant still understood the wrongness of his actions despite his mental condition—was not admissible under the Rule.[138] This is because the ability to

---

[129] United States v. Brown, 32 F.3d 236, 239 (7th Cir. 1994).

[130] Braswell, *supra* note 5, at 635.

[131] *See* Simmons, *supra* note 15, at 1024 (arguing that expert testimony should be allowed where it is also probative).

[132] 962 F.2d 1243 (7th Cir. 1992).

[133] *Id.* at 1244.

[134] *Id.*

[135] *Id.* at 1245.

[136] *Id.*

[137] *Id.* at 1250.

[138] *Id.* at 1247.

understand the wrongness of one's actions is an essential element of the insanity defense,[139] and therefore, expert testimony on this issue violated Rule 704(b).

Instead of allowing part of the testimony, however, the district court excluded all of the expert's testimony stating, "it is outrageous to say that a psychiatrist . . . should testify in support of an insanity defense when the physician says that under the definition of the statute . . . there is no insanity . . . ."[140] The court of appeals disagreed and held that the expert should have been allowed to testify as to the defendant's mental diseases, but should not have been allowed to testify on the conclusion that these diseases did not prohibit the defendant from understanding the wrongness of his actions.[141] Remarkably, the judge who authored the opinion openly questioned the logic of Rule 704(b), yet held that the court was nonetheless bound to follow the Rule's plain language.[142] The concurring judges went even further, as one ridiculed the outrageous results created by the Rule[143] and the other described possible ways to circumvent the Rule at the retrial.[144]

Clearly, Rule 704(b) is problematic. It is unduly restrictive, difficult for courts to apply, and strips juries of some of the most useful information they could be given. So, how did a rule with such problems get passed and why is the Rule still part of our judicial system? Given the politically charged atmosphere surrounding the passage of the Insanity Defense Reform Act, it is unlikely Congress considered the potential problems Rule 704(b) would create.[145] But perhaps Congress believed that any potential difficulties Rule 704(b) might create were worth enduring because of the problems the Rule would solve. Giving Congress the benefit of the doubt, the logical question is: do the problems proffered by Congress actually exist and, if so, does the Rule solve them?

---

[139] The United States Code specifies that in order to raise insanity as a defense to prosecution under a federal statute, the defendant must show that "at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts." 18 U.S.C. § 17 (2012).

[140] *West*, 962 F.2d at 1245 (omissions in original).

[141] *Id.* at 1250.

[142] *Id.* at 1249 (stating that the rationale of such a procedural system may be doubted because "[t]he evidence that would probably be most helpful to a jury on the question of sanity is an expert's opinion on whether the defendant knew what he or she was doing and whether or not it was wrong").

[143] *Id.* at 1250 (Cudahy, J., concurring) (agreeing with the trial court that "'it is outrageous to say that a psychiatrist . . . should testify in support of an insanity defense when the physician says that under the definition of the statute . . . there is no insanity. . . . There is no causative relationship, and the doctor says so right out.' The procedure *is* outrageous and seems to me to defy common sense.").

[144] *Id.* at 1251 (Manion, J., concurring).

[145] *See supra* Part I.B.

B. Problems Purportedly Remedied by Rule 704(b)

Congress's stated goal in amending Rule 704 was to prevent jury confusion by eliminating "the confusing spectacle of competing expert witnesses testifying to directly contradictory conclusions as to the ultimate legal issue to be found by the trier of fact."[146] Congress proffered that this confusion primarily arose in two places: the disagreement between psychiatric experts[147] and the leaps in logic those experts made, under pressure by the legal system, from medical concepts to legal or moral judgments.[148] With a stunning lack of logic[149] and the precision of a toddler with a chainsaw, Congress decided that the best solution was simply to prohibit any conclusions by any expert that approached such judgments. Yet even if Congress's concerns were legitimate, Rule 704(b) fails to address those concerns, making its considerable costs even more untenable.[150]

1. Testimony is Confusing to the Jury Due to Disagreement of Experts

Congress proffered that Rule 704(b) solved the problem of jury confusion caused by contradicting psychiatric expert testimony at trial.[151] Conflicting expert testimony in trial is far from unusual.[152] Yet Congress did not ban all expert testimony. Instead, testimony by psychiatric and mental health experts was singled out by Congress as a type uniquely constituted for confusion.[153] It would logically follow that there was evidence that this type of testimony was inherently more confusing to juries.[154] This would be logical, but it would be incorrect.[155] Apparently Congress believed that psychiatric expert testimony was not as exact as other types of expert testimony, so a jury had a greater likelihood of erring when considering this type of conflicting testimony.[156] Despite virtually no evidence that juries are more easily swayed when a psychiatric expert

---

146 S. REP. NO. 98-225, at 230 (1983).

147 *Id.* at 223.

148 *Id.* at 231.

149 *See infra* Part II.B.1 & 2.

150 *See supra* Part II.A.

151 S. REP. NO. 98-225, at 230.

152 Braswell, *supra* note 5, at 630–31.

153 S. REP. NO. 98-225, at 230.

154 Of course, this is assuming Congress acted rationally, instead of politically, in passing the amendment. The author of this Note suggests that the amendment was likely a heated and politically motivated response to the Hinckley trial, *supra* Part I.A & B, and other critics contend the same, Simmons, *supra* note 15, at 1025–26; Capra, *supra* note 12, at 691.

155 *See* Braswell, *supra* note 5, at 631 (noting that there is nothing to suggest juries give more weight to mental health experts as compared to other types of experts).

156 S. REP. NO. 98-225, at 222 (stating that expert testimony in insanity cases involves "inherently imprecise expert testimony").

testifies to the ultimate issue involving a defendant's mental state,[157] Congress decided that the answer was to eliminate this type of testimony altogether. Congress's solution not only causes additional problems,[158] but it does not even solve the alleged problem of jury confusion because it is founded on two faulty assumptions.[159]

First, Congress assumed illogical consequences of providing a jury with less information.[160] Expert testimony that confuses a jury because it addresses the ultimate issue in a case does not become suddenly lucid if the expert is prohibited from explaining her conclusion.[161] How is a jury to understand and apply the expert's specialized knowledge if the expert is not permitted to tell the jury what that specialized knowledge means?

A hypothetical scenario in a trial involving an arson charge illustrates the absurdity of this logic. Consider a trial where the defense calls a psychiatrist as an expert witness.[162] The psychiatrist testifies that, in her opinion, the defendant has "paranoid schizophrenia" and concludes that, based on that diagnosis, the defendant was unable to appreciate the wrongfulness of his actions at the time of the crime.[163] The prosecution then calls a different psychiatric expert who testifies that the defendant merely had an "abnormal personality."[164] He concludes that the defendant could appreciate the wrongfulness of his actions at the time of the crime.

---

[157] Braswell, *supra* note 5, at 630–31.

[158] Rice & Delker, *supra* note 21, at 713 ("In reality, the limitation imposed by subsection (b) *adds to*, rather than diminishes, jury confusion.").

[159] *See id.* at 713 (noting the reasons and stating "Congress's reasons [for Rule 704(b)] did not support the provision it enacted").

[160] *See* Capra, *supra* note 12, at 696 ("The inherent illogic and harmfulness of Rule 704(b) was lost on Congress in the heat of the Hinckley result.").

[161] P.H.V., Annotation, *Testimony of Expert Witness as to Ultimate Fact*, 78 A.L.R. 755 (2014). The author posits that "some ultimate facts in their inherent nature are such that the evidentiary facts to prove the same are unintelligible to any mind except that of the expert, and unexplainable to a person of ordinary experience and skill." *Id.* Therefore, it is not just useless, but absurd for an expert to testify to evidentiary facts and yet stop short of stating his opinion that ties those facts to a coherent conclusion regarding their meaning. *Id.* "An adherence to the rule excluding the opinion of an expert witness as to the ultimate fact . . . leaves to the jury the impossible task of determining that fact from premises of which they are ignorant, perhaps, even after the statements and explanations of the witness." *Id.*

[162] The Author has selected the following diagnoses to illustrate this point because in its report on the confusion of expert testimony, the Senate cited "paranoid schizophrenia" and "abnormal personality" as examples of terms that are undefined by psychiatric medicine and often yield conflicting diagnosis by psychiatric experts. S. REP. NO. 98-225, at 223 (1983).

[163] While all courts prohibit expert testimony that the defendant's mental state does or does not meet the legal definition of sanity, some courts also prohibit a description of the effect of this disease on a similarly situated hypothetical person. *See supra* note 77.

[164] *See* S. REP. NO. 98-225, at 223 ("[E]xperts often do not agree on the extent to which behavior patterns or mental disorders that have been labeled 'schizophrenia,' 'inadequate personality,' and 'abnormal personality' actually cause or impel a person to act in a certain way.").

While each underlying diagnosis would likely be admissible under Rule 704(b), neither of the conclusions could be admitted.[165] Even if one accepts the premise that a jury is confused by conflicting expert testimony, how is such confusion lessened when a jury is permitted to hear conflicting diagnoses, but not the explanations of the effect of those diagnoses? Surely it is not. The underlying conflicting opinions are still admitted and each expert will still testify that the defendant had either "paranoid schizophrenia" or an "abnormal personality." It is only the explanation of what those diagnoses actually mean in the real world that Rule 704(b) renders inadmissible.[166] Prohibiting an expert from explaining the meaning of her diagnosis in the particular case at hand does not in any way provide clarity for a jury that is left with plenty of jargon but little explanation. Indeed, this prohibition serves only to rob the jury of helpful information.[167]

Second, Congress assumed that the other Rules of Evidence did not already prohibit much of the testimony that so concerned Congress.[168] This is simply not true. If expert testimony is truly confusing or if it misleads the jury, the Federal Rules of Evidence will not allow it.[169] For instance, Federal Rule of Evidence 702 specifically lays out the qualifications for an expert witness and requires, among other things, that the testimony help the jury understand the evidence.[170] If the expert's testimony is confusing, it will not help the jury understand and should be prohibited. Similarly, Federal Rule of Evidence 403 allows the court to exclude evidence "if its probative value is substantially outweighed by a danger of . . . confusing the issues, misleading the jury, [or] wasting time."[171] Because these two rules already preclude testimony that is confusing or unhelpful to the jury, Rule 704(b) must logically exclude only

---

165 Cohen, *supra* note 42, at 553.

166 Rice & Delker, *supra* note 21, at 714 ("After experts present competing diagnoses, the jury must decipher the meaning of each, perhaps choose one, and decide whether that diagnosis equates with the applicable legal standard.").

167 *See supra* Part II.A.3.

168 Braswell, *supra* note 5, at 628–30.

169 *Id.*

170 Federal Rule of Evidence 702, Testimony by Expert Witnesses, states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702.

171 FED. R. EVID. 403.

testimony that *is* helpful to the jury.[172] Therefore, far from eliminating confusion for jurors, Rule 704(b) excludes only helpful testimony and leaves juries more confused.[173]

2. Confusion Due to Leaps in Logic

Congress also appeared worried about two potential scenarios where a psychiatric expert witness might confuse the jury by making an unacceptable "leap in logic."[174] The first scenario that Congress apparently envisioned is a trial in which two psychiatrists testifying as experts both agree on the diagnosis of a defendant's mental disease and the characteristics of that disease, but come to unsupported contradictory conclusions as to how the disease affected the defendant.[175] Without support or reason, one expert testifies that the defendant is sane and the other expert testifies that the defendant is insane and thus throws the jury into total confusion. However, if either expert witness does not adequately explain how or why she has reached her conclusion on the effect of the mental disease on the defendant, Rule 702 prohibits the unsupported conclusion because such a statement does not help the jury understand the evidence or facts at issue.[176] Therefore, any potential confusion caused in such a scenario should not be concerning and does not necessitate a prohibition of expert opinion in the manner of Rule 704(b).

The second scenario with which Congress seemed concerned is one in which a psychiatric expert misunderstands the law and testifies to a legal

---

[172] Capra, *supra* note 12, at 695; *see also* United States v. West, 962 F.2d 1243, 1246 (7th Cir. 1992) (stating that despite expert psychiatric opinion being "clearly relevant to the merits of [defendant's] defense. . . . [and] highly probative on the issue of insanity, . . . it was also an opinion on the ultimate issue . . . and under Rule 704(b) it was, therefore, inadmissible testimony").

[173] Rice & Delker, *supra* note 21, at 714.

[174] S. REP. NO. 98-225, at 231 (1983).

[175] *Id.* Congress quoted a statement by the American Psychiatric Association and appeared to agree that "in many criminal insanity trials both prosecution and defense psychiatrists do agree about the nature and even extent of mental disorder exhibited by the defendant at the time of the act." *Id.* (quoting Loren Roth et al., *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. PSYCHIATRY 681, 686 (1983)). Therefore, the problem with which Congress must have been concerned is the jury confusion that could result when those same expert witnesses disagree as to the application of the diagnosis to the defendant's alleged actions and make a leap in logic by failing to support their conclusions.

[176] Rule 702 prohibits such testimony as being unhelpful to the jury which, in such a case, has merely obtained a conclusion from the expert without any foundation with which to consider its import. *See* FED. R. EVID. 702 (requiring that a witness who wishes to testify as to his opinion, must among other things, base his testimony on "sufficient facts or data" and his knowledge must "help the trier of fact to understand the evidence or to determine a fact in issue").

conclusion she is not equipped to make.[177] In light of the other measures adopted by Congress's reform of the insanity defense, it is likely that the particular scenario Congress envisioned was one in which an expert misunderstands the legal definition of insanity.[178] However, if a careful foundation for the expert's testimony is required[179] and a helpful explanation of the diagnosis is allowed, any incorrect application of the law by a witness will surely be recognized by opposing counsel and the court.[180]

Thus, Congress proffered a straw-man argument that juries are confused by expert psychiatric testimony and offered Rule 704(b) to solve the problem.[181] If the Rules of Evidence are correctly applied, even contradictory expert testimony will not confuse a jury. Additionally, when the Rules of Evidence are applied, an expert will not be allowed to make "impermissible leaps in logic" and so confuse a jury. As the other Rules of Evidence prohibit the testimony that so concerned Congress, Rule 704(b) is, at best, surplusage.

---

[177] S. REP. NO. 98-225, at 231. The report states that "it is clear that psychiatrists are experts in medicine, not the law." *Id.* (quoting Roth et al., *supra* note 175, at 686). The report goes on to say that when questions involving a key element of the crime are asked of the expert, "the expert witness is required to make a leap in logic [because h]e no longer addresses himself to medical concepts but instead must infer . . . the probable relationship between medical concepts and legal or moral constructs." *Id.*

[178] The same Senate report that recommended amending Rule 704 also recommended changing the legal definition of insanity. S. REP. NO. 98-225, at 225–26. The new definition excluded from the insanity defense the argument that the defendant knew her actions were wrong, but was unable to control her actions due to her mental disease. *Id.* Therefore, it is likely that the type of "leap in logic" Congress wanted to avoid was one in which an expert psychiatric witness, unaware of the change in the legal definition of the word, diagnosed the defendant as insane because the defendant was unable to control her actions.

[179] Such foundation for the expert's testimony is indeed required by Federal Rule of Evidence 702. This rule qualifies the admissibility of expert testimony by allowing an expert to testify only if "the testimony is based on sufficient facts or data . . . [and] the expert has reliably applied the principles and methods to the facts of the case." FED. R. EVID. 702(b), (d).

[180] Cohen, *supra* note 42, at 554; *see also* Rice & Delker, *supra* note 21, at 713 n.154 (reasoning that the presiding judge will instruct the jury as to the relevant legal standard).

[181] The Senate Committee report is instructive when it states that if a psychiatric expert "present[s] medical information and opinion about the defendant's mental state and motivation and . . . explain[s] in detail the reason for his medical-psychiatric conclusions," he is "do[ing] psychiatry," not making impermissible leaps in logic. S. REP. NO. 98-225, at 231 (quoting Roth et al., *supra* note 175, at 686). Indeed, the report specifies that, "[p]sychiatrists, of course, must be permitted to testify fully about the defendant's diagnosis, mental state and motivation (in clinical and commonsense terms) at the time of the alleged act so as to permit the jury or judge to reach the ultimate conclusion." *Id.* Therefore, that the Rule prohibits *all* conclusions on the defendant's mental state and not just *unfounded* conclusions indicates that Congress's concern may not really have been with leaps in logic, but with the particular conclusions at which the experts arrived. *Id.* Of course for obvious reasons, it would hardly have been acceptable for Congress to pass a Rule that prohibited only expert testimony that led to a "not guilty by reason of insanity" verdict.

III. PROPOSED SOLUTIONS

The problems caused by Rule 704(b) have not gone unnoticed and many solutions have been offered.[182] Four of the most promising ones are analyzed below. The solutions are addressed in order of the least to greatest impact to Rule 704(b).

A. Apply the "Probes-the-Mind" Test

One proposed solution to the problem of Rule 704(b) is for courts to use the "probes-the-mind" test.[183] As previously discussed, this approach would eliminate much of the confusion that results from the broad wording of the Rule because it excludes from the Rule's grasp all expert testimony that does not come from expertise in the psychological sciences.[184] Therefore, non-psychological health experts could testify freely, provided their testimony conforms to the requirements of the other Rules of Evidence. Under this approach, the confusion that courts currently endure in cases involving non-psychological expert testimony would be eliminated.[185] This approach also has the benefit of more closely reflecting Congress's likely intent in passing the Rule.[186] Still, this approach has several major weaknesses. First, it ignores the rules of statutory construction delineated by the Supreme Court.[187] Second, it still leaves untouched the extensive problems the Rule causes in cases where psychological experts testify to the defendant's mental state. Overall, this is not a satisfactory solution.

B. Limit the Application of the Rule to Mental Health Experts

A second solution proffered to the problem of Rule 704(b) is an amendment to the Rule that limits its pernicious effects to the testimony of mental health experts testifying on the mental state of a defendant in

---

[182] *See* KAYE ET AL., *supra* note 11, at §2.2.3(b) (designating the three major approaches that courts have adopted as the "stops-short" analysis, the "necessarily-follows" test, and the "probes-the-mind" inquiry); Capra, *supra* note 12, at 702–03 (reasoning that "[a] less onerous alternative might be to amend Rule 704(b) to limit its bad effect to the testimony of mental health professionals"); Braswell, *supra* note 5, at 639 ("Therefore, federal trial courts should interpret rule 704(b) narrowly by limiting its application to statements incorporating the statutory language."); Cohen, *supra* note 42, at 560–61 (calling for practical modifications that would fundamentally change Rule 704(b)).

[183] KAYE ET AL., *supra* note 11, at §2.2.3(b).

[184] *Id.*; *see also supra* notes 109–18 and accompanying text.

[185] *See supra* notes 109–11 and accompanying text.

[186] *See* explanation provided *supra* note 62.

[187] *See* Carcieri v. Salazar, 555 U.S. 379, 387 (2009) (stating that if the statutory text is plain and unambiguous, "settled principles of statutory construction" dictate that no further steps are needed to interpret statute).

a criminal case.[188] One example for such an amendment to Rule 704 is as follows:

> (a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
>
> (b) No *mental health* expert ~~witness~~ testifying ~~with respect to the mental state or condition of a defendant~~ in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.[189]

While this solution is similar to the previous and subsequent ones, it has several advantages. One advantage is that, unlike the "probes-the-mind" or "narrow construction" approaches, such an amendment would not require courts to ignore the rules of statutory construction.[190] Since such an amendment would limit the effect of the Rule to testimony by mental health experts, courts would no longer be forced to bypass the plain meaning of the Rule to limit its application. Another advantage is that such an amendment would tailor the impact of the Rule to the type of testimony that Congress originally intended to address, which would prohibit the rule from affecting other categories of expert testimony such as law enforcement.[191] Moreover, an amendment like this would even give Congress the opportunity to save face and claim that the change in the language restores the Rule to its original intended purpose.[192] This would likely be a more politically acceptable option compared to others herein considered. The obvious weakness of such an amendment is that it still fails to remedy the problem that the Rule creates in criminal cases where mental health experts testify.[193] Therefore, this approach is not ideal because it would still limit crucial expert testimony that is helpful to the jury.

C. Narrowly Construe the Rule

A third solution is for courts to construe the Rule even more narrowly than the "probes-the-mind" test so that the Rule "prohibit[s] only opinions

---

188 Capra, *supra* note 12, at 702.

189 *Id.*

190 *See Carcieri*, 555 U.S. at 387 (noting that statutory interpretation requires interpreting text based on the plain language if the text is unambiguous).

191 *See* Capra, *supra* note 12, at 702 (stating that an amendment limiting the Rule to expert witness testimony would likely restore Rule 704(b) to "its originally intended scope").

192 *Id.* at 702–03. Capra wryly suggests that this amendment could "even be pitched as correcting the *courts'* misinterpretation of what Congress must have, in its infinite wisdom, intended." *Id.* (emphasis in original).

193 *See supra* Part II.A.3.

incorporating the statutory language of the insanity standard."[194] Under this approach, psychological expert testimony would be permitted so long as it does not use language that tracks the statutory definition of insanity.[195] This option has several advantages. First, it would limit the application of (and damage caused by) the Rule to those cases where the insanity defense is raised.[196] It is likely that this limited application most closely reflects the original intent of Congress, despite the sweepingly broad language actually used in the Rule.[197] Second, it has the advantage of providing the jury with more adequate explanations of how the diagnosed mental disease or defect may have impacted the defendant by allowing the expert to more fully explain his diagnosis.[198] Therefore, while a psychiatric expert could not specifically state that the defendant *was* unable to appreciate the wrongfulness of his acts as required by law,[199] the expert could explain how such a mental disease usually impacts the cognitive ability of someone suffering from it.

This solution certainly mitigates some of the problems created by Rule 704(b), but this approach has several difficulties. First, like the "probes-the-mind" test, interpreting Rule 704(b) in this way contradicts the plain meaning of the statute's language and disregards the rules of statutory interpretation dictated by the Supreme Court.[200] Even though this approach is a logical application of the Rule based on legislative history, it is not an acceptable way of dealing with the problem. Second, while this interpretation narrows the application of the Rule to a smaller number of cases, it still leaves those cases involving insanity pleas

---

[194] Braswell, *supra* note 5, at 639.

[195] "Insanity" is defined in the United States Code under the insanity defense statute: "It is an affirmative defense . . . that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts." 18 U.S.C. § 17(a) (2012).

[196] By limiting the application of the Rule to only the statutory definition of insanity, the Rule would no longer prohibit ultimate mental state testimony in other areas of the law such as premeditation in homicide cases or predisposition in entrapment. *See Insanity—Scope of Expert Testimony*, JUSTICE.GOV, http://www.justice.gov/usam/criminal-resource-manual-639-insanity-scope-expert-testimony (last visited Oct. 11, 2015) ("The restriction in Rule 704 on ultimate opinion psychiatric testimony extends to any ultimate mental state of the defendant relevant to ultimate legal conclusions to be proved, such as premeditation in a homicide case, or lack of predisposition in entrapment.").

[197] *See* United States v. Morales, 108 F.3d 1031, 1036 (9th Cir. 1997) ("[T]he language of Rule 704(b) is perfectly plain. It does not limit its reach to psychiatrists and other mental health experts. Its reach extends to all expert witnesses.").

[198] *See* Braswell, *supra* note 5, at 639 (reasoning that "[t]he more broadly judges construe rule 704(b), the more they will deprive juries of relevant and helpful testimony").

[199] 18 U.S.C § 17(a) (2012).

[200] *See* Carcieri v. Salazar, 555 U.S. 379, 387 (2009) (noting the well-settled principle of statutory construction to take no additional steps when the language of the statute is clear and unambiguous).

untouched. The costs of this Rule simply do not justify its difficulties for *any* number of trials, no matter how few.

D. Repeal the Rule

A final proposal to remedy the problems caused by Rule 704(b) is simply to repeal it.[201] The rationale for this recommendation is sound. Rule 702 and Rule 403 effectively prohibit the type of expert testimony that so concerned Congress.[202] If the concerns of Congress are addressed by these Rules, why should Rule 704(b) remain? No evidence indicates that juries are more prone to persuasion by experts who testify on the defendant's mental state than by other experts.[203] Therefore, juries can be trusted to separate conflicting expert opinion on the mental state of the defendant just as they are trusted to do for all other types of expert testimony.[204] The reasons that Congress provided for legislating Rule 704(b) are founded on faulty assumptions.[205] Repealing the Rule might appear to be a "slap to the face of Congress,"[206] but it is also an opportunity for Congress to fix the problems caused by this poorly constructed Rule.[207] Repealing Rule 704(b) and allowing the other rules of evidence to do their job is the best way to cure the problems created by this Rule.

CONCLUSION

Rule 704(b) is a misguided response to a dubious problem. Prior to the Hinckley trial, it was manifest that the "ultimate issue" rule served no legitimate purpose and caused substantial problems.[208] Yet, to paraphrase Justice Holmes, the "immediate overwhelming interest" in the verdict of the Hinckley trial made "what previously was clear seem doubtful."[209] Congress was so concerned that the trial's outcome might be repeated that its judgment was distorted and it forgot or ignored that

---

[201] Cohen, *supra* note 42, at 560–61.

[202] Braswell, *supra* note 5, at 628–29.

[203] *Id.* at 631.

[204] *Id.*

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

[206] *See* Capra, *supra* note 12, at 702 (reasoning that because Congress is the ultimate authority over the Federal Rules of Evidence, proposing an amendment is more "politically palatable" and "[a]s such, it is not a slap to the face to Congress").

[207] If the Rule is to change, Congress must change it. While the Supreme Court has the power to prescribe rules of evidence, those rules must be consistent with Acts of Congress. 28 U.S.C. §§ 2071–72 (2012). Therefore, because Congress has legislated on the issue of expert testimony in criminal trials in Rule 704(b), the Supreme Court may not change the Rules of Evidence to contradict this Rule. *Id.* § 2071(a); *see also* Capra, *supra* note 12, at 702 (noting Congress's ultimate authority over the rulemaking in federal courts).

[208] *See* FED. R. EVID. 704 advisory committee's note to the 1972 proposed rule (noting that the ultimate issue rule "was unduly restrictive, difficult in application, and generally served only to deprive the trier of fact of useful information").

[209] N. Sec. Co. v. United States, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting).

which was formerly obvious.[210] Consequently, an overly-broad and poorly-written Rule became law and the "ultimate issue" rule crawled out of its grave to once again haunt the federal courts with its problems.[211] Rule 704(b) is based on faulty assumptions and is a remedy desperately in need of a cure. The Rule does virtually nothing to solve the alleged problems it was designed to address and needlessly creates additional ones. Rule 704(b) unnecessarily restricts expert opinion, creates confusion in courts as to its application, and strips the jury of some of the most useful testimony an expert can offer. The solution to these problems is not novel or complicated. Indeed, it is surprisingly straightforward. Rule 704(b) should be repealed. Perhaps then the "ultimate issue" rule will finally remain in the grave where it belongs.

*Sean P. Reilly**

---

[210] *See* Simmons, *supra* note 15, at 1024 (stating that Rule 704 was amended as a "result of political pressures after the would-be presidential assassin John Hinckley was acquitted by reason of insanity").

[211] 1 JACK B. WEINSTEIN ET AL., WEINSTEIN'S FEDERAL EVIDENCE § 704App.01 (Joseph M. McLaughlin ed., 2d. ed. App. 2015) ("Rule 704(b) plainly revives the ultimate issue rule in criminal cases.").

* Soli Deo Gloria. Sincere thanks to my wife, Abigail. Her patience, selfless love, and incredible support in life and throughout the writing process is more than I deserve. Additional thanks to my parents and brother for their thoughtful insights on this Note and willingness to read countless revisions along the way.

FROM SECOND CLASS TO CERTIFIED CLASS: USING CLASS-ACTION LAWSUITS TO COMBAT HUMAN TRAFFICKING

INTRODUCTION

More than fifty years ago, Martin Luther King, Jr. penned the now famous words: "[i]njustice anywhere is a threat to justice everywhere."[1] Although the profiles of slave owners and slaves have changed, the fight against injustice in the form of slavery continues even today. Slave owners are now called traffickers, and slaves are now called trafficked persons.[2] Human trafficking is a modern word for an ancient woe;[3] human trafficking is nothing less than modern day slavery.[4]

The U.S. Department of State estimates that each year approximately 800,000 to 900,000 people are trafficked worldwide and about 18,000 to 20,000 people are trafficked into the United States.[5] Other estimates place the number of trafficked victims closer to 4,000,000.[6] The United Nations predicts that human trafficking will soon become the world's leading illegal industry,[7] and the U.S. Department of State estimates that the annual revenues from human trafficking are between $7 billion and $10 billion.[8] As a result of worldwide human trafficking, there are between 20,000,000 and 30,000,000 people living as slaves in the

---

[1] Letter from Martin Luther King, Jr. to Fellow Clergymen 2 (Apr. 16, 1963), http://okra.stanford.edu/transcription/document_images/undecided/630416-019.pdf.

[2] Karen E. Bravo, *Follow the Money? Does the International Fight Against Money Laundering Provide a Model for International Anti-Human Trafficking Efforts?*, 6 U. ST. THOMAS L.J. 138, 143 (2008).

[3] Kathleen A. McKee, *Modern-Day Slavery: Framing Effective Solutions for an Age-Old Problem*, 55 CATH. U. L. REV. 141, 144–45 (2005).

[4] Bravo, *supra* note 2, at 143; *see infra* Part I.A.

[5] U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 7 (2003), http://www.state.gov/documents/organization/21555.

[6] U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2 (2002), http://www.state.gov/documents/organization/10815.pdf.

[7] Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L.J. 1, 8 (2004).

[8] U.S. DEP'T OF STATE, *supra* note 5, at 9.

twenty-first century.[9] No other generation has ever been as enslaved as ours.[10]

With more human beings enslaved today than ever before, this generation has a moral duty to respond to the cries of injustice heard across the country and around the world. For the past decade, the United States has focused on prosecuting traffickers, preventing trafficking, and protecting trafficked persons.[11] While these efforts constitute a necessary first step, the United States' response must create a more effective deterrent if it wants to wage a successful war against human trafficking.[12]

This Note argues that using class-action lawsuits to combat human trafficking through civil litigation is a viable option and a valuable deterrent. Part I explains the context by providing background information on previous and current legal efforts to combat human trafficking. Part II describes the problem by showing why victims have limited access to justice despite stringent laws designed to prevent human trafficking. Part III outlines a solution by articulating how class-action lawsuits could be utilized as an effective deterrent to human trafficking and a viable option for providing victims with greater access to justice.

I. BACKGROUND: THE PROFILE OF PROMINENT PLAYERS

A. The Profile of Trafficked Persons

While the definition of "trafficked persons" has been subject to some debate,[13] trafficked persons can be children or adults, men or women, rich or poor, educated or illiterate, and foreign or domestic persons.[14] Although the media often focuses on the sexual exploitation aspect of human

---

[9] *Slavery Questions and Answers*, FREE THE SLAVES, http://www.freetheslaves.net/about-slavery/faqs-glossary (last visited Aug. 28, 2014); *Frequently Asked Questions*, NOT FOR SALE CAMPAIGN, https://notforsalecampaign.org/human-trafficking/frequently-asked-questions (last visited Aug. 28, 2014); INT'L LABOUR OFF., ILO GLOBAL ESTIMATE OF FORCED LABOUR: RESULTS AND METHODOLOGY 13 (2012), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182004.pdf.

[10] Sarah C. Pierce, Note, *Turning a Blind Eye: U.S. Corporate Involvement in Modern Day Slavery*, 14 J. GENDER, RACE & JUST. 577, 581 (2011).

[11] *See* Jennifer A.L. Sheldon-Sherman, *The Missing "P": Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act*, 117 PENN ST. L. REV. 443, 445, 452 (2012) (describing the "three P's" anti-trafficking strategy).

[12] *See infra* Part II.A.

[13] *See* Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2980–83, 2981 n.9 (2006) (describing the historical difficulty in defining trafficking and challenges created by the intersection of anti-trafficking and anti-prostitution efforts).

[14] *Human Trafficking*, POLARIS PROJECT, http://www.polarisproject.org/human-trafficking/overview (last visited Aug. 29, 2015).

trafficking,[15] the United States has defined human trafficking to include both forced labor and sexual exploitation.[16] People are trafficked into the United States from all over the world.[17] Countries of origin include: Thailand, Mexico, Russia, Vietnam, Jamaica, Cameroon, India, and more.[18]

For example, in 1995, authorities discovered a sweatshop in El Monte, California, where "seventy men and women from Thailand had been enslaved."[19] These men and women had been held hostage as slaves for over seven years.[20] In 1997, a number of hearing-impaired men from Mexico were trafficked into the United States and forced to peddle trinkets in major cities around the country.[21] In 2001, one of the largest landowners in California pleaded guilty to trafficking into the United States over twenty-five people, who were then used as slaves until authorities discovered and rescued them.[22]

Just four years later in 2005, authorities discovered 321 Vietnamese men enslaved to work in a sweatshop in American Samoa.[23] In another case, fifty-two men from India were recruited with the prospect of high-paying jobs in the United States.[24] Upon arriving in the United States, the men were forced to live in squalid conditions behind locked gates and to work for substandard wages.[25] These men, women, boys, and girls forced

---

[15] Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76, 79 (2012); *see Charlotte Man Indicted on Human Trafficking Charge*, HERALD-SUN, Nov. 22, 2014, at A3 (reporting on an indictment for sexual exploitation); Danae King, *Event Raises Awareness of Human Trafficking, Domestic Violence*, THE LIMA NEWS, Oct. 2, 2014 (describing a campus event focused on raising awareness about human trafficking solely in terms of sexual exploitation).

[16] May Li, Note, *Did Indiana Deliver in its Fight Against Human Trafficking?: A Comparative Analysis Between Indiana's Human Trafficking Laws and the International Legal Framework*, 23 IND. INT'L & COMP. L. REV. 277, 284–86 (2013). The definition of human trafficking has been subject to debate because the distinction between sex trafficking and forced labor is unclear at times, such as in cases where the victim is prostituted for profit. *See id.* (describing various definitions of trafficking that distinguish between sex trafficking and forced labor).

[17] *See* Kim & Hreshchyshyn, *supra* note 7, at 9 (providing examples of trafficking cases where the victims were brought to the United States from a variety of countries).

[18] *Id.* at 5, 9.

[19] *Id.* at 9.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 22.

[23] Jennifer S. Nam, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1664, 1664 n.50 (2007).

[24] *Id.* at 1664.

[25] *Id.*

to work for substandard wages or no compensation at all are modern-day slaves.[26]

While abuse through human trafficking is not limited to sexual exploitation,[27] there are still many victims who have been trafficked into the United States for sexual exploitation. For example, in 2001, seven Russians were "forced to dance nude in an Alaskan nightclub": the women had been trafficked into the United States after being recruited to perform traditional dances for a cultural event that did not exist.[28] A young girl named Gabriella was lured by a family friend into the United States with the prospect of a better-paying job.[29] When she arrived in the United States, her "friend" forced her into commercial prostitution where she was exploited for five years before she was rescued.[30]

Sexual exploitation is not limited to the trafficking of foreign persons into the United States—even young children who grew up as United States citizens are trafficked for sexual exploitation. Sarah, a seventeen-year-old Caucasian girl from Ohio, was trafficked into the commercial sex industry after running away from a broken home.[31] She was lured into the industry by a thirty-year-old man pretending to be her "friend."[32] Keisha, an African-American girl who grew up in Florida, was forced to engage in commercial sex after running away from her foster family, where she also had been sexually harassed.[33]

Gabriella, Sarah, and Keisha are not alone. While the nature of human trafficking makes it difficult to create highly accurate numeric estimates,[34] experts estimate that as many as 100,000 children are

---

[26] *See* Free The Slaves, Wash. D.C. & the Human Rights Ctr. of the Univ. of Cal., Berkeley, *Hidden Slaves: Forced Labor in the United States*, 23 BERKELEY J. INT'L L. 47, 47–49, 47 n.1 (2005) [hereinafter *Forced Labor in the United States*] (noting that debt bondage, forced/compulsory labor by threat, fraud, or coercion are forms of slavery or practices similar to slavery).

[27] *See* Nam, *supra* note 23, at 1664 (describing forced labor in sweatshops and factories).

[28] Kim & Hreshchyshyn, *supra* note 7, at 9.

[29] *Gabriella: Residential Brothel Sex Trafficking*, POLARIS PROJECT, http://www.polarisproject.org/what-we-do/client-services/survivor-stories/350-gabriella-residential-brothel-sex-trafficking (last visited Aug. 29, 2015).

[30] *Id.*

[31] *Sarah: Domestic Minor Sex Trafficking*, POLARIS PROJECT, http://www.polarisproject.org/what-we-do/client-services/survivor-stories/465-sarah-domestic-minor-sex-trafficking (last visited Aug. 29, 2015).

[32] *Id.*

[33] *Keisha: Domestic Minor Sex Trafficking*, POLARIS PROJECT, http://www.polarisproject.org/what-we-do/client-services/survivor-stories/464-keisha-domestic-minor-sex-trafficking (last visited Aug. 29, 2015).

[34] *See* Johnny E. McGaha & Amanda Evans, *Where Are the Victims? The Credibility Gap in Human Trafficking Research*, 4 INTERCULTURAL HUM. RTS. L. REV. 239, 243–44 (2009) (noting that variations in data may be based on changes in methodology); Valerie S. Payne, Note, *On the Road to Victory in America's War on Human Trafficking: Landmarks,*

trafficked into the United States' commercial sex industry each year.[35] That estimate only includes children; many more women are trafficked for sexual exploitation as well.[36]

Overall, human trafficking includes men, women, and children.[37] It includes male workers from foreign countries[38] and young girls born and raised in the United States.[39] It includes forced labor and sexual exploitation.[40] It includes individual victims like Keisha[41] and classes of victims like the men from Vietnam.[42] The crime of human trafficking or modern-day slavery includes more people today than ever before.[43]

B. The Profile of Traffickers

The profile of traffickers is as diverse as the profile of those who are trafficked.[44] Those perpetuating the crime of human trafficking include individuals, small-scale family operations, and "complex transnational crime rings."[45] Although traffickers are predominantly male, both men and women work as traffickers.[46] Some traffickers begin as victims themselves, but then become traffickers after being threatened to traffic others or suffer further abuses.[47] The nationality of traffickers is as varied as their victims' countries of origin.[48] While traffickers are often older than

---

Landmines, and the Need for Centralized Strategy, 21 REGENT U. L. REV. 435, 442 (2009) (stating that recent studies have called initial estimates into question).

35 *Human Trafficking*, *supra* note 14.

36 *See id.* (explaining that aggregating children and adults in sex and labor trafficking leads to higher numbers).

37 *Id.*

38 *See* Shamir, *supra* note 15, at 88 (describing male victims from Thailand working on a farm in Washington).

39 HUMAN SMUGGLING AND TRAFFICKING CTR., DOMESTIC HUMAN TRAFFICKING: AN INTERNAL ISSUE 2 (2008), http://www.state.gov/documents/organization/113612.pdf.

40 *Id.* at 3–4, 6.

41 *Keisha: Domestic Minor Sex Trafficking*, *supra* note 33.

42 Nam, *supra* note 23, at 1664.

43 *See* Pierce, *supra* note 10, at 581 (comparing current estimates to the number of slaves during the Trans-Atlantic slave trade).

44 Kim & Hreshchyshyn, *supra* note 7, at 6.

45 *Id.*

46 *Cf.* U.N. Glob. Initiative to Fight Human Trafficking, 016 Workshop: Profiling the Traffickers 5 (2008) [hereinafter Profiling the Traffickers], http://www.unodc.org/documents/human-trafficking/2008/BP016ProfilingtheTraffickers.pdf (noting that 78.1% of traffickers in a German study were male, but both men and women engage in trafficking with different roles in different cultures).

47 *Id.*

48 *Id.* at 7.

their victims, the age range of traffickers spans from children in their early teens to adults in their fifties and older.[49]

Traffickers may be single, married, or in domestic partnerships.[50] In some cases, the families of the traffickers are aware of and collaborate with the trafficker in their illegal activities; other times, the family is unaware of the trafficker's criminal actions.[51] Some traffickers force their own family members into this modern-day slavery.[52] While some traffickers have extensive criminal records, others have no criminal record at all.[53] Although some traffickers are primarily engaged in their criminal trafficking activities, others are also employed in other professions.[54] Some have post-graduate degrees; others have no education at all.[55]

Because human trafficking is a low-risk, high-reward activity,[56] many domestic and transnational crime rings are attracted to it.[57] For example, in 2010, twenty-nine Somalian gang members were indicted for operating a Minneapolis-based interstate sex-trafficking operation.[58] In a 2011 report, the FBI noted that there are gangs in thirty-five states and United States territories that are engaged in human trafficking.[59] Law enforcement agencies have reported that several large criminal networks are involved in trafficking humans.[60]

In 2012, the U.S. Immigration and Customs Enforcement ("ICE") arrested 637 gang members identified with 168 gangs from around the United States.[61] The ICE operation, Project Nefarious, was executed

---

[49] *Id.*

[50] *Id.* at 8.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 9.

[54] *Id.* Some human traffickers also work as doctors, lawyers, policemen, politicians, businessmen, chefs, and mechanics. *Id.*

[55] *Id.*

[56] U.S. DEP'T OF STATE, *supra* note 5, at 8–9 (noting that human trafficking is a low-risk, high-reward activity because the profits are high and victims are kept silent by threats against the victim's family, threats against the victim, and the victim's inability to access the legal system).

[57] *See* KAMALA D. HARRIS, CAL. DEP'T OF JUSTICE, THE STATE OF HUMAN TRAFFICKING IN CALIFORNIA 18–19 (2012), http://oag.ca.gov/sites/all/files/agweb/pdfs/ht/human-trafficking-2012.pdf (explaining that gangs are becoming more involved in trafficking as a funding source for other criminal activity).

[58] NAT'L GANG INTELLIGENCE CTR., 2011 NATIONAL GANG THREAT ASSESSMENT: EMERGING TRENDS 25 (2011), http://www.fbi.gov/stats-services/publications/2011-national-gang-threat-assessment/2011-national-gang-threat-assessment-emerging-trends.

[59] *Id.* at 24.

[60] *Id.* at 25. The study noted the following large criminal networks are involved in human trafficking: the Bloods, MS-13, Sureños, and Somali gangs. *Id.*

[61] *637 Gang Members and Associates Arrested During Project Nefarious*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Apr. 25, 2012), http://www.ice.gov/news/releases/1204/120425washingtondc.htm.

throughout 150 cities across the United States and targeted "transnational street gangs, prison gangs, and outlaw motorcycle gangs."[62] More than forty percent of the gang members arrested were affiliated with a total of twenty-eight gangs involved in human trafficking.[63] A 2014 report from the Texas Department of Public Safety revealed that the profile of human traffickers in Texas includes "Mexican cartels and transnational gangs."[64]

Human trafficking is a multi-billion-dollar industry,[65] and individual human traffickers can make an enormous amount of money by trafficking victims.[66] Based on the victim's route of travel, a trafficker's profit can range from $4,000 to $50,000 per person.[67] Some estimate that child sex traffickers can make as much as $600,000 per year.[68] Others estimate that traffickers can make as much as $67,200 per year, per victim.[69] Until the cost of trafficking exceeds the profit, traffickers will have little incentive to stop enslaving fellow human beings.[70]

From almost-illiterate individuals to highly educated enterprising organizations, the profile of human traffickers has many faces.[71] Some faces are young; others are old.[72] Some faces are male; others are female.[73] Some faces are foreign nationals; others are our neighbors.[74] While some

---

[62] *Id.*

[63] *Id.* The others gangs and gang members were arrested for crimes unrelated to human trafficking. *Id.*

[64] TEX. DEP'T OF PUB. SAFETY, ASSESSING THE THREAT OF HUMAN TRAFFICKING IN TEXAS 8 (2014), http://www.dps.texas.gov/director_staff /media_and_ communications/2014/ txHumanTraffickingAssessment.pdf.

[65] Alicia Wilson, *Using Commercial Driver Licensing Authority to Combat Human Trafficking Related Crimes on America's Highways*, 43 U. MEM. L. REV. 969, 974–75 (2013).

[66] Elizabeth M. Wheaton, Edward J. Schauer & Thomas V. Galli, *Economics of Human Trafficking*, 48 INT'L MIGRATION 114, 124 (2010), https://www.amherst.edu/media/ view/247221/original/Economics+of+Human+Trafficking.pdf.

[67] *Human Trafficking's Dirty Profits and Huge Costs*, INTER-AMERICAN DEV. BANK (Nov. 2, 2006), http://www.iadb.org/en/news/webstories/2006-11-02/human-traffickings-dirty-profits-and-huge-costs,3357.html. In Europe, criminal groups make approximately $3 billion per year from trafficking. *Human Trafficking: People for Sale*, UNITED NATIONS OFF. ON DRUGS & CRIME, http://www.unodc.org/toc/en/crimes/human-trafficking.html (last visited Aug. 29, 2015).

[68] *See* HARRIS, *supra* note 57, at 22 (calculating one pimp's income by multiplying the quota of one of his victims by the number of victims that pimp controlled).

[69] Priscila A. Rocha, *Our Backyard Slave Trade: The Result of Ohio's Failure to Enact Comprehensive State-Level Human-Sex-Trafficking Legislation*, 25 J.L. & HEALTH 381, 391 (2012).

[70] *Id.*

[71] *See supra* notes 46–55 and accompanying text.

[72] Profiling the Traffickers, *supra* note 46, at 7–8.

[73] *Id.* at 5.

[74] *See id.* at 7, 9 (explaining the diverse national backgrounds of traffickers and the wide variety of ordinary occupations held by individuals who also engage in trafficking).

traffickers are poor,[75] traffickers collectively make billions by committing crimes against mankind.[76] Yet, while the profiles of traffickers vary, every single one should be held responsible for what they have in common: trafficking fellow human beings into forced labor or sexual exploitation.

C. The Profile of Modern Abolitionists

The United States has combated human trafficking by focusing on prosecution, prevention, and protection.[77] While the federal government has largely championed the fight against human trafficking, the profile of governmental actors combating human trafficking includes federal, state, and local government officials.[78] Individuals and nongovernmental organizations (NGOs) have also played an important role in preventing human trafficking and protecting victims.[79]

Historically, the federal government has prosecuted few traffickers.[80] In 1999, at the peak of the federal government's efforts in prosecuting trafficking prior to passing the Trafficking Victims Protection Act (TVPA), the United States had only prosecuted six trafficking cases.[81] Along with prosecutions under the Thirteenth Amendment's prohibition against slavery,[82] the government prosecuted traffickers under a patchwork of federal laws.[83] Most of the laws required stringent standards, however, which made it difficult for the government to obtain convictions.[84] Accordingly, because there was no single federal law prohibiting human trafficking, the United States' efforts to combat human trafficking were ineffective.[85]

---

[75] Profiling the Traffickers, *supra* note 46, at 9.

[76] U.S. DEP'T OF STATE, THE ECONOMICS OF FORCED LABOR (2014), http://www.state.gov/documents/organization/228263.pdf.

[77] *See* Sheldon-Sherman, *supra* note 11, at 445 (describing the three primary purposes of the United States' anti-trafficking strategy).

[78] *See* Mark J. Kappelhoff, *Federal Prosecutions of Human Trafficking Cases: Striking a Blow Against Modern Day Slavery*, 6 U. ST. THOMAS L.J. 9, 17 (2008) (describing how federal, state, and local officials have worked together to combat trafficking).

[79] *See id.* (describing how all coordinating agencies provide help for victims).

[80] *See id.* at 13 (explaining that early anti-trafficking statutes were not often used to prosecute trafficking crimes).

[81] *Id.*

[82] U.S. CONST. amend. XIII.

[83] *See* Sheldon-Sherman, *supra* note 11, at 451 (describing the wide variety of laws that existed prior to the TVPA).

[84] *See id.* (noting that early anti-trafficking laws were ineffective because they proscribed a limited set of conduct).

[85] 22 U.S.C. § 7101(b)(14) (2012).

In 2000, as international awareness of the magnitude of human trafficking increased, the United States responded by passing the TVPA.[86] The purpose of the TVPA was to prevent severe forms of human trafficking, including both sex trafficking and labor trafficking.[87] Under the TVPA, the federal government has tasked various agencies with anti-trafficking responsibilities: the Department of Justice (DOJ) prosecutes traffickers, the Department of Health and Human Services (DHHS) provides services to individuals who are certified as victims, the Department of State coordinates international anti-trafficking efforts, and the Department of Labor helps victims to become educated and employed.[88] Although these are the primary agencies tasked with anti-trafficking responsibilities, other federal agencies also play a role in preventing human trafficking.[89]

The federal government has led in these efforts, but the states have also taken action to prevent human trafficking.[90] Although no state had an anti-trafficking law in 2003, every state but one had passed anti-trafficking laws by 2012.[91] In that same time, many states also developed anti-trafficking task forces and increased the number of trafficking investigations.[92] Today, some states have even started providing services for victims of human trafficking.[93] While the states have made great strides in combating human trafficking, many states are unable to effectively investigate and prosecute trafficking because of the significant associated costs.[94]

Local governments have also played a role in combating human trafficking.[95] In fact, because they are much more familiar with the community, local law enforcement officers are most likely to be the first to

---

[86] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464 (2000) (codified as amended in scattered sections of 18, 21, 28, and 42 U.S.C).

[87] 22 U.S.C. § 7101(a) (2012).

[88] *Federal Government Efforts to Combat Human Trafficking*, U.S. DEP'T. OF HEALTH & HUM. SERVS. (Sept. 27, 2012), http://www.acf.hhs.gov/programs/orr/resource/federal-government-efforts-to-combat-human-trafficking.

[89] *See id.* (noting that the Department of Homeland Security, Agency for International Development, Department of Defense, and Equal Employment Opportunity Commission help implement programs to protect and assist victims).

[90] Sheldon-Sherman, *supra* note 11, at 470.

[91] *Id.*; *e.g.*, IND. CODE § 35-42-3.5-1 (Westlaw through 2015 First Reg. Sess.); KAN. STAT. ANN. § 21-5426 (Westlaw through 2013); MISS. CODE ANN. § 97-3-54.1 (LexisNexis, LEXIS through 2015 Reg. Sess.); N.M. STAT. ANN. § 30-52-1 (Conway Greene, Westlaw through 2015 First Reg. Sess.).

[92] Sheldon-Sherman, *supra* note 11, at 470.

[93] *Id.* For example, New Mexico provides victims with temporary housing, healthcare, job training, advocacy services, food assistance, mental health counseling, and more. N.M. STAT. ANN. § 30-52-2(A) (Conway Greene, Westlaw through 2015 First Reg. Sess.).

[94] Sheldon-Sherman, *supra* note 11, at 471.

[95] *Id.* at 459–60.

identify traffickers.[96] For instance, in 2007 and 2008, local law enforcement officers made sixty-eight percent of all arrests of traffickers.[97] Local law enforcement is also likely to have more contact with the victims of human trafficking.[98] Yet, because there are few training programs for local law enforcement officers, local government efforts are only marginally effective in preventing human trafficking.[99]

Finally, the profile of those combating human trafficking includes NGOs.[100] The NGOs combating trafficking are usually nonprofit and completely independent from the government.[101] NGOs assist in the fight against human trafficking through a variety of means.[102] Some NGOs work on raising awareness and educating the public on the crime of human trafficking, while other NGOs focus on raising funds and providing services to victims of human trafficking.[103] NGOs also work closely with the government and the international community to strengthen anti-trafficking laws and prosecute traffickers.[104] By partnering with NGOs, the government can be more effective in preventing human trafficking.[105]

The profile of those combating trafficking includes almost every level of domestic and international government; it also includes many levels of the private sector.[106] From international NGOs to ordinary citizens, the fight against human trafficking is being waged on almost every front. Yet, even with every level of government and the private sector included in the profile of those fighting trafficking, victims still have limited access to justice.[107]

II. PROBLEMS: VICTIMS HAVE LIMITED ACCESS TO JUSTICE

Approximately 18,000 to 20,000 people are trafficked into the United States each year[108] and approximately 60,000 people are enslaved in the United States.[109] Yet, less than two percent of these victims obtain

---

96 *Id.* at 460.

97 *Id.*

98 *Id.*

99 *Id.* at 460 n.132.

100 Amir Abdul Kareem Al-Khayon et al., *Value of Non-Governmental Organizations in Countering Human Trafficking*, NAT'L ASS'N OF ATT'YS GEN. (Aug. 29, 2011), http://www.naag.org/value-of-non-governmental-organizations-in-countering-human-trafficking.php.

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*

106 *See supra* notes 78–79 and accompanying text.

107 *See infra* Part II.

108 U.S. DEP'T OF STATE, *supra* note 5, at 7.

109 Max Fisher, *This Map Shows Where the World's 30 Million Slaves Live. There are 60,000 in the U.S.*, WASH. POST (Oct. 17, 2013), http://www.washingtonpost.com/blogs/

services[110] and very few of these traffickers are prosecuted for their crimes against humanity. For example, in 2011, the DOJ obtained more convictions for human trafficking than ever before.[111] Yet, even at the height of its success, the DOJ obtained justice for only a small fraction of victims compared to the number of people enslaved.[112] Under the TVPA, traffickers are subject to criminal prosecution and civil liability.[113]

A. Criminal Prosecution

Following the end of the Civil War in 1865,[114] the United States outlawed slavery and involuntary servitude by passing the Thirteenth Amendment, which states that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[115] Congress has passed other laws that have been used to combat human trafficking, including the Peonage Act of 1867,[116] the Racketeer Influenced and Corrupt Organizations Act,[117] the Mann Act,[118] and the TVPA.[119]

---

worldviews/wp/2013/10/17/this-map-shows-where-the-worlds-30-million-slaves-live-there-are-60000-in-the-u-s/.

[110] Sheldon-Sherman, *supra* note 11, at 462–63.

[111] *Id.*

[112] *Id.*

[113] 18 U.S.C. § 1584 (2012) (criminalizing involuntary servitude); 18 U.S.C. § 1589 (2012) (prohibiting forced labor); 18 U.S.C. § 1590 (2012) (prohibiting "[t]rafficking with respect to peonage, slavery, involuntary servitude, or forced labor"); 18 U.S.C. § 1591 (2012) (prohibiting sex trafficking by force, fraud, or coercion and sex trafficking of children); 18 U.S.C. § 1595 (2012) (codifying a civil right of action for victims whose rights were violated under Section 1589, 1590, or 1591).

[114] G. Ward Hubbs, *Introduction: An Unfinished War, in* THE GREAT TASK REMAINING BEFORE US: RECONSTRUCTION AS AMERICA'S CONTINUING CIVIL WAR 1, 1 (Paul A. Cimbala & Randall M. Miller eds., 2010).

[115] U.S. CONST. amend. XIII.

[116] 42 U.S.C. § 1994 (2012); Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER, SOC. POL'Y & L. 1247, 1273 n.149 (2011).

[117] 18 U.S.C. §§ 1961–1968 (2012).

[118] White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424 (2012)); Lindsay Strauss, Note, *Adult Domestic Trafficking and the William Wilberforce Trafficking Victims Protection Reauthorization Act*, 19 CORNELL J.L. & PUB. POL'Y 495, 506 (2010).

[119] Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386, 114 Stat. 1464 (codified as amended in scattered sections of 8, 18, 20, 22, 27, 28, and 42 U.S.C).

Until the passage of the TVPA, none of these laws explicitly prohibited human trafficking.[120] Accordingly, many of these laws had a limited effect in deterring or combating human trafficking.[121] In response to the growing need to combat human trafficking, Congress passed the TVPA in 2000 and President Clinton signed it into law.[122] The TVPA criminalizes involuntary servitude;[123] prohibits forced labor;[124] prohibits "[t]rafficking with respect to peonage, slavery, involuntary servitude, or forced labor";[125] and prohibits sex trafficking by force, fraud, or coercion and sex trafficking of children.[126]

Even with the passage of the TVPA, the United States has been largely ineffective in combating human trafficking.[127] Few traffickers are criminally prosecuted and few victims are assisted.[128] For example, from 2001 to 2008, the DOJ prosecuted 531 defendants and obtained convictions or guilty pleas in 518 cases.[129] Although these numbers represent a dramatic increase from the convictions obtained in previous years, the DOJ is still able to prosecute only a small fraction of traffickers each year.[130] Even with three straight years of record-level trafficking prosecutions,[131] the DOJ has only rescued a small fraction of the victims enslaved in the United States.[132]

---

[120] *See* Mark Sidel, *Richard B. Lillich Memorial Lecture: New Directions in the Struggle Against Human Trafficking*, 17 J. TRANSNAT'L L. & POL'Y 187, 197 (2008) (describing how earlier laws dealt with slavery, peonage, etc., but did not address trafficking directly).

[121] *See id.* at 202 (explaining that state laws generally were the product of legislatures with a strong desire to make a statement, but few resources to devote to the problem, so they garnered few results).

[122] Victims of Trafficking and Violence Protection Act of 2000, 114 Stat. 1464; Tessa L. Dysart, *The Protected Innocence Initiative: Building Protective State Law Regimes for America's Sex-Trafficked Children*, 44 COLUM. HUM. RTS. L. REV. 619, 622 (2013).

[123] 18 U.S.C. § 1584 (2012).

[124] *Id.* § 1589.

[125] *Id.* § 1590.

[126] *Id.* § 1591.

[127] *See* Chacón, *supra* note 13, at 3017 (noting that despite attention brought to the crime of trafficking by the TVPA, labor exploitation has been largely unaffected and few people have been helped).

[128] *See id.* at 3018–19 (noting a small number of individuals eligible for services and a relatively modest increase in prosecutions).

[129] Kappelhoff, *supra* note 78, at 16.

[130] Sheldon-Sherman, *supra* note 11, at 468.

[131] Kappelhoff, *supra* note 78, at 16.

[132] Dina Francesca Haynes, *Good Intentions Are Not Enough: Four Recommendations for Implementing the Trafficking Victims Protection Act*, 6 U. ST. THOMAS L.J. 77, 81 (2008). Law enforcement is unable to rescue every victim of human trafficking.

> But not every legitimate victim of human trafficking is or could possibly ever be rescued by law enforcement. In fact, very few are rescued. . . . In the year 2007, as a point of reference, the DOJ's Human Trafficking Prosecution Unit,

Unless an individual qualifies for the victim services authorized under the TVPA, the victim is unable to obtain any assistance.[133] To qualify for these benefits, the individual must be certified by the DHHS in one of the following categories: (1) the individual must prove that she is a victim of severe trafficking and is under eighteen;[134] (2) the individual must prove that she has received "continued presence" status from the DHHS because her continued presence is necessary to prosecute traffickers; or (3) the individual must prove that she is a victim of severe trafficking, is willing to prosecute her trafficker, and has applied for a T-visa.[135]

Yet, because many victims do not qualify for benefits unless the DOJ prosecutes the trafficker,[136] many victims do not receive necessary services.[137] For example, even though the TVPA authorizes 5,000 T-visas per year for certified victims of human trafficking, the Department of Homeland Security (DHS) only granted 247 T-visas in 2008 out of 394 applications.[138] These victims are likewise unable to receive the benefit of other services such as food, housing, education, and counseling.[139] Of the thousands of individuals in the United States victimized by human trafficking,[140] less than a few hundred are rescued from slavery and restored to society.[141]

Even in cases in which the government does attempt to prosecute the trafficker, there are several barriers reducing the effectiveness of criminal prosecution. For example, to obtain a conviction under the TVPA for involuntary servitude, the prosecutor must prove beyond a reasonable doubt[142] that the trafficker "knowingly and willfully" held or sold another person into any condition of involuntary servitude.[143]

---

working with all of its U.S. Attorneys and their investigators combined, initiated 183 investigations, charged 89 defendants in 32 cases, and obtained 103 convictions involving human trafficking.

Id. Even with an entire unit of the DOJ dedicated to combating human trafficking and with all of the resources available, the federal government was only able to obtain 103 convictions in 2007—a mere fraction necessary to deter human trafficking. *Id.*

133 Sheldon-Sherman, *supra* note 11, at 461.

134 22 U.S.C. § 7105(b)(1)(C) (2012). Severe trafficking includes individuals forced to perform sexual or labor services through force, fraud, or coercion. *Id.* § 7102(8).

135 *Id.* § 7105(b)(1)(E)(i).

136 *See id.* (requiring victims to cooperate with law enforcement in order to be certified by the DHHS).

137 Sheldon-Sherman, *supra* note 11, at 462–63.

138 *Id.* at 466.

139 *Id.* at 461–62.

140 *Forced Labor in the United States*, *supra* note 26, at 51.

141 *See supra* notes 129–32 and accompanying text.

142 Kim & Hreshchyshyn, *supra* note 7, at 16–17.

143 18 U.S.C. § 1584(a) (2012).

Even if a preponderance of the evidence clearly indicates that the defendant enslaved a fellow human being in violation of 18 U.S.C. § 1584, the defendant walks away without any consequences if the prosecutor cannot prove the government's case beyond a reasonable doubt. In such a case, the trafficker walks away without any consequences and the trafficked victim walks away without any compensation.[144] Moreover, not only does the victim not receive the satisfaction of seeing the perpetrator convicted for his crimes, but the victim is also often unable to access any services provided by the DHHS.[145]

Furthermore, in criminal prosecution, the focus of the case is on retribution for the wrong committed against society.[146] While punishing the wrongdoer is necessary to deter further crimes against mankind, the victim is often left without restitution or restoration.[147] Accordingly, criminal prosecution provides an ineffective deterrence[148] for the traffickers netting millions each year by enslaving fellow human beings.[149] While few traffickers are criminally prosecuted, even fewer are convicted of human trafficking.[150]

B. Civil Litigation

Even though people have enslaved fellow human beings throughout history, human trafficking victims did not have an effective private right of action in the United States until 2003 when the TVPA was reauthorized.[151] Before the 2003 reauthorization of the TVPA and the codification of a private right of action, victims of human trafficking had

---

[144] *See* Kim & Hreshchyshyn, *supra* note 7, at 16–17 (discussing the criminal and civil remedies available to a plaintiff that brings a successful claim under the TVPA).

[145] Rocha, *supra* note 69, at 412.

[146] *See* Pierce, *supra* note 10, at 585 (noting that prior to its reauthorization, "human rights advocates criticized the TVPA for its 'limited and prosecutorially-focused approach,' claiming that it was too focused on punishing the perpetrators rather than assisting the victims" (quoting Nam, *supra* note 23, at 1661)).

[147] *See* Kim & Hreshchyshyn, *supra* note 7, at 16–17 (discussing why restitution is often forgotten in criminal prosecutions).

[148] *See* Eileen Overbaugh, *Human Trafficking: The Need for Federal Prosecution of Accused Traffickers*, 39 SETON HALL L. REV. 635, 654 (2009) (implying that the profit from trafficking outweighs the potential punishment from trafficking).

[149] *See supra* note 8 and accompanying text.

[150] *See* Patricia Medige, *The Labyrinth: Pursuing a Human Trafficking Case in Middle America*, 10 J. GENDER, RACE & JUST. 269, 271 (2007) (stating that in 2005 the DOJ prosecuted 116 traffickers and convicted 45 traffickers).

[151] *See* 18 U.S.C. § 1595 (2012) (codifying a civil right of action for victims). While it is beyond the scope of this article to explain why previous civil statutes did not provide an ideal remedy for human trafficking victims, several professors have provided thorough answers to this question. *E.g.*, Sidel, *supra* note 120, at 203–04; Kathleen A. McKee, *Modern-Day Slavery: Framing Effective Solutions for an Age-Old Problem*, 55 CATH. U. L. REV. 141 (2005).

no cause of action for the true harm suffered: slavery.[152] Victims were left with suing to obtain civil remedies through contract law, tort law, and constitutional law.[153] Yet, while human trafficking often involves breached contracts and tort-like wrongs, the true harm suffered by the victims is slavery, and sometimes this harm was not adequately remedied through common law causes of action.[154] With the reauthorization of the TVPA to include a private right of action, victims can now hold their traffickers directly accountable.[155]

While human trafficking has historically been combated almost exclusively through criminal prosecution, civil litigation enabled through the private cause of action created in the TVPA presents some unique benefits in restoring victims and punishing traffickers. Unlike in criminal prosecution, where the victim has no control over the prosecution, civil litigation gives the victim greater control over the case.[156] Victims are also more likely to obtain restitution by pursuing traffickers through civil litigation than through criminal prosecution.[157]

More importantly, though, the victim is more likely to obtain a successful outcome in civil litigation than in criminal prosecution because there is a lower evidentiary standard. While the criminal prosecution must be proved beyond a reasonable doubt, the victim in a civil case can obtain victory by proving the defendant's guilt by a mere preponderance of the evidence.[158]

Finally, while the focus of criminal prosecution is on punishing the traffickers, the focus of civil litigation is on restoring the victims by compensating them for the abuses they endured.[159] Under the TVPA, victims may be able to receive compensatory and punitive damages.[160] Unlike criminal prosecution of human trafficking, which has resulted in

---

[152] Kim & Hreshchyshyn, *supra* note 7, at 24–25.

[153] Sidel, *supra* note 120, at 203–04.

[154] Kim & Hreshchyshyn, *supra* note 7, at 24–25.

[155] *Id.* at 16–17.

[156] Sidel, *supra* note 120, at 206.

[157] *See* Kim & Hreshchyshyn, *supra* note 7, at 16–17 (stating that in criminal cases, prosecutors often prioritize the defendant's incarceration, instead of the victim's restitution); Sidel, *supra* note 120, at 206 (stating that victims have some control in a civil lawsuit and a possibility of receiving monetary recovery).

[158] Kim & Hreshchyshyn, *supra* note 7, at 17.

[159] *See* Rocha, *supra* note 69, at 416 (stating that, because the reauthorization of the TVPA provides a private cause of action, victims may recover damages and attorneys' fees from their perpetrators).

[160] Francisco v. Susano, 525 Fed. App'x 828, 835 (10th Cir. 2013); Ditullio v. Boehm, 662 F.3d 1091, 1096 (9th Cir. 2011).

few convictions and minor consequences for traffickers,[161] civil litigation could be a valuable deterrent in preventing human trafficking.[162]

Yet, even though civil litigation presents a greater opportunity for success, few traffickers are sued under civil laws for enslaving fellow human beings.[163] Because they are unable to gain meaningful access to the legal system to defend their rights, many victims are unable to obtain justice through civil litigation.[164] Even though civil litigation has the potential to be a viable deterrent to human trafficking, few civil lawsuits are filed each year because victims of human trafficking often have little legal power.[165]

For example, victims of human trafficking often have limited education, generally do not speak the language, and rarely have the financial resources necessary to hire qualified lawyers.[166] Meanwhile, lawyers have little incentive to litigate claims concerning human trafficking because of the potential for personal harm,[167] and very few civil lawsuits are filed compared to the number of people enslaved in the United States.[168] For example, while there are approximately 60,000 people enslaved in the United States,[169] there were only around 30 lawsuits filed under 18 U.S.C. § 1595 between 2003 and 2009.[170]

When traffickers face less than a one percent chance of criminal prosecution or civil litigation, the status quo does not provide a viable

---

[161] *See supra* Part II.A.

[162] *See* Kim & Hreshchyshyn, *supra* note 7, at 16–17 (noting that civil litigation "empowers trafficked persons individually to pursue greater damage awards in the form of compensatory, punitive, and/or pecuniary damages," and "can achieve substantial deterrence of trafficking activity through high punitive awards").

[163] *See* Nam, *supra* note 23, at 1668 (noting that 18 U.S.C. § 1595 has been "infrequently utilized since its inception").

[164] *See id.* at 1682 (noting that "trafficking victims have little access to courts, and unfortunately, the prosecutorial approach of the TVPA has heightened this lack of empowerment").

[165] *See id.* at 1656–57 ("[T]rafficking victims have filed very few lawsuits under [the 2003 reauthorization of the TVPA] in the four years since its creation, while sex trafficking victims in particular have not filed a *single* lawsuit under this provision.").

[166] *See* Kappelhoff, *supra* note 78, at 9 (stating that "human traffickers prey upon and exploit some of the most vulnerable people in our society—the poor, the unemployed, the underemployed, the uneducated, and the desperate"); Sheldon-Sherman, *supra* note 11, at 448–50 (noting that these factors, coupled with "[d]ebt bondage" and language barriers, keep victims in captivity).

[167] *See* Medige, *supra* note 150, at 281 (arguing that nonprofit legal service providers are essential to protecting victims' rights because even if the victim can recover litigation-related attorneys' fees, some aspects of a trafficking case do not involve litigation).

[168] Nam, *supra* note 23, at 1656–57.

[169] *Supra* note 109 and accompanying text.

[170] Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 2009 U. CHI. LEGAL F. 247, 292 (2009).

deterrent to human trafficking.[171] As a consequence, less than two percent of the victims of human trafficking are able to receive services.[172] If the United States wants to win the battle against human trafficking, then the nation must find a valuable deterrent—the United States must find a solution that results in consequences for more than one percent of the perpetrators.

III. SOLUTION: CLASS-ACTION LAWSUITS ARE A VIABLE OPTION AND A VALUABLE DETERRENT IN COMBATING HUMAN TRAFFICKING

A. History of Class-Action Lawsuits

Originally known as "group actions" in the twelfth century, class-action lawsuits have roots dating back to medieval times.[173] The first recorded judicially created group action, *Discart v. Otes*, occurred in 1309 when the justices in the case required all affected parties to be included within the lawsuit.[174] When the justices ruled against the class of plaintiffs, all of the plaintiffs were bound by the judgment.[175] Group actions were most frequently used when the law of a town or church was violated and multiple people were injured.[176] Litigating individual cases was difficult because of poor communication and transportation.[177]

While the prevalence of group actions faded in England during the nineteenth century, the United States continued to use class actions to litigate disputes involving many similarly situated people.[178] Scholars credit Justice Story with preserving class-action lawsuits in the United

---

[171] *See* Rocha, *supra* note 69, at 394 (stating that only one percent of known traffickers are prosecuted annually).

[172] *See* Sheldon-Sherman, *supra* note 11, at 462–63 (noting that domestic victims are not required to prosecute their traffickers to obtain services).

[173] Susan T. Spence, *Looking Back . . . In A Collective Way*, BUS. L. TODAY, July–Aug. 2002, at 21.

[174] Raymond B. Marcin, *Searching for the Origin of the Class Action*, 23 CATH. U. L. REV. 515, 521 (1974) (citing Discart v. Otes, 30 Seld. Society 137, 138 (No. 158, P.C. 1309) (1914) ("[A]ll that are in like case with the present complainant are bidden to appear . . . before that same Council, either in person or by some one representing them all, to hear its opinion and to receive such judgement as shall there be delivered.")).

[175] *Id.* at 522 (citing 30 Seld Society xxxvii (1914)).

[176] Howard M. Downs, *Federal Class Actions: Due Process by Adequacy of Representation (Identity of Claims) and the Impact of* General Telephone v. Falcon, 54 OHIO ST. L.J. 607, 612–13 (1993); *History of Class Action Lawsuits*, CLASS ACTION LAWSUITS CTR., http://classactionlawsuitcenter.com/history-of-class-action-lawsuits (last visited Sept. 12, 2015).

[177] *History of Class Action Lawsuits*, *supra* note 176.

[178] *Id.*

States.[179] In *West v. Randall*, the earliest federal class-action lawsuit in the United States,[180] Justice Story wrote that "[i]t is a general rule in equity, that all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be."[181]

Before the United States merged law and equity, class-action lawsuits were guided by Equity Rule 48, which allowed representative suits where individual litigation was inefficient because the outcome affected many individuals.[182] In the early twentieth century, Equity Rule 48 was replaced with Equity Rule 38.[183] When the United States merged law and equity in 1938,[184] Equity Rule 38 became Federal Rule of Civil Procedure 23—the modern rule on class-action lawsuits.[185]

B. Requirements for Class-Action Lawsuits

To file a lawsuit as a class action, the party seeking class certification must satisfy the prerequisite requirements of Rule 23(a) and then qualify for certification under one of the three categories in Rule 23(b).[186] There are four requirements under Rule 23(a): commonality on questions of law or fact, adequacy of legal representation, numerosity of class members such that joinder is impracticable, and typicality of claims and defenses.[187] After a party seeking class certification satisfies the Rule 23(a) requirements, the party must qualify for certification under one of the Rule 23(b) categories:

> (1) prosecuting separate actions by or against individual class members would create a risk of:
>
> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
>
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would

---

[179] J. Britton Whitbeck, *Identity Crisis: Class Certification, Aggregate Proof, and How Rule 23 May Be Self-Defeating the Policy for Which It Was Established*, 32 PACE L. REV. 488, 488–89 (2012).

[180] Downs, *supra* note 176, at 621–22 n.55.

[181] West v. Randall, 29 F. Cas. 718, 721 (C.C.D.R.I. 1820) (No. 17,424).

[182] DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 10–11 (2000).

[183] Spence, *supra* note 173, at 23.

[184] Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 431 (2003).

[185] Spence, *supra* note 173, at 23.

[186] FED. R. CIV. P. 23(a)–(b).

[187] FED. R. CIV. P. 23(a).

> substantially impair or impede their ability to protect their interests;
>
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
>
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.[188]

While there are three possible categories for obtaining class certification,[189] Rule 23(b)(3) certification is the best option for human trafficking cases. Unlike a class action filed under 23(b)(1) or 23(b)(2), in which members are generally bound by the judgment and are not able to opt out of the class-action lawsuit, members of a 23(b)(3) class action can opt out of the lawsuit.[190] If a member opts out of the class action, then that member is not bound by the court's judgment and the opted-out member can proceed to file a separate lawsuit.[191] In a 23(b)(3) class-action lawsuit, the party seeking certification must prove two elements: predominance of mutual legal or factual questions and superiority of class action over individual litigation.[192] Class actions filed under 23(b)(3) are most often used to obtain money damages, as opposed to other remedies.[193] Any of these methods can be used to obtain judicial certification—an action required to move forward in a class action.[194]

C. Benefits of Class-Action Lawsuits

There are several benefits to both courts and litigants in allowing class certification where the lawsuit involves multiple plaintiffs with identical or similar claims. The four primary advantages to pursuing a claim as a class action rather than as an individual include efficiency, effectiveness, deterrence, and compensation.[195] While all of these

---

188 FED. R. CIV. P. 23(b).

189 2 WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 4:1, at 4 (5th ed. 2012).

190 *Id.* § 4:4, at 23.

191 Ilana T. Buschkin, *The Viability of Class Action Lawsuits in a Globalized Economy—Permitting Foreign Claimants to Be Members of Class Action Lawsuits in the U.S. Federal Courts*, 90 CORNELL L. REV. 1563, 1574–75 (2005).

192 2 RUBENSTEIN ET AL., *supra* note 189, § 4:47, at 189.

193 *Id.* § 4:47, at 186.

194 *See* FED. R. CIV. P. 23(c)(1) (stating that, after the action is filed, the court must determine whether to certify it as a class action).

195 2 RUBENSTEIN ET AL., *supra* note 189, §§ 1:7–10, at 17, 21–22, 26, 29.

advantages may not be present in every class-action lawsuit,[196] these are the four major policy reasons for certifying class-action lawsuits.

First, class-action lawsuits often save time and money, increasing the efficiency of the legal process and lowering the costs of litigation.[197] In an age where the court system would be handicapped if all potential claims went to trial,[198] the ability to combine numerous individual claims into one lawsuit can help increase the efficiency of the legal system.[199] Class-action lawsuits reduce the number of lawsuits filed and encourage settlement.[200]

Second, class-action lawsuits increase the incentive for an individual to prosecute his or her rights and impose the costs of wrongdoing on the wrongdoer.[201] In some class-action lawsuits, the monetary award to the individual plaintiff is small but the deterrent to the defendant is high.[202] As such, class-action lawsuits are an effective, legal deterrent to unlawful behavior.[203]

Third, class-action lawsuits are an effective deterrent to illegal conduct. For example, in *Reiter v. Sonotone Corporation.*, a class of plaintiffs sued five corporations for vertical and horizontal price fixing in violation of the Clayton Act, which authorizes treble damages for violations.[204] When the Supreme Court held that the five corporations were liable under the Clayton Act, it stated that Congress enacted the treble-damages provision for price fixing because it could deter future violations of the Clayton Act.[205] Likewise, awarding punitive damages for wrongdoing creates an effective deterrent because it incentivizes litigation and punishes wrongdoers for illegal activity.[206]

---

[196] *See* Buschkin, *supra* note 191, at 1584 (stating that the advantage of efficiency is not present in some class-action suits).

[197] *Id.* at 1583.

[198] *See* Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 269 (1999) ("The justice system would grind to a halt if cases were prohibited from settling.").

[199] *See* Buschkin, *supra* note 191, at 1583 ("In certain circumstances, class action lawsuits offer both courts and defendants some form of efficiency.").

[200] 5 JAMES D. PAGLIARO & DEANNE L. MILLER, ENVIRONMENTAL LAW PRACTICE GUIDE § 33.05(2)(b)(iii), LEXIS (Michael B. Gerrard ed., 2015).

[201] *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (noting that class-action lawsuits make recovery feasible for those plaintiffs for whom the cost of litigation would otherwise be a deterrent in the face of a small recovery).

[202] *See* Buschkin, *supra* note 191, at 1583–85 (stating that, although the injuries of individual victims may be small, the collective injuries of many victims can mitigate the high costs of litigation and hold wrongdoers accountable).

[203] *See id.* at 1584 (stating that class actions allow victims to hold wrongdoers accountable).

[204] 442 U.S. 330, 335 (1979).

[205] *Id.* at 343–45.

[206] 1 RUBENSTEIN ET AL., *supra* note 189, § 1:8, at 22–24.

Fourth, class-action lawsuits compensate plaintiffs for the wrongdoing they endured.[207] Because class-action lawsuits incentivize litigation, plaintiffs are more likely to receive compensation on small claims.[208] Furthermore, class actions enable plaintiffs with less legal power and fewer financial resources than the defendant to raise an effective legal claim.[209] Class-action lawsuits even the playing field between defendants and plaintiffs, which is especially important in human trafficking cases.

In addition to criminal prosecution and individual litigation, class-action lawsuits in human trafficking cases present a viable option and valuable deterrent to combating the magnitude of slavery in the twenty-first century. While class-action lawsuits would not be appropriate in every human trafficking case,[210] there are some victims of human trafficking that would be well-suited to obtaining justice through filing a civil class-action lawsuit. For these potential plaintiffs, the ability to file their claim as a class would enable them to compete in the legal arena with the traffickers, who generally wield greater legal power than the victims.[211] Yet, while class-action lawsuits could prove a valuable tool in combating human trafficking, courts have been reluctant to grant certification to classes of human trafficking victims.[212]

---

[207] *Id.* § 1:7, at 17; *see* Ortiz v. Fibreboard Corp., 527 U.S. 815, 824, 827 (1999) (stating that claimants settled to recover compensation for personal injury and death claims).

[208] 1 RUBENSTEIN ET AL., *supra* note 189, § 1:7, at 17, 19–21.

[209] *Id.* § 1:7, at 19–20.

[210] *See* 1 RUBENSTEIN ET AL., *supra* note 189, §§ 1:7–10, at 17, 21–22, 26, 29 (describing four reasons that victims might want to file class actions: compensation, deterrence, efficiency, and legitimacy). For example, class-action lawsuits are not a viable deterrent where the trafficker has trafficked very few victims. *See* FED. R. CIV. P. 23(a) (stating that elements to qualify for a class action include numerosity such that joinder is impracticable and common questions of law or fact). If there are only a few victims with similar claims, the lawsuits should be filed individually or the victims should join claims. Regardless, class certification would not be appropriate because the plaintiffs are not numerous. Similarly, class-action lawsuits are not effective as a deterrent if the defendant in the suit does not have any money because the plaintiffs would endure the hassle of a trial without the benefit of any compensation and there is no consequence to the trafficker.

[211] *See* 22 U.S.C. § 7101(b)(20) (2012) (stating that victims find it difficult to report or prosecute crimes); *see* 1 RUBENSTEIN ET AL., *supra* note 189, § 1:7, at 17–19 (stating that defendants generally have more resources than individual plaintiffs and that individual plaintiffs who incur small harms are generally powerless to bring an action to be compensated).

[212] *See, e.g.*, David M. Zieja, Case Comment, David v. Signal Int'l, L.L.C., *2012 U.S. Dist. LEXIS 114247 (E.D. La., Jan. 3, 2012)*, 36 SUFFOLK TRANSNAT'L L. REV. 277, 277–78 (2013) (analyzing a case in which a federal district court denied a motion for class certification of 500 foreign ship workers).

D. Barriers to Certification in Class-Action Trafficking Cases

Although human trafficking plaintiffs meeting the requirements of Rule 23(a) could pursue certification under any Rule 23(b) category,[213] it makes the most sense for potential classes to pursue certification under 23(b)(3), which requires predominance of legal or factual questions and a showing that the class action is superior to individual litigation.[214] While the superiority requirement is satisfied by showing that class-wide litigation will reduce costs and promote efficiency,[215] the predominance element requires courts to determine if the common questions in the case predominate over the individualized questions.[216] In evaluating what issues predominate in the case, courts consider the underlying elements of the claim.[217]

Although few human trafficking cases have been filed as class-action lawsuits, labor trafficking cases are best suited to class-wide litigation.[218] In a labor trafficking case filed under the TVPA, the law states that:

> (a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—
>
> (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
>
> (2) by means of serious harm or threats of serious harm to that person or another person;
>
> (3) by means of the abuse or threatened abuse of law or legal process; or
>
> (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint
>
> shall be punished as provided under subsection (d).[219]

If the plaintiffs consented to the labor conditions, then the defendant is not liable under the TVPA.[220] However, if the plaintiffs were coerced to

---

[213] *Supra* notes 188–89 and accompanying text.

[214] Sullivan v. DB Invs., Inc., 667 F.3d 273, 296 (3d Cir. 2011).

[215] Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996).

[216] *Sullivan*, 667 F.3d at 297.

[217] Blades v. Monsanto Co., 400 F.3d 562, 569 (8th Cir. 2005).

[218] *See* Theodore R. Sangalis, Comment, *Elusive Empowerment: Compensating the Sex Trafficked Person Under the Trafficking Victims Protection Act*, 80 FORDHAM L. REV. 403, 427 (2011) (noting that many labor trafficking suits have been brought under 18 U.S.C. § 1595 and that, "[f]or the most part, the cases that reach the merits have received favorable judgments").

[219] 18 U.S.C. § 1589 (2012).

[220] *See* David v. Signal Int'l, L.L.C., No. 08-1220, 2012 U.S. Dist. LEXIS 114247, at *71 n.35 (E.D. La. Jan. 3, 2012) (stating that the alleged victim's consent is a relevant consideration under the TVPA for determining whether the alleged victim's labor was involuntary).

work in the labor conditions, then the defendant is liable under the TVPA.[221] Therefore, the issue of consent or coercion in providing labor is the focal point in a labor trafficking case.[222] Some courts have held that the issue of consent can be tried on a representative basis,[223] while other courts have required an individualized showing of proof concerning consent and coercion.[224]

Of the class-action lawsuits filed under the TVPA, courts have diverged in interpreting the proof required to show consent.[225] If the issue of consent is an individualized question that predominates over other questions in the case, then class certification is not appropriate.[226] In contrast, if the issue of consent does not require individualized proof, then class certification is appropriate in litigating the claims.[227] Because of the divergence in interpreting the TVPA, some courts have granted class certification,[228] while other courts have refused class certification.[229]

For example, in *Tanedo v. East Baton Rouge Parish School Board*, the United States District Court for the Central District of California granted class certification to approximately 350 Filipino teachers.[230] The teachers had been lured to work in the United States by the promise of high-paying jobs.[231] However, once the teachers arrived in the United States, the defendants compelled the Filipinos to work without adequate pay.[232] The Filipino teachers filed a class-action lawsuit, and the court granted certification because the issue of consent in 18 U.S.C. § 1589 could be tried on a class-wide basis by using a reasonable person standard.[233]

In contrast, in *David v. Signal International, L.L.C.*, the United States District Court for the Eastern District of Louisiana refused to grant class certification to approximately 500 ship and rig workers who had

---

[221] *See id.* at *71, *76 (noting that coercion is part of the causation analysis in a civil action under 18 U.S.C. § 1589).

[222] *See id.* at *71–73 (stating that the alleged victim's consent to labor conditions and the defendant's coercion of the alleged victim is pivotal in determining whether labor was involuntary).

[223] Tanedo v. E. Baton Rouge Parish Sch. Bd., No. LA CV10–01172 JAK (MLGx), 2011 U.S. Dist. LEXIS 152329, at *21 (C.D. Cal. Dec. 12, 2011).

[224] *David*, 2012 U.S. Dist. LEXIS 114247, at *71–73.

[225] *Compare id.* at *77 (requiring an inquiry into individualized questions of consent), *with Tanedo*, 2011 U.S. Dist. LEXIS 152329, at *21 (holding that no inquiry into individualized questions of consent is required).

[226] *David*, 2012 U.S. Dist. LEXIS 114247, at *58–59, *79–81.

[227] *Tanedo*, 2011 U.S. Dist. LEXIS 152359, at *9, *21.

[228] *Id.* at *29–30 (granting class certification in a labor trafficking case).

[229] *David*, 2012 U.S. Dist. LEXIS 114247, at *8–9, *128–29 (refusing to grant class certification in a labor trafficking case).

[230] *Tanedo*, 2011 U.S. Dist. LEXIS 152329, at *1, *6.

[231] *Id.* at *2, *4–6.

[232] *Id.* at *4–5.

[233] *Id.* at *20–21.

been lured to the United States with promises of well-paying jobs.[234] When the workers arrived in the United States, however, the traffickers forced the workers to live in "squalid conditions . . . conducive to the spread of disease and illness."[235] By confiscating the workers' passports, the traffickers were able to coerce the workers to labor in substandard conditions.[236] Because the workers were in a "precarious financial situation" and had a "vulnerable immigration status," they were unable to leave the awful working conditions.[237] While the workers lived in substandard work camps that felt like a prison, the trafficking company made millions of dollars by exploiting the migrant workers.[238] When the workers brought a class-action lawsuit, the court refused to grant certification, reasoning that the TVPA required proof of individualized consent, and therefore, individual questions of fact predominated over questions of fact applicable to the class of plaintiffs.[239] As such, the court held that 23(b)(3) class certification was not appropriate.[240]

E. Courts Should Adopt the Reasonable Person Standard

Courts should adopt the reasonable person standard used in *Tanedo*, which allowed a forced labor claim under the TVPA to be tried on a representative basis.[241] In *Tanedo*, the court stated that the key question was whether "a reasonable person of the same background and circumstances would feel compelled to continue working" because of the threats made by the defendant.[242] By adopting the reasonable person standard in forced labor claims under the TVPA, courts would effectuate the intent of the statute by providing necessary relief to classes of human trafficking victims.[243]

First, based on the plain language of the statute, courts should adopt a reasonable person standard in determining if the plaintiffs were coerced to labor because the language of the statute focuses on the defendant's actions. In Section 1589(c), the definition section states that "serious

---

[234] *David*, 2012 U.S. Dist. LEXIS 114247, at *8–10.

[235] *Id.* at *43.

[236] *Id.* at *33.

[237] *Id.* at *44–45.

[238] *Id.* at *10–11, *42–43.

[239] *Id.* at *71, *77–78.

[240] *Id.* at *129.

[241] Tanedo v. E. Baton Rouge Parish Sch. Bd., No. LA CV10–01172 JAK (MLGx), 2011 U.S. Dist. LEXIS 152329, at *19–22 (C.D. Cal. Dec. 12, 2011).

[242] *Id.* at *21.

[243] *See* Sangalis, *supra* note 218, at 424 (stating that the legislative intent of the TVPA is to combat human trafficking through strong measures that the legislature has kept intact even after later modifications of the TVPA).

harm" is harm that would "compel a *reasonable person* of the same background and in the same circumstances to perform or to continue performing labor or services."[244] Not only does the language of the statute explicitly incorporate a reasonable person standard, but the entire statute is also written with a focus on the defendant.[245] Therefore, because the statute focuses on the defendant's actions, courts should adopt the reasonable person standard in determining if a worker would have felt coerced by the defendant.

Second, courts should adopt a reasonable person standard because a broad interpretation of the TVPA best effectuates Congress's intent in enacting the TVPA.[246] By including a criminal statute prohibiting forced labor and then codifying a civil cause of action to enforce the law, the TVPA was designed to combat human trafficking by creating private attorney generals to assist in enforcing the TVPA.[247] While the narrow interpretation of the TVPA by the *David* court denied judicial relief to 500 abused workers,[248] the broad interpretation of the TVPA by the *Tanedo* court provided judicial relief to 350 Filipino teachers.[249] To effectuate Congress's intent in passing the TVPA, courts should broadly interpret the forced labor language of the TVPA, just as they have broadly interpreted other provisions of the TVPA.[250]

For example, courts have broadly interpreted other provisions of the TVPA because such an interpretation best effectuates Congress's intent.[251] In *United States v. Marcus*, the Eastern District of New York interpreted the term "commercial sex act" to include pornography.[252] Similarly, in *United States v. Veerapol*, the Ninth Circuit held that the threat of deportation could constitute legal coercion even if such a threat to an adult of normal intelligence would not compel involuntary servitude.[253]

Even in interpreting other aspects of the forced labor statute in the TVPA, courts have broadly interpreted the language of the TVPA. In *United States v. Bradley*, the First Circuit held that the definition of

---

[244] 18 U.S.C. § 1589 (2012) (emphasis added).

[245] *Id.*

[246] *See* 22 U.S.C. § 7101(a) (2012) (stating that the purpose of the TVPA is to prevent human trafficking).

[247] Ditullio v. Boehm, 662 F.3d 1091, 1104–05 (9th Cir. 2011); Kim, *supra* note 170, at 298.

[248] *Supra* notes 234–40 and accompanying text.

[249] *Supra* notes 230–33 and accompanying text.

[250] *See* Sheldon-Sherman, *supra* note 11, at 469 (stating that courts have leniently interpreted the TVPA by broadly construing terms to include different types of illegal activity).

[251] *Id.*

[252] 487 F. Supp. 2d 289, 306–07 (E.D.N.Y. 2007).

[253] 312 F.3d 1128, 1132 (9th Cir. 2002).

"serious harm" could include threats of any consequences.[254] By broadly interpreting the language of the TVPA, courts have effectuated Congress's intent in passing the TVPA. Therefore, courts should broadly interpret the language of the forced labor statute to apply a reasonable person standard.

CONCLUSION

"Injustice anywhere is a threat to justice everywhere,"[255] and this generation has a moral duty to fight against the injustice occurring every day within the borders of our own country. To be effective in preventing human trafficking, the United States must create a more effective deterrent to human trafficking. Although class-action lawsuits are not appropriate in every case, they would provide a viable and valuable deterrent in large labor trafficking schemes. Yet, classes of human trafficking victims will be denied justice unless the courts adopt a reasonable person standard in interpreting the forced labor statute of the TVPA.

Every day countless men, women, and children are treated as second-class citizens within the borders of the United States. These men, women, and children are sexually abused and financially exploited. Even though human trafficking has become one of the most profitable illegal industries worldwide, few victims are ever compensated for the abuses suffered at the hands of their traffickers. If the courts interpret the TVPA to adopt a reasonable person standard in the forced labor statute, victims of human trafficking treated as second-class citizens could pursue legal compensation as a certified class, which might enable more people to find freedom through the legal system. Our generation could be included among the most-free people ever living.

Renee M. Knudsen[*]

---

[254] 390 F.3d 145, 150 (1st Cir. 2004).

[255] Letter from Martin Luther King, Jr. to Fellow Clergymen, *supra* note 1, at 2.

[*] J.D. Candidate, Regent University School of Law, 2016. I would like to express my heartfelt appreciation to my parents, Mark and Michelle Knudsen, for their steadfast love and support throughout my entire life, and to my siblings for their constant friendship and encouragement. I would also like to express my sincere gratitude to Professor James Boland, Professor Tessa Dysart, and Jessica Krentz for their advice and assistance on this Note.

CASE SUMMARY: *OBERGEFELL V. HODGES*

On January 16, 2015, the Supreme Court granted certiorari in *DeBoer v. Snyder*,[1] a case in which the Sixth Circuit upheld laws in Kentucky, Tennessee, Ohio, and Michigan banning same-sex marriage and the recognition of out-of-state same-sex marriages.[2] And on June 26, 2015, the Court reversed the Sixth Circuit's holding in *Obergefell v. Hodges*.[3]

This Case Summary proceeds as follows: Part I details the factual background and district court proceedings for the four predicate cases in *DeBoer v. Snyder*. Then, Part II discusses the Sixth Circuit's decision, which consolidated all four cases for joint decision in a single opinion. Part III outlines the arguments made by the petitioners and respondents on appeal to the Supreme Court. Finally, Part IV discusses the majority and dissenting opinions in the Supreme Court's decision in *Obergefell v. Hodges*.

I. DISTRICT COURT DECISIONS

The Sixth Circuit's decision in *DeBoer* was a consolidation of four district court cases, each of which struck down the state law at issue.[4] Because each case varies slightly in its factual and procedural background, they are examined below individually.

A. Obergefell v. Wymyslo[5]

There were two relevant laws in *Obergefell v. Wymyslo*—the first was a law passed by Ohio lawmakers in 2004 that stated as follows:

> (1) Any marriage between persons of the same sex is against the strong public policy of this state. Any marriage between persons of the same sex shall have no legal force or effect in this state and, if attempted to be entered into in this state, is void ab initio and shall not be recognized by this state.
>
> (2) Any marriage entered into by persons of the same sex in any other jurisdiction shall be considered and treated in all respects as having no legal force or effect in this state and shall not be recognized by this state.[6]

---

1 135 S. Ct. 1040 (2015).

2 DeBoer v. Snyder, 772 F.3d 388, 396, 399, 421 (6th Cir. 2014), *rev'd sub nom.* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

3 *Obergefell*, 135 S. Ct. at 2608.

4 *DeBoer*, 772 F.3d at 396–99.

5 962 F. Supp. 2d 968 (S.D. Ohio 2013), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014).

6 OHIO REV. CODE ANN. § 3101.01(C)(1)-(2) (LexisNexis, LEXIS through the 131st Gen. Assemb.).

The second was a constitutional amendment passed by Ohio voters that same year, which stated as follows:

> Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.[7]

Plaintiffs in *Obergefell v. Wymyslo* were multiple same-sex couples whose out-of-state marriage licenses were not recognized by the state of Ohio[8] and a licensed funeral home director who was responsible under Ohio statute for filling out death certificates that are "required for burial, cremation, insurance, probate, and other purposes after the death of a spouse."[9] Shortly after the Supreme Court's decision in *United States v. Windsor*,[10] the plaintiffs filed suit against the Director of the Ohio Department of Public Health in his official capacity, raising an as-applied constitutional challenge to the Ohio law banning the state from recognizing out-of-state same-sex marriages.[11] The petitioners alleged that the law "violate[d] federal constitutional guarantees of due process, equal protection, and the right to travel," as well as the Full Faith and Credit Clause.[12]

The United States District Court for the Southern District of Ohio granted a permanent injunction for the plaintiffs to be recognized as spouses on their deceased partners' death certificates.[13] In its due process analysis, the district court established a fundamental "right to remain married," and found that the state could not satisfy heightened scrutiny.[14] In its equal protection analysis, the court held that heightened scrutiny applies to sexual orientation classifications because homosexuals have faced a history of severe and pervasive discrimination, sexual orientation does not bear on an individual's ability to contribute to society, homosexuals are "lacking in the political power to expand their civil rights," and sexual orientation is an immutable characteristic.[15] Further, the court held that the law could not survive even under rational basis

---

7 OHIO CONST. art. XV, § 11.

8 Brief for Petitioners at 6–9, *Obergefell*, 135 S. Ct. 2584 (No. 14-556) [hereinafter *Obergefell* Petitioners' Supreme Court Brief].

9 *Id.* at 8.

10 133 S. Ct. 2675, 2696 (2013).

11 *Obergefell* Petitioners' Supreme Court Brief, *supra* note 8, at 12.

12 *Id.* at 14.

13 Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 973, 978, 997–98 (S.D. Ohio 2013).

14 *Id.* at 978.

15 *Id.* at 987–91.

scrutiny because the legitimate reasons provided by the state were pretexts for discrimination.[16]

B. DeBoer v. Snyder[17]

DeBoer challenged a number of Michigan laws. In 1996, Michigan lawmakers enacted a new law and amended four others to reassert the state's policy toward excluding same-sex marriage.[18] The new law declared that "[m]arriage is inherently a unique relationship between a man and a woman," and that "[a]s 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."[19] Additionally, the law stated that "marriage contracted between individuals of the same sex is invalid in this state."[20] The amendments to existing law involved (1) defining marriage as a civil contract "between a man and a woman";[21] (2) prohibiting the recognition of "a marriage contracted between individuals of the same sex, which marriage is invalid in this state";[22] and (3) "adding gender-based prohibitions to the existing consanguinity limitations."[23] Additionally, Michigan voters approved an amendment to the state constitution in 2004 that stated: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose."[24]

The *DeBoer* plaintiffs were a same-sex couple that had adopted three children, but did not share custody of the children because they could not be legally married under Michigan law.[25] They first filed a challenge to the state's adoption laws, yet when this failed, the district court allowed to the plaintiffs to amend their complaint to specifically challenge the

---

[16] *Id.* at 991, 993.

[17] 973 F. Supp. 2d 757 (E.D. Mich. 2014), *rev'd*, 772 F.3d 388 (6th Cir. 2014).

[18] Brief for Petitioners at 8, *DeBoer*, 973 F. Supp. 2d 757 (No. 14-571) [hereinafter *DeBoer* Petitioners' District Court Brief].

[19] MICH. COMP. LAWS § 551.1 (Westlaw through P.A. 2015, No. 130 of 2015 Reg. Sess., 98th Leg.).

[20] *Id.*

[21] § 551.2 (Westlaw).

[22] § 551.271(2) (Westlaw).

[23] Brief for Petitioners at 7–8, DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014) (No. 14-571) [hereinafter *DeBoer* Petitioners' Circuit Court Brief]. The Michigan Code places restrictions on the ability to marry based on consanguinity and gender. *See* §§ 551.3–551.4 (Westlaw) (listing persons men and women are prohibited from marrying, including a prohibition of a man marrying another man and a woman marrying another woman).

[24] MICH. CONST. art. I, § 25.

[25] DeBoer v. Snyder, 973 F. Supp. 2d 757, 759–60 (E.D. Mich. 2014), *rev'd*, 772 F.3d 388 (6th Cir. 2014).

same-sex marriage laws.[26] Suing the Governor and the Attorney General of the State of Michigan in their official capacities, the plaintiffs alleged that the Michigan laws prohibiting same-sex marriage and the recognition of out-of-state same-sex marriages were unconstitutional on due process, equal protection, and federalism grounds.[27]

The United States District Court for the Eastern District of Michigan found for the plaintiffs and enjoined the state from enforcing both the constitutional amendment and the applicable same-sex marriage laws.[28] In doing so, the court held that the Michigan laws were unconstitutional on equal protection grounds because they did not meet rational basis scrutiny.[29] The plaintiffs' due process claims were not addressed.

In holding that the laws failed rational basis scrutiny, the court rejected the state's proffered justifications. First, the court dismissed the state's evidence that same-sex marriage impedes the goal of "optimal child-rearing" because child-rearing is not a prerequisite for marriage, the same-sex marriage ban disadvantages children in same-sex marriages, and the state does not similarly ban opposite-sex couples from marrying when their children may be exposed to other "'sub-optimal' developmental outcomes."[30] Therefore, there was "no logical connection between banning same-sex marriage and providing children with an 'optimal environment' or achieving 'optimal outcomes.'"[31] The court also rejected the state's argument that the court should "wait and see" if new studies confirm the state's suspicions, stating that "any deprivation of constitutional rights calls for prompt rectification."[32] The court dismissed the preservation of traditional marriage as a justification for the same-sex marriage bans because tradition alone cannot meet rational basis review and traditional marriage is based on "moral disapproval of redefining marriage to encompass same-sex relationships."[33] Finally, the court rejected the state's argument that federalism allows states to define marriage, holding that a "ballot-approved measure" is not due deference if it "raises a constitutional question."[34]

---

26 *DeBoer* Petitioners' Circuit Court Brief, *supra* note 23, at 9.

27 *Id.*

28 *DeBoer*, 973 F. Supp. 2d at 775.

29 *Id.* at 768–69.

30 *Id.* at 770–72.

31 *Id.* at 772.

32 *Id.* (quoting Watson v. Memphis, 373 U.S. 526, 532–33 (1963)).

33 *Id.* at 772–73.

34 *Id.* at 773–75.

C. *Bourke v. Beshear*[35]

Two types of laws were at issue in *Bourke*. The first was a series of statutes passed by Kentucky lawmakers in 1998 that made same-sex marriage and the recognition of same-sex marriage illegal.[36] These statutes declared "marriage between members of the same sex . . . against Kentucky public policy,"[37] expressly prohibited same-sex marriages, and provided that "[a] marriage between members of the same sex which occurs in another jurisdiction shall be void in Kentucky."[38] The second law was a constitutional amendment passed by Kentucky voters in 2004 that stated as follows: "Only a marriage between one man and one woman shall be valid or recognized as a marriage in Kentucky. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized."[39]

The *Bourke* plaintiffs included two same-sex couples who were denied marriage licenses by the state of Kentucky and four same-sex couples whose out-of-state marriage licenses were not recognized by the state of Kentucky.[40] Shortly after *Windsor* was announced, the *Bourke plaintiffs* filed suit against the Governor and the Attorney General of Kentucky in their official capacities, alleging that Kentucky's ban on same-sex marriage and its failure to recognize out-of-state same-sex marriages violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[41]

The United States District Court for the Western District of Kentucky held that the applicable laws were unconstitutional because they violated the Equal Protection Clause.[42] Although the court applied rational basis review,[43] it listed three rationales for potentially applying heightened scrutiny: (1) "the right to marry is a fundamental right" based on Supreme Court precedent,[44] (2) the ban on same-sex marriage

---

[35] 996 F. Supp. 2d 542 (W.D. Ky. 2014), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014).

[36] *Id.* at 545.

[37] KY. REV. STAT. ANN. § 402.040(2) (West, Westlaw through 2015 Reg. Sess.).

[38] § 402.045(1) (Westlaw). Kentucky also statutorily defined marriage to exclude and void same-sex marriages. *See* §§ 402.020(1)(d), 402.005 (Westlaw) (defining marriage based on distinctions of sex as well as prohibiting and voiding marriages between members of the same sex).

[39] KY. CONST. § 233A.

[40] Brief for Petitioners at 7–10, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-574) [hereinafter *Bourke* Petitioners' Supreme Court Brief] (*Bourke v. Beshear* was a consolidated case of *Obergefell v. Hodges*).

[41] *Id.* at ii, 7.

[42] *Bourke*, 996 F. Supp. 2d at 544.

[43] *Id.* at 549.

[44] *Id.* at 548–49.

"demeans one group by depriving them of rights provided for others,"[45] and (3) homosexual individuals are either a suspect or quasi-suspect class.[46]

Ultimately, the court held that determining the level of scrutiny was irrelevant because the laws failed to meet even rational basis scrutiny.[47] In so holding, the court rejected the argument that the laws were rationally related to the state's interest in "preserving the state's institution of traditional marriage" or its interests in "responsible procreation and childrearing, steering naturally procreative relationships into stable unions, promoting the optimal childrearing environment, and proceeding with caution when considering changes in how the state defines marriage." [48] The court attempted to reassure advocates of traditional marriage that their religious beliefs would not be infringed except when, as in this case, those beliefs interfere with constitutionally-protected rights. In addition, the court stated that its holding did not violate federalism principles because federalism cannot justify constitutional violations; thus, the court's decision did not protect a new right, but the well-established right to equal protection of the law.[49]

D. Tanco v. Haslam[50]

Tanco involved a challenge to two Tennessee laws. The first was a 1996 Tennessee statute that prohibited same-sex marriage,[51] reinforced the "'historical institution' and traditional definition of marriage,"[52] and provided that any out-of-state marriage that is not permitted in Tennessee "shall be void and unenforceable in this state." [53] The statute further provided that the "marriage licensing laws reinforce, carry forward, and make explicit the long-standing public policy of this state to recognize the family as essential to social and economic order and the common good and as the fundamental building block of our society."[54] In 2006, Tennessee

---

[45] *Id.* at 551.

[46] *Id.* at 548–49.

[47] *Id.* at 549.

[48] *Id.* at 552–53.

[49] *Id.* at 555–56.

[50] 7 F. Supp. 3d 759 (M.D. Tenn. 2014), *rev'd sub nom.* DeBoer v. Snyder, 772 F.3d 388 (6th Cir. 2014).

[51] TENN. CODE ANN. § 36-3-113 (LEXIS, LexisNexis through 2015 Reg. Sess.).

[52] Brief for Respondents at 2–3, *Tanco*, 7 F. Supp. 3d 759, (No. 14-562) [hereinafter *Tanco* Respondents' District Court Brief].

[53] § 36-3-113; *see also* Brief for Petitioners at 7–8, *Tanco*, 7 F. Supp. 3d 759 (No. 14-562) [hereinafter *Tanco* Petitioners' District Court Brief] (characterizing the Tennessee statute as a denial of marital dignity and privileges for same-sex couples).

[54] § 36-3-113.

reaffirmed these principles when voters passed an amendment to the state constitution. The amendment provided as follows:

> The . . . relationship of one (1) man and one (1) woman shall be the only legally recognized marital contract in this state. . . . If another state or foreign jurisdiction issues a license for persons to marry and if such marriage is prohibited in this state by the provisions of this section, then the marriage shall be void and unenforceable in this state.[55]

Plaintiffs in the *Tanco* case were three same-sex couples who received out-of-state marriage licenses.[56] Suing the Governor, the Commission of the Department of Finance and Administration, and the Attorney General of Tennessee, all in their official capacities, the plaintiffs alleged that the laws prohibiting the authorization and recognition of same-sex marriage were unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, that the laws violated the right to interstate travel, and that the laws discriminated against the plaintiffs based on their sex and sexual orientation.[57]

The United States District Court for the Middle District of Tennessee granted the preliminary injunction, enjoining the state from enforcing the same-sex marriage laws.[58] In its analysis, the court found that the plaintiffs were likely to prevail on their due process and equal protection claims based on the "thorough and well-reasoned" decisions of other district courts that struck down same-sex marriage bans even under rational basis scrutiny.[59]

II. SIXTH CIRCUIT OPINION

All four predicate cases were consolidated and certified for appeal by the Sixth Circuit in *DeBoer v. Snyder*.[60] The Sixth Circuit examined these cases in light of the following question: "Does the Fourteenth Amendment to the United States Constitution prohibit a state from defining marriage as a relationship between one man and one woman?"[61] According to the Sixth Circuit, this issue was fundamentally about an even simpler question: "Who decides—federal courts or the democratic process?[62] Ultimately, the court reversed each lower-court decisions, finding that this issue was properly decided by each state's political process.[63]

---

55 TENN. CONST. art. XI, § 18.

56 *Tanco*, 7 F. Supp. 3d at 762.

57 *Tanco* Petitioners' District Court Brief, *supra* note 53, at (ii), 2–3.

58 *Tanco*, 7 F. Supp. 3d at 771–72.

59 *Id.* at 768.

60 772 F.3d 388 (6th Cir. 2014).

61 *Id.* at 396.

62 *Id.*

63 *Id.* at 421.

A. Issue One: The Licensing Provisions

The first issue examined by the Sixth Circuit was: "Does the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment require states to expand the definition of marriage to include same-sex couples?"[64] The court provided a number of justifications for its holding that the Fourteenth Amendment does not require states to license same-sex marriage.

First, the court relied on the Supreme Court's opinion in *Baker v. Nelson*,[65] in which the Court issued a one-line order dismissing a homosexual couple's claim that Minnesota's refusal to grant them a marriage license violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment, stating that the issue did not raise a "substantial federal question."[66] Second, the court looked at the original meaning of the Fourteenth Amendment to find that it did not recognize a right to same-sex marriage.[67] Third, the court found two rational bases for the same-sex marriage bans: (1) that "a reasonable first concern of any society is the need to regulate male-female relationships and the[ir] unique procreative possibilities" and "[o]ne way to pursue this objective is to encourage couples to enter lasting relationships through subsidies and other benefits and to discourage them from ending such relationships through these and other means";[68] and (2) that it is rational for a state to "wait and see before changing a norm that our society (like all others) has accepted for centuries."[69] Fourth, the court found that state constitutional amendments were not the results of discriminatory animus toward homosexuals.[70] Fifth, the court rejected the application of heightened scrutiny in sex discrimination cases because there is no "fundamental right to marry" under the test in *Washington v. Glucksberg*,[71] and because homosexual individuals are not a "discrete and insular class without political power."[72] Finally, the court examined national and international precedents to find that there is no overwhelming consensus regarding the "evolving meaning" of marriage.[73]

---

64 *Id.* at 399.

65 409 U.S. 810 (1972).

66 *DeBoer*, 772 F.3d at 400 (quoting *Baker*, 409 U.S. at 810).

67 *Id.* at 403.

68 *Id.* at 404–05.

69 *Id.* at 406.

70 *Id.* at 408.

71 *Id.* at 411 (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

72 *Id.* at 413.

73 *Id.* at 416–17.

B. Issue Two: The Recognition Provisions

The second issue considered was: "Does the Constitution prohibit a State from denying recognition to same-sex marriages conducted in other States?"[74] The court examined this question in light of the Full Faith and Credit Clause and the right to travel.

Under its analysis of the Full Faith and Credit Clause, the Sixth Circuit found that the Clause had never required "a State to apply another State's law in violation of its own legitimate public policy."[75] Because of its holding on the first issue, the court held that the non-recognition provisions did not violate the Full Faith and Credit Clause.[76] Further, the court found it persuasive that some states, such as Ohio, did not recognize certain out-of-state heterosexual marriages.[77]

Under its analysis of the constitutional "right to travel," the Sixth Circuit found that none of the challenged state laws prohibited homosexuals from traveling in or out the state, and that those married same-sex couples who traveled into the state are treated "like other citizens of that State," whose same-sex marriages were also prohibited under state law.[78] Thus, the non-recognition laws did not violate the right to travel.[79] The court's opinion closed with the following remark:

> This case ultimately presents two ways to think about change. One is whether the Supreme Court will constitutionalize a new definition of marriage to meet new policy views about the issue. The other is whether the Court will begin to undertake a different form of change—change in the way we as a country optimize the handling of efforts to address requests for new civil liberties.
>
> If the Court takes the first approach, it may resolve the issue for good and give the plaintiffs and many others relief. But we will never know what might have been. If the Court takes the second approach, is it not possible that the traditional arbiters of change—the people—will meet today's challenge admirably and settle the issue in a productive way? In just eleven years, nineteen States and a conspicuous District, accounting for nearly forty-five percent of the population, have exercised their sovereign powers to expand a definition of marriage that until recently was universally followed going back to the earliest days of human history. That is a difficult timeline to criticize as unworthy of further debate and voting. When the courts do not let the people resolve new social issues like this one, they perpetuate the idea that the heroes in these change events are judges and lawyers. Better in this instance, we think, to allow change through the customary political processes, in

---

74 *Id.* at 418.

75 *Id.* (quoting Nevada v. Hall, 440 U.S. 410, 422 (1979)).

76 *DeBoer*, 772 F.3d at 418.

77 *Id.* at 419–20.

78 *Id.* at 420 (quoting Saenz v. Roe, 526 U.S. 489 (1999)).

79 *Id.*

> which the people, gay and straight alike, become the heroes of their own stories by meeting each other not as adversaries in a court system but as fellow citizens seeking to resolve a new social issue in a fair-minded way.[80]

III. PARTIES' ARGUMENTS

On January 16, 2015, the Supreme Court granted certiorari in *DeBoer v. Snyder*, limiting its inquiry to two questions:

1. Does the Fourteenth Amendment require a state to license marriage between two people of the same sex?
2. Does the Fourteenth Amendment require a state to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state?[81]

A. Issue One: The Licensing Provisions

1. The Petitioners' Argument

In their brief, the *DeBoer* petitioners primarily focused on the licensing provisions arguing that the Fourteenth Amendment requires states to license same-sex marriages.

First, they asserted that the Court is required to act in any case in which law violates constitutional rights and causes injury.[82] They cited legal, economic, social, and psychological harm stemming from the refusal of the state to license a same-sex marriage when a same-sex couple has children, or when a same-sex partner dies.[83] This injury was compounded by requiring the same-sex couples to "wait and see" if state consensus builds in their favor.[84]

Second, a state's ban on licensing same-sex marriages could not survive any level of scrutiny.[85] They cited two reasons for this failure to meet even rational basis scrutiny: (1) these laws were not enacted for a legitimate purpose, but instead were enacted "out of prejudice, fear, animus, or moral disapproval of a particular group," and (2) the means chosen to meet this purpose were not "logically and plausibly related to [a] legitimate purpose . . . [and] proportional to the burdens imposed."[86]

---

80 *Id.* at 420–21.

81 DeBoer v. Snyder, 135 S. Ct. 1040 (2015).

82 Brief for Petitioners at 27, 29, Obergefell v. Hodges, 135 S. Ct. 2584 (No. 14-571) [hereinafter *DeBoer* Petitioners' Supreme Court Brief] (*DeBoer v. Snyder* was consolidated with *Obergefell v. Hodges*).

83 *Id.* at 26.

84 *Id.* at 29.

85 *Id.* at 32, 42.

86 *Id.* at 30 (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973); Romer v. Evans, 517 U.S. 620, 632 (1996)).

They further contended that the state's burden on "the important personal interests of 'marriage, family life, and the upbringing of children'" were not justified by the state's given purposes.[87] The following justifications provided by the state were also challenged: that such laws encourage procreation in marriage; that such laws encourage the "optimal environment" for children—namely, the "mother-father family"; and that it is necessary for the state to "'wait and see' how marriage by same-sex couples will affect children, or the institution."[88]

Third, such a ban should receive heightened scrutiny under the Equal Protection Clause because the law targeted sexual orientation.[89] Petitioners contended that homosexual individuals satisfy all four requirements for a classification that warrants heightened scrutiny: (1) they have suffered "a history of invidious discrimination"; (2) they have "characteristics that distinguish the group's members [and] bear no relation to their ability to contribute to society";[90] (3) they are a minority group that has lacked political power;[91] and (4) they have "obvious, immutable, or distinguishing characteristics that define [them] as a discrete group."[92]

Finally, the petitioners argued that such laws banning same-sex marriage should receive heightened scrutiny because marriage is a fundamental right that is separate and distinct from the right to procreate.[93] They relied on Supreme Court precedent showing individuals have the "freedom of personal choice in matters of marriage and family life"[94] and the "freedom to marry."[95] To them, this was a case about marriage generally, rather than same-sex marriage specifically, and *Windsor* and *Lawrence* support the idea that same-sex partners have the same marriage rights as opposite-sex partners.[96]

---

87 *Id.* at 32–33 (quoting M.L.B. v. S.L.J., 519 U.S. 102 (1996)).

88 *Id.* at 35, 38–39, 42.

89 *Id.* at 50.

90 *Id.* at 50–51.

91 *Id.* at 52–53.

92 *Id.* at 52 (quoting Bowen v. Gilliard, 483 U.S. 587, 602 (1987)).

93 *Id.* at 57, 62.

94 *See id.* at 56 (quoting Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 639–40 (1974)).

95 *Id.* (citing Loving v. Virginia, 388 U.S. 1, 11–12 (1967)).

96 *DeBoer* Petitioners' Supreme Court Brief, *supra* note 82, at 56–58, 60.

2. The Respondents' Arguments

The *Tanco*, *DeBoer*, and *Bourke* respondents also addressed the licensing provisions, mainly arguing that "the Fourteenth Amendment allows a state to define marriage in the traditional way."[97]

First, there is a rational basis for a state making laws that support the traditional view of marriage, because "marriage cannot be divorced from its procreative purpose,"[98] and laws banning same-sex marriage "increas[e] the likelihood that when children are born, they will be born into stable family units."[99] Under rational basis review, laws are given a presumption of constitutionality, and this presumption is even stronger when the law at issue was "passed by the citizens themselves at the ballot box."[100] In addition, the laws of the various states were enacted rationally, rather than out of a discriminatory animus.[101]

Further, the respondents presented a number of reasons to support the conclusion that a state's traditional definition of marriage does not warrant heightened scrutiny. First, same-sex marriage was not a fundamental right because it was neither "deeply rooted in this Nation's history and tradition" nor "'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it] were sacrificed.'"[102] As the *DeBoer* respondents argued, even if there is a fundamental right to marriage, "[t]he petitioners seek something quite different here: a due-process right to an *expanded* definition of marriage they prefer—the right of two consenting partners to marry regardless of 'the gender of the partners.'"[103] Second, based on Supreme Court precedent,[104] homosexuals

---

[97] Brief for Respondents at 36, Obergefell v. Hodges, 135 S. Ct. 2584 (No. 14-562) [hereinafter *Tanco* Respondents' Supreme Court Brief] (*Tanco v. Haslam* was consolidated with *Obergefell v. Hodges*).

[98] *Id.* at 39.

[99] *Id.*

[100] *Id.* at 38 (citing Heller v. Doe, 509 U.S. 312 (1993); Gregory v. Ashcroft, 501 U.S. 452 (1991)).

[101] Brief for Respondents at 30–31 *Obergefell*, 135 S. Ct. 2584 (No. 14-574) [hereinafter *Bourke* Respondents' Supreme Court Brief] (*Bourke v. Beshear* was consolidated with *Obergefell v. Hodges*); Brief for Respondents at 28, *Obergefell*, 135 S. Ct. 2584 (No. 14-571) [hereinafter *DeBoer* Respondents' Supreme Court Brief] (*DeBoer v. Snyder* was consolidated with *Obergefell v. Hodges*); *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 39–41.

[102] *Bourke* Respondents' Supreme Court Brief, *supra* note 101, at 17 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[103] *DeBoer* Respondents' Supreme Court Brief, *supra* note 101, at 21 (quoting *DeBoer* Petitioners' Supreme Court Brief, *supra* note 82, at 60).

[104] The Court has established four factors used to identify whether a specific characteristic qualifies as a suspect class: "(1) inability to attract the attention of lawmakers; (2) a history of unequal treatment; (3) an obvious, immutable or distinguishing trait; and (4) bearing no relation to their ability to perform or contribute to society." *Bourke* Respondents' Supreme Court Brief, *supra* note 101, at 20 (citing City of Cleburne v. Cleburne Living Ctr.,

do not constitute a suspect or quasi-suspect class because (1) "[g]ays and lesbians as a class clearly have the ability to attract the attention of lawmakers";[105] (2) "[t]he social discrimination experienced by homosexual persons is distinguishable from the systematic governmental discrimination experienced by recognized protected classes";[106] and (3) "[p]etitioners have not established that gays and lesbians have obvious, immutable, or distinguishing traits,"[107] and immutable characteristics alone do not make a protected class.[108]

The respondents also argued that, although sex is a protected class, the same-sex marriage laws did not discriminate on the basis of sex, because they "appl[ied] equally to members of both genders."[109] Additionally, sexual orientation is not recognized as a protected class and, even if it were, the laws at issue did not discriminate on the basis of sexual orientation because they prevented both homosexuals and heterosexuals from marrying a person of the same sex.[110]

Finally, the respondents contended that the decision to define marriage traditionally should be left up to the states.[111] They stated that because "[n]othing in the Fourteenth Amendment's text or history requires a state to license a marriage between two people of the same sex," the Constitution leaves this decision to each state to decide.[112] Contrary to the petitioners' assertions, "*Windsor* confirm[ed] that these decisions should be made on the local level, and—once made—the federal government lacks authority to interfere with that decision."[113]

B. Issue Two: The Recognition Provisions

1. The Petitioners' Arguments

The petitioners in *Tanco*, *Obergefell*, and *Bourke* focused primarily on the recognition provisions in their briefs, arguing that the non-recognition bans were unconstitutional under the Equal Protection Clause.

---

473 U.S. at 441, 445 (1985); Lyng v. Castillo, 477 U.S. 635, 368 (1986); Frontiero v. Richardson, 411 U.S. 677 (1973); San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)).

[105] *Id.*

[106] *Id.* at 23.

[107] *Id.* at 24.

[108] *Id.* at 20, 24–25.

[109] *Id.* at 26–27; *DeBoer* Respondents' Supreme Court Brief, *supra* note 101, at 54–55.

[110] *Bourke* Respondents' Supreme Court Brief, *supra* note 101, at 25–26; *DeBoer* Respondents' Supreme Court Brief, *supra* note 101, at 53; *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 41–42.

[111] *Bourke* Respondents' Supreme Court Brief, *supra* note 101, at 11; *DeBoer* Respondents' Supreme Court Brief, *supra* note 101, at 14; *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 47.

[112] *DeBoer* Respondents' Supreme Court Brief, *supra* note 101, at 14.

[113] *Bourke* Respondents' Supreme Court Brief, *supra* note 101, at 11.

First, the non-recognition laws should be subject to strict scrutiny because they infringe upon the fundamental "right to marry" under the Fourteenth Amendment.[114] To this end, citing a series of Supreme Court decisions, including *Loving v. Virginia*,[115] *Meyer v. Nebraska*,[116] *Griswold v. Connecticut*,[117] *Lawrence v. Texas*,[118] and *M.L.B. v. S.L.J.*,[119] the petitioners proposed that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights . . . of basic importance in our society *[and are] sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect.*"[120] This right was further entrenched for same-sex couples that were married in another state, because "once a couple has married, privacy, autonomy, and associational rights attach to the marital relationship, protecting it from unjustified state intrusion."[121]

Second, the petitioners argued that the non-recognition laws should receive strict scrutiny because they infringe upon a same-sex couple's fundamental "right to travel" under the Fourteenth Amendment.[122] Even if the law did not treat out-of-state same-sex married couples differently than in-state same-sex couples, it imposed a burden on these couples that was high enough to warrant strict scrutiny, which this law did not satisfy.[123]

Third, the Court should apply *Windsor's* "careful consideration," because, like DOMA in *Windsor*, the "design, purpose, and effect" of the non-recognition laws is to impose inequality.[124] Although these principles were adopted in the context of federal law in *Windsor*, they are equally

---

[114] Brief for Petitioners at 17, Obergefellv. Hodges, 135 S. Ct. 2584 (2015) (No. 14-562) [hereinafter *Tanco* Petitioners' Supreme Court Brief] (*Tanco v. Haslam* was a consolidated case of *Obergefell v. Hodges*).

[115] 388 U.S. 1 (1967).

[116] 262 U.S. 390 (1923).

[117] 381 U.S. 479 (1965).

[118] 539 U.S. 558 (2003).

[119] 519 U.S. 102 (1996).

[120] *Tanco* Petitioners' Supreme Court Brief, *supra* note 114, at 18–20 (quoting *M.L.B.*, 519 U.S. at 116) (citing *Lawrence*, 539 U.S. at 574; *Loving*, 388 U.S. at 12; *Griswold*, 381 U.S. at 485–86; *Meyer*, 262 U.S. at 399).

[121] *Id.* at 21.

[122] *Id.* at 23–24.

[123] *Id.* at 29.

[124] *Obergefell* Petitioners' Supreme Court Brief, *supra* note 8, at 20, 28 (quoting United States v. Windsor, 133 S. Ct. 2675, 2689, 2692 (2013)); *Tanco* Petitioners' Supreme Court Brief, *supra* note 114, at 30–31 (quoting *Windsor*, 133 S. Ct. at 2689, 2692); *see also Bourke* Petitioners' Supreme Court Brief, *supra* note 40, at 54 (describing the careful consideration *Windsor* applied to DOMA's purpose and effect).

applicable in the state law context.[125] Fourth, the Court should apply heightened scrutiny because the non-recognition laws discriminate on the basis of sex and sexual orientation.[126]

Finally, the petitioners contended that a state's interest in enacting the non-recognition laws cannot satisfy even rational basis review because there could be no legitimate state interest for such laws.[127] To this end, the non-recognition laws were not justified by (1) the state's interest in the welfare of children, because they actually harmed children and "[t]he benefits of being raised by married parents do not differ depending on the sex of those parents";[128] (2) the state's democratic process, because it "put up for popular vote" the constitutional rights of a specific group;[129] or (3) the state's interest in maintaining federalism, because the non-recognition laws "effectively create[d] two nations"[130] and "cooperation among states is an essential feature of horizontal federalism."[131]

2. The Respondents' Arguments

The *Tanco*, *Obergefell*, and *Bourke* respondents focused on the non-recognition laws mainly arguing that "[t]he Fourteenth Amendment does not require a state to recognize an out-of-state same-sex marriage."[132]

---

[125] *Tanco* Petitioners' Supreme Court Brief, *supra* note 114, at 30; *see also Bourke* Petitioners' Supreme Court Brief, *supra* note 40, at 25, 53 (arguing that heightened scrutiny should apply to Kentucky's same-sex marriage laws).

[126] *Bourke* Petitioners' Supreme Court Brief, *supra* note 40, at 32, 38; *Obergefell* Petitioners' Supreme Court Brief, *supra* note 8, at 41, 48; *Tanco* Petitioners' Supreme Court Brief, *supra* note 114, at 34, 39.

[127] *Bourke* Petitioners' Supreme Court Brief, *supra* note 40, at 39, 51; *Obergefell* Petitioners' Supreme Court Brief, *supra* note 8, at 49–50; *Tanco* Petitioners' Supreme Court Brief, *supra* note 114, at 46.

[128] *Tanco* Petitioners' Supreme Court Brief, *supra* note 114, at 47–48; *see also Bourke* Petitioners' Supreme Court Brief, *supra* note 40, at 50 (arguing that the marriage ban denied children stability based on the sexual orientation of their parents); *Obergefell* Petitioners' Supreme Court Brief, *supra* note 8, at 58–59 (noting research has rejected a difference in the stability offered by same-sex couples and arguing that the denial of recognition leaves children of these unions unprotected).

[129] *Tanco* Petitioners' Supreme Court Brief, *supra* note 114, at 46; *see also Bourke* Petitioners' Supreme Court Brief, *supra* note 40, at 40 (asserting as a foundational premise that certain constitutional protections should not be subject to the democratic process); *Obergefell* Petitioners' Supreme Court Brief, *supra* note 8, at 52 (noting the unequal treatment of marriage recognition resulting from the state democratic processes).

[130] *Tanco* Petitioners' Supreme Court Brief, *supra* note 114, at 46–47.

[131] *Id.* at 56.

[132] *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 10, 26; *see also Bourke* Respondents' Supreme Court Brief, *supra* note 101, at 35, 41 (asserting that the Fourteenth Amendment does not compel recognition of out-of-state same-sex marriages); Brief for Respondents at 35–36, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556) [hereinafter *Obergefell* Respondents' Supreme Court Brief] (same).

In support of this argument, the respondents first noted that states have historically had the ability to reject out-of-state marriage licenses.[133] Citing *Nevada v. Hall*[134] and *Pacific Employers Insurance Co. v. Industrial Accident Commission*,[135] the respondents contended 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,"[136] nor does it "demand 'subserviency' from a state."[137]

Second, substantive due process did not compel states to recognize out-of-state same-sex marriages because there is neither a fundamental right to marry nor a fundamental right to remain married.[138] What the petitioners desired was not the right to "marriage" as described in the Court's prior decisions, because "the union of one man and one woman has been the definition of marriage throughout the United States since its founding"[139] and "the Court's reason for deeming the right to marry fundamental has undoubtedly been based on the procreative capacity of that man-woman relationship."[140] In addition, there is no "right to 'remain married,'"[141] because "[t]he Due Process Clause requires States not to deprive citizens of their fundamental rights, but it does not impose affirmative obligations on States to act."[142]

Third, the non-recognition laws did not violate the right to travel found in the Privileges and Immunities Clause of Article IV, Section Two of the Constitution or the Privileges or Immunities Clause of the Fourteenth Amendment because same-sex couples within a state were also ineligible for marriage.[143] Therefore, the laws did not infringe on any of the three components of the right to travel.[144]

---

[133] *Obergefell* Respondents' Supreme Court Brief, *supra* note 132, at 37; *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 11; *see also Bourke* Respondents' Supreme Court Brief, *supra* note 101, at 36 (noting Kentucky's adherence to non-recognition of same-sex marriages licensed in other states).

[134] 440 U.S. 410 (1979).

[135] 306 U.S. 493 (1939).

[136] *Bourke* Respondents' Supreme Court Brief, *supra* note 101, at 38 (quoting *Hall*, 440 U.S. at 422); *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 11 (quoting *Hall*, 440 U.S. at 422) (citing *Pac. Emp. Ins.*, 306 U.S. at. 504).

[137] *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 11.

[138] *Id.* at 23–24; *see also Obergefell* Respondents' Supreme Court Brief, *supra* note 132, at 37 (arguing that same-sex marriage falls outside of the scope of recognized rights).

[139] *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 19.

[140] *Id.* at 18; *see also Bourke* Respondents' Supreme Court Brief, *supra* note 101, at 9 (noting the state's interest in facilitating procreation).

[141] *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 7.

[142] *Id.* at 26.

[143] *Id.* at 33, 35–36.

[144] *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 33–35 (citing Saenz v. Roe, 526 U.S. 489, 501–02 (1999)) (noting that the three components of the right to travel include "the right of a citizen of one State to enter and to leave another State without

Fourth, federalism demands that states be allowed to enact non-recognition standards,[145] an argument that was bolstered, rather than undermined, by the Court's opinion in *Windsor*.[146]

Finally, the respondents argued that the non-recognition laws did not discriminate on the basis of sex and were not subject to heightened scrutiny based on sexual orientation classification.[147] Consequently, the non-recognition laws were constitutional because they "rationally promote important state interests."[148]

IV. SUPREME COURT OPINION

In a 5-4 decision, the Court reversed the Sixth Circuit, holding that the Constitution requires states to issue marriage licenses to same-sex couples and to recognize a same-sex couple's out-of-state marriage license.[149] Justice Kennedy authored the majority opinion joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.[150]

The majority's opinion asserted the importance of marriage throughout the course of time, beginning with a recitation of the history of marriage and a confirmation of "[t]he centrality of marriage to the human condition."[151] the Court stated that this "lifelong union . . . always has promised nobility and dignity to all persons," and, contrary to the Respondents' contentions, the Petitioners did not seek to 'demean' marriage, but rather, "respect . . . its privileges and responsibilities."[152] The majority focused on how the institution of marriage has evolved over time.[153] This evolution, the majority declared, coincides with the evolution of homosexual rights in America, which began with the American

---

impediment," "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State," and the right to be treated like other citizens of that state).

145 *Obergefell* Respondents' Supreme Court Brief, *supra* note 132, at 19; *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 14.

146 *Bourke* Respondents' Supreme Court Brief, *supra* note 101, at 10–11; *Obergefell* Respondents' Supreme Court Brief, *supra* note 132, at 11.

147 *Bourke* Respondents' Supreme Court Brief, *supra* note 101 at 16, 28; *Obergefell* Respondents' Supreme Court Brief, *supra* note 132, at 50; *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 41.

148 *Obergefell* Respondents' Supreme Court Brief, *supra* note 132, at 51–52; *see also Bourke* Respondents' Supreme Court Brief, *supra* note 101, at 35 (concluding that the statutes were narrowly tailored amd therefore satisfied even heightened scrutiny); *Tanco* Respondents' Supreme Court Brief, *supra* note 97, at 32 (connecting the law to rational state interests).

149 Obergefell v. Hodges, 135 S. Ct. 2584, 2607–08 (2015).

150 *Id.* at 2591.

151 *Id.* at 2594.

152 *Id.* (noting petitioners also "need[ed]" the privileges and responsibilities of marriage).

153 *Id.* at 2595.

Psychiatric Association declassifying homosexuality as a mental disorder and eventually led to increased public tolerance of homosexual behavior.[154] To further bolster this evolution, the majority relied on the dramatic shift from its 1986 holding in *Bowers v. Hardwick*, which upheld a Georgia law criminalizing homosexual sodomy,[155] to its 1996 decision in *Romer v. Evans*, which struck down a state constitutional amendment that prevented the state from protecting an individual against sexual orientation discrimination,[156] and its 2003 holding in *Lawrence v. Texas*, which overruled *Bowers*.[157] This, of course, culminated in the Court striking down the Defense of Marriage Act ("DOMA") in *United States v. Windsor*, which spurred many of the petitioners' claims in this suit.[158]

The Court found its primary justification for striking down state same-sex marriage bans in the Due Process Clause of the Fourteenth Amendment, which protects to "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[159] The Court asserted that the limits of these rights are based on the Court's "reasoned judgment" over the years, and although "[h]istory and tradition guide and discipline this inquiry," they "do not set its outer boundaries."[160] Remarking that society long regarded interracial and inter-class marriages to be prohibited, the Court reasoned that the definition of marriage is subject to revision again by perceived popular opinion.

The Court cited a number of cases to support its assertion that "the right to marry is protected by the Constitution"[161] and found four propositions that demonstrate why this right should be applied to same-sex couples: (1) decisions about marriage are "inherent in the concept of individual autonomy";[162] (2) marriage is a "two-person union unlike any other";[163] (3) marriage helps promote families and protect children; and (4) marriage is fundamental to our social order.[164] The majority strayed from traditional due process analysis by admitting that, while its holding in *Washington v. Glucksberg* generally mandates that a fundamental right

---

154 *Id.* at 2596.

155 *Obergefell*, 135 S. Ct. at 2596 (citing Bowersv. Hardwick, 478 U.S. 186,196(1986)).

156 *Id.* (citing Romer v. Evans, 517 U.S. 620, 635–36 (1996)).

157 *Id.* (citing Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

158 *Id.* at 2597 (citing United States v. Windsor, 133 S. Ct. 2675, 2696 (2013)).

159 *Id.*

160 *Id.* at 2598.

161 *Id.*

162 *Id.* at 2599 (relying on previous cases to hold that decisions regarding contraception, family relationships, procreation, and childrearing are inherent in the concept of individual autonomy).

163 *Id.*

164 *Id.* at 2600–01.

be "defined in a most circumscribed manner,"[165] the right to marry has never been considered in anything other than its "comprehensive sense."[166]

The majority's Equal Protection Clause analysis resembled the penumbras language used in *Griswold v. Connecticut*.[167] The Court found that the Due Process and Equal Protection Clauses are "connected in a profound way," and thus "[t]his interrelation of the two principles furthers our understanding of what freedom is and must become."[168] Under this analysis, law adapts to public policy; hence, as social acceptance of same-sex relationships has grown, so must the law to protect these relationships.

In closing, the majority justified its override of the democratic process by stating that, although more debate could be had on this issue, there had already been enough deliberation.[169] Although "the Constitution contemplates that democracy is the appropriate process for change,"[170] this is no longer true when the Court discovers a new fundamental right. The majority asserted that religious individuals are still free to wholeheartedly advocate for traditional marriage and will not be persecuted for doing so.[171] However, no express methods of protection were addressed. Finally, the majroity confronted the recognition bans, which were found unconstitutional because "the disruption caused by the recognition bans is significant and ever-growing."[172] And, every state is now required to issue same-sex marriage licenses.[173]

Four pointed dissenting opinions were filed. First, Chief Justice Roberts argued that the Court was not the proper body to decide the legality of same-sex marriage. While he conceded that there may be strong policy reasons for allowing same-sex marriage, he argued that the legal justifications were lacking.[174] In his words, the majority's decision was "an act of will, not legal judgment."[175] Roberts noted that although the majority attempted to bolster its decision based on history and tradition, it did nothing of the sort, and instead represented only "the unprincipled tradition of judicial policymaking" that is reminiscent of *Lochner v. New*

---

165 *Id.* at 2602 (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

166 *Id.*

167 *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (concluding that penumbras of the Bill of Rights create a right of privacy).

168 *Obergefell*, 135 S. Ct. at 2602–03.

169 *Id.* at 2605.

170 *Id.*

171 *Id.* at 2607.

172 *Id.*

173 *Id.* at 2607–08.

174 *Id.* at 2611 (Roberts, C.J., dissenting).

175 *Id.* at 2612.

York.[176] In addition, Roberts expressed strong doubts about the majority's promise that individual religious liberties will be preserved after its decision, and stated that the "most discouraging aspect" of the majority's opinion was its characterization of those in favor of traditional marriage as bigoted and disrespectful.[177] Roberts's dissent closed with the following poignant remark:

> If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it.[178]

Next, Justice Scalia argued that the majority's opinion posed a threat to American democracy. In his opening remarks, he stated, "[t]oday's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court."[179] He argued that the Court's decision prematurely eliminated public debate, despite the fact that the same-sex marriage debate displayed "American democracy at its best," and instead enabled the Court to act as a super-legislature.[180] Scalia criticized the Court's conclusion on the grounds that it represented only the majority's personal views about the propriety of same-sex marriage, rather than the view of the American people either today or at the Founding.[181] In closing, Scalia characterized the majority's analysis as "pretentious," because it claimed to have "discovered in the Fourteenth Amendment a 'fundamental right' overlooked by every person alive at the time of ratification, and almost everyone else in the time since."[182]

Next, Justice Thomas disputed the majority's understanding of the word "liberty" and its use of substantive due process, arguing that the Court's analysis "distort[s] our Constitution, . . . ignores the text, [and] inverts the relationship between the individual and the state in our Republic."[183] Although Thomas fundamentally disagreed with the use of substantive due process in general,[184] he argued that the petitioners' claims should fail even under such analysis because they had not been deprived of "liberty," which has historically been defined as "freedom from

---

[176] *Id.* at 2616 (citing Lochner v. New York, 198 U.S. 45 (1905)).

[177] *Id.* at 2626

[178] *Id.*

[179] *Id.* at 2627 (Scalia, J., dissenting).

[180] *Id.* at 2627–29.

[181] *Id.* at 2628.

[182] *Id.* at 2629–30.

[183] *Id.* at 2631 (Thomas, J., dissenting).

[184] *Id.*

physical restraint."[185] He further argued that even if a broader definition of liberty were conceded, it represented "individual freedom *from* governmental action, not . . . a right *to* a particular governmental entitlement."[186] Like Roberts, Thomas saw the majority's opinion as a threat to religious freedom that is guarded only by a "weak gesture toward religious liberty."[187] Finally, Thomas criticized the majority's focus on advancing the dignity of same-sex couples because "[t]he flaw in that reasoning, of course, is that the Constitution contains no 'dignity' Clause, and even if it did, the government would be incapable of bestowing dignity. Human dignity has long been understood in this country to be innate."[188]

Finally, Justice Alito criticized the majority's characterization of marriage as "promot[ing] the well-being of those who choose to marry."[189] He stated that "[t]his understanding of marriage, which focuses almost entirely on the happiness of persons who choose to marry, is shared by many people today, but it is not the traditional one."[190] Instead, he argued that the traditional definition of marriage is intended to encourage procreation in the context of long-lasting familial units, and expressed strong reservations about the ability of such a changed definition of marriage to successfully promote this interest.[191] Finally, Justice Alito asserted that the majority's opinion promoted two injustices: first, it usurped power from the people and dangerously increased the scope of the Court's power; second, by equating same-sex marriage bans with interracial marriage bans, the majority's opinion could "be used to vilify Americans who are unwilling to assent to the new orthodoxy."[192]

Marie Louise Dienhart

---

[185] *Id.* at 2633.

[186] *Id.* at 2634.

[187] *Id.* at 2638.

[188] *Id.* at 2639.

[189] *Id.* at 2641 (Alito, J., dissenting).

[190] *Id.*

[191] *Id.* at 2641–42.

[192] *Id.* at 2642.