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Letter from the Editor-in-Chief

For over fifty years, the *Howard Law Journal* has prided itself on being one of the premier scholarly publications of the Howard University School of Law. We have continuously devoted our volumes, issues, and pages to some of the most cutting-edge legal topics, while also staying true to who we are: a beacon of social justice. Today, we remain committed to this legacy.

This issue opens with a thoughtful piece, *Now I See: Redefining the Post-Grade Student Conference as Process and Substance Assessment*, by Cassandra L. Hill and Katherine T. Vukadin, who offer a practical analysis of how law students and law professors alike can effectively approach the task of legal writing. The authors also outline a comprehensive method for both students and professors to graduate feedback sessions into substantial legal writing and analytical tools. In *Article I Torture Courts: A Constitutional Means of Compensation and Deterrence?*, Lynn Percival, IV critically analyzes the constitutionality of adjudicating cases involving allegations of torture against the federal government and federal officials in non-Article III courts. Stephen Plass' *Private Dispute Resolution and the Future of Institutional Workplace Discrimination* evaluates how the privatization of employment discrimination disputes affects both judicial and general perceptions of employment discrimination and impedes employer reform to rid workplaces of discrimination. Lastly, our very own W. Sherman Rogers, authors a riveting article, *The Constitutionality of the Defense of Marriage Act and State Bans on Same-Sex Marriage: Why They Won't Survive*, which examines the constitutionality of legislation with regard to same-sex marriage and predicts how the High Court is likely to rule on the issue if such issue is granted review.

This issue also includes pieces by two of our editors. Senior Staff Editor, Andrew C. Mendrala's *Wasted Money and Insufficient Remedies in Adequacy Litigation: The Case for an Extended School Day and Year to Provide Students Access to Constitutionally Mandated Curriculum* evaluates the difficulties in defining and implementing a constitutional standard for education. Senior Notes & Comments Editor, Alta M. Ray's *The Blame Game: Family and Medical Leave Act Violations and Individual Liability in the Public and Private Sectors* analyzes issues of employer liability that arise under the Family and Medical Leave Act. Andy and Alta continue to greatly contribute to both the Law School and *Journal* through their service and scholarship, and the *Journal* is very pleased to publish their works.

We hope you find our pieces to be intellectually stimulating and look forward to your readership. We proudly present Volume 54, Issue 1 of the *Howard Law Journal*.

YAA ABA ACQUAAH
Editor-in-Chief
2010-2011

Now I See: Redefining the Post-Grade Student Conference as Process and Substance Assessment

CASSANDRA L. HILL*
KATHERINE T. VUKADIN**

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We are grateful to Danyahel Norris for his excellent research assistance and Gertrude Florent for her support and assistance. We thank Rebecca K. Stewart, Tobi A. Tabor, Elizabeth A. Traverse, and Davor S. Vukadin for reviewing drafts of this Article and offering their insightful comments.

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[T]he object of [the conference] critique is not only the student’s product but also the creative and artistic process through which the student’s product comes to be. Richard K. Neumann¹

INTRODUCTION

The task of guiding law students toward success in legal writing is an urgent one. Law students could once expect to develop their writing skills after law school graduation. But today’s legal employers are increasingly reluctant to shoulder the burden of teaching new law graduates essential practice skills.² The American Bar Association’s MacCrate report³ and the recent Best Practices in Legal Education

1. RICHARD K. NEUMANN, *TEACHER’S MANUAL FOR LEGAL REASONING AND LEGAL WRITING* 200 (5th ed. 2005).

2. Katy Montgomery & Neda Khatamee, *What Law Firms Want in New Recruits*, N.Y. L.J., Apr. 27, 2009, 15, available at www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202430432895 (quoting law firm survey respondents as saying that “young lawyers need better writing skills,” and that “very few associates can write well”); Ashby Jones, *Legal Heavies Tackle the First-Year Associate Dilemma*, WALL ST. J.L. BLOG, (Dec. 09, 2009, 4:02 PM), <http://blogs.wsj.com/law/2009/12/09/legal-heavies-tackle-the-first-year-associate-dilemma>.

3. ROBERT MACCRATE ET AL., *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM*, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PRO-

Redefining the Post-Grade Student Conference

report⁴ emphasize that law schools must better equip students to enter the legal profession. Legal writing professors should answer this challenge by using every tool at their disposal to refine and improve students' legal writing skills.

One such tool is the post-grade student conference—the one-on-one conference a student might request after receiving a poor memorandum or brief grade. Unlike a routine student-faculty conference, the post-grade conference comes at a critical juncture. The conferencing student may be frustrated and angry over a poor grade and is at risk of letting the disappointing grade color his or her future attitude and performance in the legal writing class. The student may request a conference to discuss or even challenge the poor grade. The resulting post-grade conference presents an opportunity to reach the student most at risk of missing important practice skills and to change the student's approach and trajectory in legal writing.

To chart a new course in legal writing, however, the student must first see why past practices failed. This Article posits that a poor legal writing grade most often results from problems in not just one area, but in two distinct areas that should be analyzed separately: (1) the writing process, and (2) the resulting substance of the student's writing. To maximize the post-grade conference's value as a teaching opportunity, the legal writing professor should therefore organize the post-grade conference as a review of these two distinct areas in which students can falter.⁵ Instead of focusing on point deductions and marginalia, the conference should first deconstruct the writing process through a student interview and then deconstruct the student's written product. To capture this analysis, the professor can prepare a list of individualized Writing Targets—specific lessons learned in the conference—that the student carries forward in completing future assignments. A discussion about point deductions and grading curves

FESSION: NARROWING THE GAP 331-32 (1992) (“[L]aw schools continue to emphasize the teaching of the skills of ‘legal analysis and reasoning’ and ‘legal research,’ as described in the Statement of Skills and Values . . .”). In particular, the MacCrate Report called for a practice-oriented, rather than a theory-oriented approach to legal education. *Id.*

4. ROY STUCKEY ET AL., BEST PRACTICES FOR LEGAL EDUCATION, A VISION AND A ROAD MAP 17-18 (2007) (noting that law schools' main purpose should be preparation for legal practice).

5. See LAUREL JOHNSON BLACK, BETWEEN TALK AND TEACHING: RECONSIDERING THE WRITING CONFERENCE 5 (5th ed. 1998) (“Conferencing is something we do, but unexamined, it remains something we do not understand and thus cannot improve.”). This book advocates an active learning mode for the conference that allows students to have the dignity of his or her own vision for writing. *Id.*

should come last. When the student views point deductions as the result of the student's writing process and substantive product, the student walks away with both an understanding of the grade and the means to improve.

Part I of this Article describes a typical conference, which provides contrast for the focused process and substance review presented in Part II. Part II describes the process interview and assessment and the substance interview and assessment. Part III describes the Writing Targets document that professor and student prepare during the conference. Here, the Article focuses on the post-grade legal writing conference, but the process and substance approach is equally applicable to conferences in doctrinal and skills courses.

I. THE POST-GRADE CONFERENCE AS AN AWKWARD AND FRUITLESS ENCOUNTER

Law students and professors alike describe the typical post-grade conference as an uncomfortable appointment. The student may focus on the grade, and if the grade is a poor one, the student may be angry with the professor.⁶ The professor may fear a potentially time-consuming confrontation over point deductions or a challenge to grading processes. But the post-grade conference also holds promise, because the student and the professor are together and both are completely focused on a work product that can serve as the starting point for improvement.⁷

From the student's perspective, the post-grade conference brings together some of the most fraught aspects of law school: grades, legal writing, and law professors. A law student may understandably approach a student-faculty conference focused on issues other than overall improvement in legal writing. The student may be preoccupied by the recently-received poor grade and its impact on the student's grade

6. Maureen Arrigo-Ward, *How To Please Most of the People Most of the Time: Directing (or Teaching in) a First-Year Legal Writing Program*, 29 VAL. U. L. REV. 557, 587 (1995) (noting that conferencing legal writing professors will eventually be faced with highly emotional students); Anne M. Enquist, *Unlocking the Secrets of Highly Successful Legal Writing Students*, 82 ST. JOHN'S L. REV. 609, 665-67 (2008) (describing individual students' reactions to low grades and the tendency of some students to blame the professor rather than themselves for the poor performance).

7. See Robin S. Wellford-Slocum, *The Law School Student-Faculty Conference: Towards a Transformative Learning Experience*, 45 S. TEX. L. REV. 255, 257-58 (2004) (explaining the student-faculty conference's value for "significant breakthroughs" in students' legal abilities and understanding).

Redefining the Post-Grade Student Conference

point average and employment prospects.⁸ Many students understandably have a very emotional reaction to a poor law school grade, to the point that their perception of work invested in the class and pertinence of work can determine the student's level of effort going forward.⁹ The law student's focus on grades is likely to lead to a conference request, even to a challenge of the professor's grading and teaching abilities.¹⁰ In the meantime, law school classes press on, and the student may lack sufficient time in which to step back from current studies and focus on what worked and what did not work in the past assignment.¹¹

The student's sense of deference to his or her law professors may add to anxiety over a poor grade. Many law students feel somewhat or very intimidated by their law professors¹² and may hesitate to request a conference out of fear that the request may be interpreted as a criticism of the professor's judgment.¹³ Law students may feel stressed by the idea of meeting with a professor. Simply sitting across the desk from a professor can create feelings of anxiety.¹⁴ In addition, students may feel, as a result of subtle cues, that the professor is pressed for time and too busy to meet.¹⁵ The professor may appear preoccupied and busy, which only increases the student's sense that any conference must be completed as quickly as possible.¹⁶

Student preparation is essential to a useful post-grade conference. Without pre-conference preparation, a student may struggle to understand the professor's comments in context. As a practical matter, a student who does not refresh his or her recollection may have difficulty remembering much about the paper or its writing, given that

8. Philip C. Kissam, *Conferring With Students*, 65 UMKC L. REV. 917, 919 (1997) (noting that law students frequently suffer from stress in law school due to lack of time, competition for grades, and uncertainty regarding professional goals and prospects).

9. Enquist, *supra* note 6, at 626 (describing individual students' emotional reactions to grades—reactions ranged from the openly upset and irate to the tearful; students' reactions to poor grades and their "perception of how their efforts were or were not paying off impacted how much time and effort they subsequently devoted to the course").

10. Susan M. Taylor, *Students As (Re)visionaries: Or, Revision, Revision, Revision*, 21 TOURO L. REV. 265, 288-89 (2005) (noting that law students tend to be highly focused on grades).

11. *Id.*

12. Kissam, *supra* note 8, at 923.

13. Richard Henry Seamon, *Lightening and Enlightening Exam Conferences*, 56 J. LEGAL EDUC. 122, 125 (2006) (noting that students "feel deferential nigh on intimidation toward their professors and so hesitate to imply by requesting a conference that they question the professor's judgment about their grade").

14. *Id.*

15. Kissam, *supra* note 8, at 920-21.

16. *Id.* at 921.

weeks usually elapse between the student completing the paper and receiving the grade.¹⁷ Without guidance as to how students should prepare, pre-conference preparation is understandably uneven.¹⁸ Students may not have the opportunity to review or prepare any pre-conference materials.¹⁹ On the other hand, where professors have developed a system to require specific student preparation in advance of conferences, the conferences have changed markedly from professor-driven to student-driven experiences.²⁰ The inconsistency of students' undirected preparation and the positive results of directed preparation suggest that a more methodical and directed approach to students' preparation, such as the one described below, is helpful.

Despite the anxieties associated with post-grade conferences, students understand that individual feedback is a crucial part of the writing process.²¹ Indeed, most students value a one-on-one conversation about their writing.²² Both the process and substance of writing are highly individual, and students may not have had many opportunities before law school to discuss how and what they write. Because the writing process is so individual, writing would be ideally taught on a one-on-one basis.²³ However, given course loads and class sizes, this is impracticable. Hence, the individual conference is perhaps the closest experience to that ideal the student and professor can expect.²⁴

From the professor's perspective, student-faculty post-grade conferences present a slightly different set of challenges.²⁵ Professors

17. Seamon, *supra* note 13, at 122 (recalling how the author as a law student “went in [to the conference] cold—without reviewing the test questions or any other material. When the professor showed [him] what [he] had written, [he] recognized [his] writing but none of the content.”).

18. *See id.* (noting that in general, professors prepare for exam conferences, whereas students may not); Arrigo-Ward, *supra* note 6, at 586 (stating that without a pre-conference assignment, students tend to attend conferences with only “a formless mass of discontent”); *see also* Candace Mueller Centeno, *A Recipe For Successful Student Conferences: One Part Time Sheets, One Part Student Conference Preparation Questionnaire, and a Dash of Partial Live Editing*, 18 PERSP. 24, 26 (2009) (“During my first and second years as a legal writing professor, I was disappointed by the lack of preparation by some students for their individual conferences.”).

19. Seamon, *supra* note 13, at 122, 126.

20. Centeno, *supra* note 18, at 24 (explaining that a required pre-conference questionnaire vastly changed the conference experience from professor-dominated to student-driven).

21. Christy DeSanctis & Kristen Murray, *The Art of the Writing Conference: Letting Students Set the Agenda Without Ceding Control*, 17 PERSP. 35, 35 (2008) (noting that students “need—and appreciate” discussion about their writing).

22. *Id.*

23. *Id.*

24. Wellford-Slocum, *supra* note 7, at 262 (“[T]he student conference has the potential to be the most effective forum for law professors to help students develop as thinkers and writers.”).

25. *See* HELENE SHAPO, MARILYN WALTER & ELIZABETH FAJANS, *TEACHER'S MANUAL FOR WRITING AND ANALYSIS IN THE LAW* 181-82 (5th ed. 2008) (listing the variables that affect

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may view such conferences as time-consuming, or they may be overwhelmed by scheduling difficulties. Professors may also perceive these conferences as uneventful endeavors for which students do not prepare or for which students contest the professor's grading system rather than focus on the student's writing. Also, like some students, some professors do not relish the opportunity to discuss a student's weak performance in such one-on-one settings. These professors feel more comfortable and confident relying on their written feedback.

Lack of time to hold student-faculty conferences, in general, is a serious concern.²⁶ According to a recent survey of legal writing programs, legal writing professors each taught an average of 41.65 students during the fall semester and 41.09 students during the spring semester.²⁷ Some professors taught as many as fifty-five total students in their first-year legal writing course.²⁸ What does this mean for the legal writing professor's workload? In general, they review an average of 1483 pages of student work in the fall and 1524 in the spring.²⁹ Given the large number of students in each class and the number of pages the professor must review over the course of the semester, professors often lack the time to hold meaningful conferences with each individual student, especially with those students who are struggling. In addition, professors have a host of other pressing responsibilities, such as class preparation, scholarship, committee meetings, and service commitments.³⁰ In 2008, for example, legal writing professors spent an average of 33.16 hours preparing major research and

the length, number, and content of conferences held with each student, such as class size, total number of students a professor is teaching, and the length and number of writing assignments).

26. NEUMANN, *supra* note 1, at 189 ("In some writing programs, faculty-student ratios are too high for individual, face-to-face meetings between teacher and student to be scheduled regularly, although they might occur where either the teacher or the student feels that something is drastically wrong."); see Susan Apel, *Seven Principles for Good Practice in Legal Education*, 49 J. LEGAL EDUC. 371, 380 (1999) ("Contact with students is time-consuming."); Kissam, *supra* note 8, at 920-21 (addressing the problem of time for faculty in scheduling conferences); Wellford-Slocum, *supra* note 7, at 271-73 (discussing institutional barriers, such as time constraints, to the effective use of conferences).

27. Association of Legal Writing Directors, *2008 Survey Results*, LEGAL WRITING INST. vii (2008), [http://www.lwionline.org/uploads/fileupload/2008surveyresults\(REVISED\).pdf](http://www.lwionline.org/uploads/fileupload/2008surveyresults(REVISED).pdf) [hereinafter 2008 ALWD Survey]. At Thurgood Marshall School of Law ("Thurgood Marshall"), legal writing professors teach an average of forty students in their first-year research and writing classes.

28. For example, at the University of California, Los Angeles School of Law, legal writing professors teach an average of fifty to fifty-five total students in their first-year research and writing classes.

29. 2008 ALWD Survey, *supra* note 27, at vii.

30. *Id.* at 63-64; see also Apel, *supra* note 26, at 380 (recognizing scholarship still occupies the place of greatest significance in law schools, leaving no institutional incentive for faculty to spend time with students).

writing assignments for their classes and 69.17 hours preparing for class instruction in the fall.³¹ These averages were slightly less for the spring semester.³² Thus, student-faculty conferences may be perceived as time-consuming and one more task on a professor's already overloaded to-do list.³³

Even when the legal writing professor's schedule permits meeting times with students, the students' class schedules may present obstacles. For example, certain law school curricula require students to attend tutorial sessions in addition to their doctrinal and skills classes.³⁴ As such, each week, there may be a mandatory hourly tutorial session for each doctrinal class (such as torts, contracts, and property)³⁵ and a required writing lab.³⁶ In such a schedule, there is very little time for professors to schedule meetings with students during regular business hours.³⁷

In addition to a busy schedule, a student's lack of preparedness for the conference often contributes to its ineffectiveness.³⁸ A student may arrive at the scheduled time and simply want to know what he or she did wrong or what he or she could have done better.³⁹ However,

31. 2008 ALWD Survey, *supra* note 27, at vii.

32. *Id.*

33. Seamon, *supra* note 13, at 123 (noting that the biggest costs to law faculty of holding conferences are time and energy).

34. For example, at Thurgood Marshall, first year students attend a weekly one-hour tutoring session for each doctrinal class. This session is led by a second- or third-year law student who typically reviews basic concepts covered in class the previous week and assists the students with completing certain short analysis problems.

35. For Fall 2009, one section of Thurgood Marshall's first-year class had the following schedule on Thursdays: (1) Contracts tutorial from 9-9:50 am, (2) Lawyering Process class from 10-10:50 am, (3) Writing Module Lab from 12-12:50 pm, (4) Torts tutorial from 3-3:50 pm, and (5) Legal Research from 4-4:50 pm. Essentially, on Thursdays, the students had only a few hours to grab a snack or eat lunch, prepare for class, and possibly meet with their professors. This schedule is largely representative of the remainder of the school week.

36. For example, at Southern University Law Center, first-year students attend a one-hour weekly legal research lab in addition to the required Legal Writing course. See *Course Descriptions*, S. UNIV. L. CTR., <http://www.sulc.edu/students/courses.htm> (last visited Sept. 20, 2010) (describing the lab as "[a]n intensive study of the use of legal materials and research methods"). In addition, at Thurgood Marshall, many first-year students are required to attend a separate weekly writing session that addresses basic writing matters, such as grammar, punctuation, and writing style.

37. Mark Broida, a legal writing professor at California Western School of Law, explained that he sometimes schedules conferences on a Saturday or Sunday during busy parts of the semester. Mark Broida, *Student Conferences*, in GERALD F. HESS & STEVEN FRIEDLAND, *TECHNIQUES FOR TEACHING LAW* 362, 365 (1999).

38. NEUMANN, *supra* note 1, at 191 ("If either the teacher or student is unprepared for the critique, it will waste the time of both.").

39. See Taylor, *supra* note 10, at 287 (noting that when a student receives his first assignment back from the professor and sees the "red blood pouring all over the page, he will certainly demand a conference with the professor").

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students generally do not come to the conference with specific questions or concerns.⁴⁰ As one author noted, “busy law students can be unprepared for or not invested in the conferencing process.”⁴¹ It is quite difficult to hold a meaningful student-faculty conference when a student does not first review the assignment, the written work product, and the professor’s feedback, nor take the time to identify specific concerns or questions for the professor.⁴²

The legal writing professor also may believe that post-grade conferences focus too much on point deductions rather than on the student’s actual written work.⁴³ Some students request a meeting with their professor to discuss a grade without first examining the assignment and their work product. Understandably, without proper guidance from the professor, these students arrive at the meeting ready to ask how many points each section was worth, to ask why they did not receive full credit, or to bargain or negotiate for extra points.⁴⁴ Thus, these students lack proper focus on their writing process and the substance of their work. However, by setting the agenda toward the writing process and substance, professors can transform the tone, direction, and outcome of the meeting.⁴⁵

Lastly, some professors actually prefer to provide their feedback in writing rather than in person during individual conferences. With written comments, the professor can discuss clearly, in authoritative terms, what he or she knows about the writing process, the substantive law, and the assignment. And, in such cases, the professor does not run the risk of being questioned about unfamiliar topics.⁴⁶ Also, by relying on written feedback, the professor avoids difficult questions about how a student can acquire certain “tacit professional knowledge,” such as knowledge of how to read judicial opinions or perform

40. Arrigo-Ward, *supra* note 6, at 586; Centeno, *supra* note 18, at 26.

41. Centeno, *supra* note 18, at 26.

42. *Id.* at 24.

43. See Broida, *supra* note 37, at 364 (“I have had my share of students (especially first-semester students who have not received any other grades) challenge their grade and my teaching ability.”); Seamon, *supra* note 13, at 123 (recognizing that some professors dread the exam conference period, in part, because most students who request a conference are unhappy about their grades).

44. See Taylor, *supra* note 10, at 289 (explaining that most first year students receive only a legal writing grade during the semester and are apt to challenge it and the teacher’s ability).

45. See Seamon, *supra* note 13, at 131 (noting that the author announces before conferencing that grades will not be changed except in the case of computational error).

46. See Kissam, *supra* note 8, at 924 (commenting about certain risks to the professor’s sense of professorial expertise during student-faculty conferences).

successfully on exams or other written assignments.⁴⁷ The solutions to these and similar topics are largely based on individual experiences and involve intangible factors like personal beliefs, intuition, and hunches; and, thus, cannot be readily articulated or explained to law students. Consequently, some professors have substantial difficulty trying to instruct students about how to complete these tasks and improve their legal skills⁴⁸ and do not relish the opportunity to do so in person.

Regardless of these challenges to holding student-faculty conferences, a revised approach to the post-grade meeting that focuses on and separately analyzes both the writing process and the substance of the work product will show that the benefits outweigh any obstacles.

II. THE POST-GRADE CONFERENCE AS REVIEW OF PROCESS AND SUBSTANCE ASSESSMENT

The student requesting a post-grade conference may be disappointed and overwhelmed by receiving a poor grade. The student may be focused on point deductions and may have difficulty seeing the bigger picture. Professors should, of course, respond to these student concerns.⁴⁹ But, while questions about points are valid and understandably important to students, the professor should foster a dialogue that nudges the conference agenda toward a broader context and, thus, to skills that are transferable to the next assignment.⁵⁰ In order to move the conversation away from grading—at least for a while—and toward a more self-reflective and constructive approach, the professor can explain that the conference will address point deductions and grading but will also consist of a thorough review of the student's writing process and work product substance.

47. *Id.* (discussing the problem of tacit knowledge in connection with student-faculty conferences).

48. *Id.* (“The often unrecognized problem of tacit knowledge . . . taints many of the experiences that both law students and law professors seem to have with individual student-faculty conferences in law schools.”).

49. See DeSanctis & Murray, *supra* note 21, at 38 (noting that the student should have a significant part in setting the conference agenda, otherwise the student will not be invested in the conference and the conference is more likely to fail).

50. *Id.* (noting that students tend to focus on line edits and that the goal is to “foster higher-level and transferable thought about writing choices—why a writer makes them and what effect they might have on a reader”).

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A. The Writing Process—The Work Product in Context

“I just write.” “I only get inspired at the last minute.” “I always procrastinate and pull it off at the end.” The writing process is the stuff of law school legends, often repeated but with little application in reality. Most legal writing professors find that students generally cannot produce a serious and accurate legal memorandum or brief overnight. Behind a disorganized or problematic writing product tends to lurk a haphazard or incomplete writing process. The genesis of a disappointing grade, therefore, comes weeks before the work is finished. As preeminent legal writers teach us, “the process determines the product.”⁵¹ For this reason, an initial review of the student’s writing process illuminates the post-grade conference and shows how the final product—hence the grade—came to be.

How should the professor initiate such a review? A student still reeling from a disappointing grade may not be immediately receptive to broader discussions about legal writing. This Article therefore suggests that the professor start with a writing process interview, in two phases. In the first phase, before the conference, the professor should encourage the student to gather pre-writing evidence of the writing process, such as notes, outlines, case briefs, and drafts. In the second phase, during the conference, the professor interviews the student about each step of the process and about how the final paper evinces these steps. This way, the student can apply the lessons learned to the next writing project, and the professor can gather points during the meeting to create a list of “Writing Targets” for use on future writing projects.

1. Before the Conference: A Request for Pre-Writing Process Materials

To understand the final work product, the student and professor must first reconstruct the student’s writing process. Rather than struggle to recreate the process from memory, the student and professor can best accomplish this through a review of the student’s pre-writing materials. The post-grade conference most often occurs weeks after the paper was written, so memories of the writing process and product will likely have faded. In addition, the student may be embarrassed to recall a writing process that did not turn out as planned, so written evidence can be most informative. A collaborative review of the

51. BRYAN A. GARNER, *THE WINNING BRIEF* 4 (2d ed. 2004).

materials reminds the student of the paper's history and also reinforces the importance of the foundational pre-writing steps.⁵² Thus, this review serves multiple purposes: a memory prompt, a discussion-starter, and a true record of how the paper was written.

Upon receiving a post-graduate conference request, the legal writing professor can ask the student to come prepared with pre-writing materials. The request should be broad, calling for all briefs, charts, pre-writing outlines, and any other tools or materials the student was assigned or encouraged to create during the writing process.

This Article does not recommend the conference be made contingent upon the student's bringing materials. While the professor can strongly recommend that students bring materials, a law school's regulations might require that students be given the opportunity to review a grade with the professor, and the professor will not want to appear obstructive. Moreover, the student may be overwhelmed or have other reasons for not providing the materials. If the conference does not go forward, the professor will lose the opportunity to reach the student. In such situations, the absence of pre-writing materials presents a good starting point for the in-conference discussion.

2. What Happened? Reconstructing the Writing Process Through Pre-Writing Materials

Arriving at the conference, the student may be brimming with ideas, thoughts, or frustrations about the particular grade or the paper. The professor should encourage the student to share these ideas and thoughts before turning to the professor's assessment.⁵³ The professor must also, however, exercise judgment as to the hierarchy of topics of discussion during the limited conference time available.⁵⁴ At the outset, the professor can signal that the student's main concerns will be addressed, but that the conference will be best organized if the work is discussed in order. That is, the conference starts at the begin-

52. Legal writing texts and manuals stress the importance of pre-writing outlines and planning. See, e.g., ANNE ENQUIST & LAUREL CURRIE OATES, *JUST WRITING* 9 (3d ed. 2009) (noting that even for professional writers, outlines, and lists save time and aid the writing process).

53. Arrigo-Ward, *supra* note 6, at 586 (explaining that conferencing legal writing professors should first listen to the student's concerns and then respond); Wellford-Slocum, *supra* note 7, at 311 (explaining that allowing the student to first share thoughts and ideas "encourages students to begin to assume responsibility for critiquing their own work, a role they will be required to take following graduation" and encourages the student to be attentive to the professor's points).

54. Wellford-Slocum, *supra* note 7, at 314 (describing some students' tendencies to concentrate on late-stage editing issues such as word choice while overlooking more fundamental writing problems).

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ning of the writing process, working through substance to the grade at the end.

As an initial matter, the absence of any pre-writing materials suggests a profound process issue—has the student ignored incremental legal writing assignments until the final assignment was due? Has the student started to write without any pre-writing process? Did the student fail to manage time and rush at the last minute to produce a paper? While a student might otherwise be embarrassed to state that the memorandum or brief was written with little or no prior thought or preparation, the absence of pre-writing materials will bring that point to the fore.

Reviewing the pre-writing materials together, the professor and student will want to establish a chronology of the writing process: What happened first? Did the student have a plan? Was each step of the process completed before moving on, or was the process scattered and incomplete? Did the student run out of time? The average conference length of twenty or thirty minutes will not leave time to dwell on every issue.⁵⁵ This Article therefore recommends that the professor march quickly through issues that are unproblematic and select a few to consider in greater depth.⁵⁶

Writing Assignment Instructions: In legal writing assignments, as in doctrinal class exams, a surprising number of students lose points due to the simple failure to follow instructions—points that represent the low fruit of legal writing.⁵⁷ In memoranda or brief assignments, these may include errors such as improper headings, omission of page numbers, and other formatting errors. Students may also write over-long papers or omit an issue entirely, sometimes due to carelessness or perhaps due to time management problems. A student who is well on his or her way to mastering case analysis and application is sometimes chagrined to learn that tasks not perceived as “lawyerly” are also important. In the competitive law school classroom, the loss of these points can result in a markedly lower grade.

55. *See id.* at 325-26 (explaining that due to the brief nature of student-faculty conferences, the conference should be considered a form of “triage”).

56. Taylor, *supra* note 10, at 293 (explaining that a professor with too many conference priorities risks overwhelming or confusing the student).

57. John H. Langbein, *Writing Law Examinations*, WESTLAW, <http://lawschool.westlaw.com/shared/marketinfodisplay.asp?code=so&id=6&subpage=3> (last visited Jan. 6, 2010) (urging law students to follow exam instructions and stating, “I have been staggered by the amount of abject carelessness exhibited by examinees.”).

If the conferencing student's paper contains careless errors, find out whether the student has an appropriate view of the expected level of detail and correctness; that is, the goal should be to eliminate formatting and clerical mistakes completely. Occasionally, students believe that "someone else" will be responsible for these tasks in legal practice and are genuinely surprised to learn their legal writing professor's expectations. Confirm that the student printed out instructions, read them thoroughly, and referred to them once more before turning in the paper. If the student did not give the instructions and assignment details appropriate consideration, this point should be added to the student's Writing Targets sheet.

Case Briefs or Charts: If the student's final work product lacked depth or thoroughness, case briefing and analytical material may reflect a lack of time spent on absorbing the subject matter. Weaker papers tend to gloss lightly over facts and skim through important issues, suggesting that the author did not take the time up front to understand the precedent's complexities. In contrast, better papers contain depth and subtlety that first requires full understanding of the precedent cases.⁵⁸ To achieve depth and understanding, the most successful legal writing students tend to systematically interact with cases and absorb the details by working with the material.⁵⁹ Did the conferencing student create a case brief or a case chart? If not, this is the time to mention the importance of reading and understanding cases thoroughly, without rushing to write prematurely.⁶⁰

The case brief is the student's first step in understanding a body of law—the substance, the language, and the factual details in a case all contribute to the student's interpretation of the law.⁶¹ To cement and organize their understanding, students can create charts, notes, and other personal work product from the material.⁶² When a student

58. Charles Alan Wright, "How I Write" Essays, 4 SCRIBES J. LEGAL WRITING 87, 88 (1993) ("[I]t is necessary first to have a complete grasp of whatever subject . . . is . . . going to be [written] about.").

59. Enquist, *supra* note 6, at 669; John O. Sonsteng et al., *A Legal Education Renaissance: A Practical Approach For the Twenty-First Century*, 34 WM. MITCHELL L. REV. 303, 396 (2007) (explaining that active, experience-based learning is preferable to passive absorption of concepts in legal education).

60. See GARNER, *supra* note 51, at 4 (warning against the temptation to write without first understanding); Enquist, *supra* note 6, at 669 (noting that the study's successful legal writing students put material in their own words and "owned" it while less successful students did little more than "download and highlight [cases]").

61. LINDA H. EDWARDS, LEGAL WRITING & ANALYSIS 31 (2d ed. 2007) (explaining the importance of writing case briefs to students' understanding of the law).

62. Enquist, *supra* note 6, at 669.

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brings case briefs and charts to the conference, the professor can cross-check the student's understanding by closely examining the materials. Do the briefs include sufficient factual detail? Did the student hone in on the relevant issues? Did the student become preoccupied with underlying procedural issues that do not affect or relate to the memorandum or brief problem? Perhaps the student simply did not understand the subtleties of the case and began to write too soon. Time permitting, the professor can review a case brief with the student and point the student toward facts and issues that should have been included.

Brainstorming Notes: Does the student have notes or documents suggesting that a brainstorming process took place before writing? If not, and the student did not brainstorm in some other way, perhaps the student did not consider the importance of this stage of the writing process. While brainstorming and thinking are of course highly individual endeavors, a student who ignores this stage of the process or skips it entirely should know that the profession's top writers take this step seriously. The use of the Betty Flowers madman-architect-carpenter-judge paradigm⁶³ or the Anne Enquist and Laurel Currie Oates cluster approach,⁶⁴ can permit creative flow and show relationships and connections that the writer might otherwise have missed. A student with an incomplete or missing brainstorming process might be interested in learning about these approaches. The professor and student can use these techniques to discuss the creative aspect of writing and the way one decides what to argue.

Outline: Did the student develop a structure before writing? If not, why not? The student who was tempted to omit this step should know that legal writers recommend this step almost without exception,⁶⁵ and writers such as Charles Alan Wright considered it the most important—and difficult—step in writing.⁶⁶

63. Betty Sue Flowers, *Madman, Architect, Carpenter, Judge: Roles and the Writing Process*, in PROCEEDINGS OF THE CONFERENCE OF COLLEGE TEACHERS OF ENGLISH 7-10 (1979); see Betty S. Flowers, *Madman, Architect, Carpenter, Judge: Roles and the Writing Process*, INTELL. ENTREPRENEURSHIP, https://webpace.utexas.edu/cherwitz/www/ie/b_flowers.html (last visited Sept. 24, 2010); see also GARNER, *supra* note 51, at 4-7 (discussing Flowers' method that ensures the writer benefits from all his brain has to offer, not just from the mental realm with which he is most comfortable).

64. ENQUIST & OATES, *supra* note 52, at 13.

65. See, e.g., *id.* at 11; EDWARDS, *supra* note 61, at 83-86 (describing the annotated outline that students can create before writing).

66. Wright, *supra* note 58, at 88 ("The next stage, and to me the hardest of all, is organization. I never sit down to the keyboard . . . until I am clear in my mind how I am going to organize whatever it is that I am doing.").

If the student does not find a traditional outline helpful, the professor can explain that there are numerous variations,⁶⁷ and that approaches to structure differ. Students might prefer a “writing plan” or “ordered list.”⁶⁸ Bryan Garner describes a “whirlybird,” or circular outline, which shows relationships and permits additions and strands that the traditional format does not.⁶⁹ So, the conferencing student need not feel wedded to roman numerals or constrained by traditional outlining approaches. An outline should, after all, serve its author’s purposes.⁷⁰ But regardless of its format or the title it is given, a plan of some sort is in order before the student starts to write.⁷¹ Most legal writing texts and manuals advise writers on how to develop such a plan, or how to trick oneself into developing such a plan if writer’s block takes hold.⁷² Working in a flow chart form or another form of outline may help a student jump into writing.⁷³

Even professional writers do not dare gloss over the organizational and structural work of writing. Without an equivalent pre-writing step, the first-year law student cannot help but have difficulties. In the post-grade conference, the student’s outline or its absence, can inform both the professor and student of difficulties in this regard.

Drafts and Editing: Students sometimes imagine that lawyers write with ease, drafting documents without much revision.⁷⁴ They are often surprised that revising and editing take even experienced writers considerable time; without these steps, the final product is likely to be disjointed and unprofessional. Unless the student already has multiple drafts and a careful editing method in place, a discussion of this stage of the process is in order.

To focus on this issue, the professor can ask the student to describe the various drafts of the paper, as well as the editing process and the paper’s progression through drafts. Did the student use multiple drafts and a methodical, distinct editing process? Or, did the stu-

67. GARNER, *supra* note 51, at 28-30.

68. ENQUIST & OATES, *supra* note 52, at 9-10.

69. GARNER, *supra* note 51, at 30-33.

70. ENQUIST & OATES, *supra* note 52, at 9-10.

71. *Id.* at 9; Bryan A. Garner, *From The Record*, in GARNER ON LANGUAGE AND WRITING 593, 594 (2009) (stating that great lawyers still outline their appellate briefs, and “always [outline] before they begin writing in earnest”).

72. See ENQUIST & OATES, *supra* note 52, at 11; see also EDWARDS, *supra* note 61, at 83-86 (describing the annotated outline that students can create before writing).

73. ENQUIST & OATES, *supra* note 52, at 11.

74. Taylor, *supra* note 10, at 265 (also describing students’ excitement at drafting a first legal writing project and how underestimation of the editing process can be damaging to the results).

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dent try to write and edit at the same time, thereby possibly stifling the creative process?⁷⁵ Ask the student how the paper evolved, and whether the student left time between drafts to consider and rethink the work product.⁷⁶

When editing, did the student first view the paper broadly to catch errors in logic, coherence, tone, or argument flow?⁷⁷ Did the student organize around big issues and the intended argument?⁷⁸ This review, termed the “macro edit”⁷⁹ should be the first level of review. The student should have examined his or her arguments for logical flow and continuity. Here too, the student should recheck the assignment’s instructions and ensure that the final work product follows all applicable format rules.

Once the macro edit is complete, the student should have moved to a more detailed, or “micro edit.”⁸⁰ In this small-scale revision process, the writer checks and revises details of grammar, spelling, and style.⁸¹ Does the conferencing student have a considered small-scale editing plan in place? If not, consider guiding the student toward particular techniques that focus the mind on particular aspects of the paper.⁸²

What techniques did the student use to combat what this Article terms “document fatigue,” that is, the tendency to skip over errors in a familiar document? The student may, like many tired writers, simply have read and reread the document, seeing what he or she expected to

75. See GARNER, *supra* note 51, at 44 (explaining that as separate mental processes, writing and editing should be performed separately and that editing while writing will tend to stifle the writer’s creativity).

76. See Taylor, *supra* note 10, at 270 (describing the risk of leaving out an important point altogether if insufficient revision time is allowed).

77. See *id.* (discussing the “macro” level of revision, in which the writer assesses argument flow, workability of a transaction, tone, excessive emotion, and the like).

78. See Garner, *supra* note 71, at 595 (explaining that briefs should be organized around “deep issues” or “points of decision for the court express in a way that your nonlawyer relatives would understand”).

79. See Taylor, *supra* note 10, at 266-67 (describing the “macro” or big-picture editing process).

80. *Id.* at 270.

81. *Id.* at 271 (discussing the “micro” level of revision, in which the writer assesses details such as grammar, spelling, style, punctuation, format, tabulation, factual details, and the like).

82. See *id.* at 271-72 (setting out particular techniques for focusing students on the details of their written work, such as circling and questioning the prepositions, underlining nominalized words, circling all instances of “to be,” scrutinizing the text for superfluous words, and counting the number of words in each sentence with the goal of determining whether the length is reasonable).

see instead of existing errors.⁸³ If the student has no such techniques, consider discussing some or referring the student to another source of such techniques.⁸⁴ And, because the editing process tends to be completed toward the end of the writing process, time management can be important here as well. Did the student leave sufficient time between drafts so that errors in tone or spelling would be apparent? If not, the paper's errors may be due to time management problems rather than a lack of editing skills.

Once the document review is complete, the professor and student can move to other areas of the writing process that are often problematic—time, focus, and technology.

3. Completing the Process Assessment Through the Process Interview

The pre-writing document review may bring writing process issues to the fore. Some process issues may not be evident from a document review alone. The professor can therefore raise the following additional points concerning the writing process. Here too, the professor can move quickly through points that were unproblematic and save time for one or two areas of greatest concern.

a. Twenty-Four Hours Before the Due Date: How Was Your Paper?

Procrastination is toxic to the writing process and therefore merits special mention in the post-grade conference. Time management presents a challenge to any writer but particularly to novice legal writers.⁸⁵ Anecdotal and expert evidence show that procrastination is the bane of legal writing students.⁸⁶ And, a study of students' work habits and success in legal writing shows the very real effect of procrastination and poor time management upon students' performances.⁸⁷ That is, less successful students fall victim to poor time management and procrastination, while successful legal writing students develop strate-

83. See GARNER, *supra* note 51, at 28 ("If you've seen the page several times, you're likely to assume that things are as you expect them to be, not as they actually are.")

84. See Taylor, *supra* note 10, at 274 (describing revision techniques such as reading a document backwards, so as to force the reader to focus on each word out of context and assist in identifying errors).

85. Anne M. Enquist, *Defeating the Writer's Archenemy*, 13 PERSP. 145, 145 (2005).

86. *Id.*

87. Enquist, *supra* note 6, at 645.

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gies for overcoming the temptation to procrastinate.⁸⁸ Successful students write rather than wait.⁸⁹

As an initial matter, the conferencing student may have underestimated the number of hours required to complete a memorandum or brief. Many first-year law students have an incomplete understanding of the writing process and do not realize the amount of time required to draft a cogent and complete piece of legal writing.⁹⁰ Indeed, even many legal writing faculty members can be taken aback at the considerable amounts of time successful legal writing students spend on their legal writing class assignments.⁹¹ Good legal writing takes time.

Successful students tend to spend a lot of time writing, and a lot of time on the legal writing class—much more than their less successful counterparts.⁹² In addition, the most successful students spend their time on writing rather than on research and other tasks.⁹³ The successful legal writing students tend to use more than half of their total legal writing course time for actual writing.⁹⁴ On the other hand, less successful legal writing students tend to start writing projects later and then have difficulty completing them before the deadline.⁹⁵ A later start also leaves students ill prepared for classroom discussions and unable to take advantage of meetings regarding their assignments.⁹⁶

The reasons for procrastination naturally differ from student to student, but experts recognize common themes. Some students are overly optimistic about their ability to complete a project within a given time—these are known as “relaxed procrastinators.”⁹⁷ Others, known as “anxious, tense procrastinators” may lack confidence in their writing and refuse to believe that their work will be good

88. *Id.*

89. *Id.* at 638-40, 645.

90. See Taylor, *supra* note 10, at 265 (observing that many law students “have the impression that good legal writers sit down to a computer and type out their legal documents perfectly the first time”).

91. See Enquist, *supra* note 6, at 669 (“When the study was concluded and the legal writing faculty at the Seattle University School of Law first saw the time charts for the six [high-scoring] students in the study, they were astounded.”).

92. See *id.* (stating that the most successful legal writing students in the study spent more than twice as much time on the class as the least successful students and more than twenty-five percent more time than the moderately successful students).

93. *Id.* at 669-70.

94. *Id.* at 670.

95. *Id.*

96. *Id.* at 645, 655.

97. ENQUIST & OATES, *supra* note 52, at 17.

enough.⁹⁸ Some students simply have difficulty stopping research and starting writing.⁹⁹ This discussion can start with a non-accusatory inquiry: “How were you on time?” “When did you finish the first draft?” If the student’s work has suffered due to procrastination, the professor can help the student understand this pitfall and develop strategies for avoiding procrastination in future projects.¹⁰⁰ These might include creating an individual schedule with progress milestones for each future project or turning in work at each stage in the writing process.¹⁰¹ These techniques should be included in the Writing Targets sheet.

In addition, the professor may want to mention the psychological reasons for procrastination. Did the student lack confidence in his or her work, such that he or she hesitated to start? Or, did he or she believe the project simply would not take much time to complete? While a psychological discussion of procrastination is beyond the conference’s scope, a simple mention of these issues may encourage the student to think about them and to address them on future projects. The professor may wish to point the student toward additional resources that discuss strategies for dealing with procrastination or refer the student to academic support resources.

b. Tell Me About Your Work Environment—Were You Distracted?

Distractions are a major barrier to many students’ legal writing success. Students today face the same distractions as in the past, but today’s students also must fight the temptation to check email, text friends, and access the Internet. In addition, law school students are faced with tempting distractions such as extra-curricular activities and new social interactions. And, of course, everyday distractions such as family obligations and personal or family illness do not disappear when one becomes a law student. Avoiding distraction is one of the biggest challenges to writing.¹⁰²

Electronic distractions can be difficult to resist, because they are ever-present and located on the same computer that the student is

98. *Id.*

99. Enquist, *supra* note 6, at 644.

100. Enquist, *supra* note 85, at 146 (depending on the type of procrastinator, strategies for addressing procrastination can include creating writing schedules, sending in mandatory progress reports, or reframing negative thinking).

101. *Id.*

102. ENQUIST & OATES, *supra* note 52, at 15.

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likely using to write the paper.¹⁰³ During the conference, the professor can inquire as to whether the student experienced difficulty in staying focused. If so, the professor can suggest that the student anticipate this challenge and take affirmative steps to maintain focus: close the door, find a workspace apart from friends, keep off the internet while drafting, and answer emails only at specified times.¹⁰⁴ The professor should add these techniques to the student's individualized Writing Targets worksheet.

In addition to internet and social distractions, students may face life distractions such as illness, family demands, and work.¹⁰⁵ Students' abilities to cope with and plan for these distractions can be significant to their legal writing performance.¹⁰⁶ Students who excel at time management tend to prepare for distractions such as planned trips out of town, and they will organize their work so as not to fall behind.¹⁰⁷ Unanticipated distractions, such as illness of the student or a family member, can also have a significant impact on performance.¹⁰⁸ Furthermore, a student's choices in resisting distractions can have a direct effect on a legal writing grade. A student who participates in numerous extra-curricular activities can create a heavy burden on his or her schedule. Further, the student who spends the weekend before a brief is due helping a friend, instead of editing, can, by that act alone, severely handicap the student's performance.¹⁰⁹

If life distractions affected the student's legal writing performance, the student may welcome the opportunity to strategize for the next assignment. Here, the professor can draw on personal experience with work-life balance or brainstorm with the student as to how he or she can meet other obligations while performing his or her best in law school. If the law school has an academic support department, the professor may refer the student to that department for additional resources. By raising and discussing the issue of life distractions, the professor can show empathy for the student and a willingness to help the student succeed.

103. *Id.*

104. *Id.*

105. Enquist, *supra* note 6, at 662.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 663.

Thus, if the work product is marked by careless errors or the student failed to manage time appropriately, a conversation about distractions may be necessary and useful.

c. Did You Have Technology Problems or Disruptions?

Students rushing to meet a memorandum or brief deadline may well neglect to save or back up their work, thus inviting a complete loss of work, and therefore time. Computers are vulnerable to loss or breakage, and this type of disruption can be disastrous to a student who then has to painstakingly recreate the many hours of lost work. While such disruptions are not a basis for changing grades, they can serve as important lessons learned and entries for the Writing Targets document that professor and student create together.

During the conference, the professor can listen to the student's account of any technology problem and strategize as to how it can be avoided on future assignments. The student should be urged to save the document frequently during the writing process. In addition, the student may want to have certain data-protection procedures in place, to be carried out at regular intervals or at the end of each writing session. The data-protection procedures can include the student's emailing the document to himself or herself and printing out a hard copy. If a hard copy of the document is required, the student risks falling victim to the vagaries or availability of a printer.¹¹⁰ Here too, a discussion about planning and personal experience with meeting deadlines in legal practice may be useful to the conferencing student. Technology problems and challenges can be considerable in both law school and practice—a pledge to back up work, print the document, and then email it to oneself after each writing session may save the student hours of stress in future projects or in professional life.

d. Did You Use the Help Available to You?

Legal writing assignments are often designed to include some level of collaboration; students may be permitted to seek help directly from the professor and from other sources, provided that the written work is their own.¹¹¹ Students who succeed in legal writing tend to

110. See Christina R. Heyde & Susan F. Provenzano, *E-Grading: The Pros and Cons of Paperless Legal Writing Papers*, 12 PERSP. 139, 140 (2004) (describing the high frequency of student requests for extensions due to lack of printer access).

111. At Thurgood Marshall, students are permitted to discuss writing assignments with students within their own section; the written work must be the student's own.

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use the help available to them and seek out ways to obtain more.¹¹² In particular, successful legal writing students in one study sought out the professor and found creative ways to obtain more of the professor's help.¹¹³ Less successful students, on the other hand, did not meet with the professor even when advised to do so.¹¹⁴

Seeking help bears fruit in the student's understanding of issues, but it also serves an important psychological purpose: the act of deciding to seek help develops certain types of thinking.¹¹⁵ By simply seeking help, the student is taking a psychologically positive step. If the conferencing student did not use the available help, try to find out why. Did the student think peer reviews would be unhelpful? Or, did the student fall behind so that he or she was ill positioned to even discuss the assigned problem? The student's answer may give important clues to his or her attitude toward the legal writing class and to other potential problem areas.

The process of writing is highly individual, so the legal writing classroom discussion and lecture tend to focus more on the resulting substance than on the precise means for producing a memorandum or brief. The classroom discussion can, of course, include tips and guidance for writing, but few observations will apply to all students.¹¹⁶ The individual student conference, therefore, provides a more appropriate setting in which to discuss the student's own writing difficulties and strategies. The post-grade conference is perhaps the most useful place to discuss the student's writing process. While an abstract discussion of the writing process may have some value, the post-grade discussion is specific and realistic, in that student and professor can both judge the success of the student's writing process in the paper and grade before them. And, while a post-grade discussion of writing processes should address how those processes worked or did not work, the discussion of writing processes also provides a lesson the student can transfer to subsequent projects.

112. Enquist, *supra* note 6, at 671-72 (describing how successful students sought out the professor for additional help and used out-of-class discussions with other students to hone their understanding).

113. *Id.* (describing the successful students' persistence and creativity in seeking out the professor for help).

114. *Id.* at 671.

115. See Wellford-Slocum, *supra* note 7, at 270.

116. *Id.* at 262 (“[D]idactic dialogue within a classroom setting cannot adequately address the myriad of problems students experience when attempting to commit to writing their not yet perfectly formed understanding of complex legal issues and drafting schemata.”).

B. The Work Product Substance—Content Review and Assessment

The next step in fully understanding the student's work product is to examine the substance of the written piece. After a student submits a legal memorandum or brief for a grade, most legal writing professors provide the student with a written critique or feedback, in addition to the grade achieved by the student. The feedback method used by professors varies from comments written or typed on the paper itself and comments at the end of the paper, and from general feedback addressed to the class to a feedback memorandum addressed to individual students.¹¹⁷ While the feedback method may vary, one thing remains constant—writing professors agree they should avoid overwhelming students with too many comments and should focus on a discrete number of concerns in preparation for the post-grade conference.¹¹⁸

In making this determination, the professor should carefully review the comments on the assignment and identify a few main areas of needed improvement.¹¹⁹ Concerns about substantive content vary but may address the following: Is the law stated accurately? Is the authority used effectively? Are the cases compared to the client's situation? Are the facts argued? Are all elements addressed? Is the paper clearly organized?¹²⁰

But how should the professor prepare for a meaningful discussion about the substance of the paper? A student who is focused on a disappointing grade or the number of marks on his or her paper may be somewhat reluctant to openly discuss what is actually written on the page. Similar to the writing process interview, this Article suggests that the professor broach the substantive critique in two phases.

117. 2008 ALWD Survey, *supra* note 27, at ii.

118. See NEUMANN, *supra* note 1, at 191 (“Conferences will work best when you select a relatively small number of significant problems, use the conference to develop those themes, and cover technical matters secondarily to fill out the picture.”); see also LAUREL CURRIE OATES & ANNE ENQUIST, *TEACHER’S MANUAL, LEGAL WRITING HANDBOOK* 267 (4th ed. 2006) (“Overcommenting, particularly on weak papers, tends to overwhelm and frustrate students.”); Anne Enquist, *Critiquing and Evaluating Law Student Writing: Advice from Thirty-Five Experts*, 22 SEATTLE U. L. REV. 1119, 1130-32 (1999); Wellford-Slocum, *supra* note 7, at 325 (“The delivery of too much information . . . would obscure the more important issues with which the student must contend.”).

119. DeSanctis & Murray, *supra* note 21, at 38 (noting that one of the most important features of a successful writing conference is identifying one or two major concerns on which to focus).

120. See SHAPO, WALTER & FAJANS, *supra* note 25, at 181 (providing specific questions for the substantive content of a conference).

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In the first phase, before the conference, the student can prepare deconstruction outlines as requested by the professor, complete any revision assignments, and gather certain pre-writing and brainstorming documents. In the second phase, during the conference, the professor interviews the student about the substance of his or her paper, using the assigned tasks and collected material to aid in the discussion. The professor then can reinforce the development of the student's legal analysis and writing skills by engaging the student in a short question-answer session about the paper's substance. Based on the information learned by the professor and the student from the collected materials and conference discussion, they can add substantive goals and reminders to the list of individualized Writing Targets for the student to apply on future assignments.

1. Before the Conference: A Request for Substantive Writing Materials

After completing the written critique of the student's paper, the professor should reflect on any substantive problem areas and identify a few main points on which to focus in the conference. Did the student organize the paper and discussion in a clear manner? Is the paper missing key sections? Did the student use the wrong cases? Did the student provide an inaccurate or incomplete statement of the law? Do the arguments lack proper development? If the student's paper was poorly organized, the professor could instruct the student to complete a deconstruction outline exercise. In addition, where the student's paper shows that his or her analysis is on target but could benefit from further development or an improved writing style, the professor could require the student to complete a short revision assignment before the meeting. If the student's paper exhibits poor issue-spotting or lacks sufficient analysis or development, the professor could instruct the student to bring certain brainstorming and pre-writing materials to the conference. Incorporating these strategies increases the student's level of preparation for and investment in the conference. In addition, using these strategies allows the professor to better tailor the post-grade conference to the unique needs of each individual student.

Deconstruction Outline Exercise: A deconstruction, or post-writing, outline lets the student diagnose the problems in his or her own paper. As compared to a pre-writing outline, the deconstruction outline exercise requires the student to reflect on what he or she has actu-

ally written in the paper and the order in which he or she presented the information.¹²¹

Preeminent legal writers stress the importance of outlining before writing a paper.¹²² When a student neglects this very crucial step in the writing process or underestimates its impact on his or her writing, the resulting paper is often disjointed to say the least.¹²³ Typically, in response to this problem, writing professors vigorously mark up the student's paper with a myriad of comments about structure: "Your writing is poorly organized." "This organization is confusing." "Your structure does not conform to proper memorandum format." "You are missing a case here." "You need a specific rule here." The student then reviews the professor's feedback and becomes frustrated, unable to see any problems with the paper's organization or the paper's lack of adherence to a formal legal writing paradigm.

When a professor only tells, but does not show a student that his or her paper needs to be better organized, the student probably has not learned anything new, likely because the student knew his or her paper was problematic at the start.¹²⁴ What the student needs is an explanation as to why he or she is not organizing the material well and some helpful strategies to solve the problem.¹²⁵ The first step in reaching this objective is for the professor to help the student recognize there is a fundamental problem with the paper's organization. Rather than simply telling the student what particular section is missing or that the paper is poorly organized, it is extremely helpful and productive to have the student examine his or her own work product and arrive at this conclusion on his or her own.¹²⁶

Writing professors can achieve this goal by assigning the student a deconstruction outline exercise before the scheduled post-grade

121. Similar outlines for paper drafts are also referred to as after-the-fact outlines. *See* OATES & ENQUIST, *supra* note 118, at 235 (identifying mini-lessons for revising writing assignments).

122. Legal writing texts and manuals stress the importance of pre-writing outlines and planning. *See, e.g.*, ENQUIST & OATES, *supra* note 52, at 9 (noting that even for professional writers, outlines and lists save time and aid the writing process).

123. *See* MARGARET ELIZABETH McCALLUM, CHRISTINA L. KUNZ & DEBORAH A. SCHMEDEMANN, *SYNTHESIS: LEGAL READING, REASONING AND WRITING IN CANADA* 104 (2003) ("Success of the discussion of an office memo depends on a sound structure.").

124. OATES & ENQUIST, *supra* note 118, at 261 (article reprinted from Sept. 1989 issue of the Second Draft, "Beyond Labeling Student Writing Problems: Why Would a Bright Person Make this Mistake?").

125. *Id.*

126. *See id.* at 283 (recognizing the importance of requiring students to complete a self-edit of their paper to bring to the conference).

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conference. The exercise is quite illuminating for the student. From the exercise, the student not only improves his or her editing and self-diagnosis skills, but also enhances his or her ability to complete the same task on future writing assignments.¹²⁷ Also, the student strengthens his or her outlining and organization skills; internalizes the necessary components for the paper; and better understands their interconnectedness, purpose, and structure. The deconstruction outline exercise provides the student with a visual aid that he or she actually constructs and can use to improve his or her legal writing.¹²⁸

How does the deconstruction outline exercise work? First, the legal writing professor must ascertain whether the student has a problem with large-scale organization, small-scale organization, or both.¹²⁹ A large-scale organization problem suggests the student has difficulty visualizing the big picture components of the paper.¹³⁰ The relevant areas include the main sections of the paper and the individual subsections under the discussion. For example, a legal memorandum may have six distinct sections.¹³¹ If a student's paper is missing one section or a few of these sections, he or she has a large-scale organization problem. Also, if the student does not adhere to the traditional memorandum format and had no principled reason for deviating from this structure, the student may have difficulty grasping the purpose behind memorandum structure and, hence, a large-scale organization problem. In addition, when the student does not identify or address a key

127. See Wellford-Slocum, *supra* note 7, at 284 (noting that preconference self-edit assignments help students more comfortably assume the role of "expert editor").

128. See McCallum, Kunz & Schmedemann, *supra* note 123, at 103 (explaining that the student may wish to sketch out the organization of his actual draft discussion and check it against his pre-writing sketch); Shapo, Walter & Fajans, *supra* note 25, at 183 (commenting that, during the conference, "it is helpful to outline the paper to see where the organization fell apart and how it can be restructured"); Debbie Mostaghel, *Commenting on Student Papers*, 14 SECOND DRAFT BULL. LEGAL WRITING INST., No. 1 (Legal Writing Inst., Macon, Ga.), Nov. 1999, at 5-6 available at www.lwionline.org/publications/seconddraft1nov99.pdf (advocating that a "visual aid approach is the most concrete way to demonstrate what is wrong with the organization").

129. Several legal writing texts and manuals discuss large-scale and small-scale organization of a paper. See, e.g., Edwards, *supra* note 61, at 77-108; Helen S. Shapo, Marilyn R. Walter & Elizabeth Fajans, *Writing and Analysis in the Law* 89-129 (5th ed. 2008). One text also discusses middle-scale organization of a paper, which targets the subparts of a paper or how the author orders the elements of a rule. See McCallum, Kunz & Schmedemann, *supra* note 123, at 92, 95. For purposes of discussion, this Article categorizes organization problems as either large-scale or small-scale challenges.

130. See McCallum, Kunz & Schmedemann, *supra* note 123, at 92 (characterizing large-scale organization as arranging stories in a house and explaining the structure focuses on parts of the discussion section).

131. As with most traditional formats, for our predictive memoranda assignments at Thurgood Marshall, students include six separate sections: introduction, question presented, brief answer, statement of facts, discussion, and conclusion.

element of a claim or defense in his or her memorandum or fails to present the issues in a logical order under the discussion section, it shows a difficulty with large scale organization. Sometimes elements have their own logical structure (such as addressing a threshold issue first) or the elements' proper organization is dictated by the client's facts.¹³² If the student has a large-scale organization problem, the professor may opt to focus solely on this issue with the deconstruction exercise.

Concern with a paper's small-scale organization may relate to the student's adherence to proper CRRPAC format or any other standard sequence,¹³³ presentation of a rule proof or an argument, or structure or arrangement of individual paragraphs.¹³⁴ For example, if for each issue addressed in his or her memorandum, the student does not adhere to the CRRPAC schemata and the student has no principled reason for deviating from this format and the resulting writing is ineffectively drafted, the memorandum presents a small-scale structure concern. Also, when a student's analysis is hard to follow because his or her discussion of precedent lacks clear facts, incorrectly identifies or describes the holding, or obfuscates the court's reasoning, the paper has small-scale organization challenges. Another example of a student's small-scale organization difficulty exists when the student does not present his or her argument in a clear manner, starting with a thesis statement, followed by fact comparisons or other analytical techniques, and ending with a concluding sentence.

Once the professor determines whether the student's paper presents a problem with large-scale or small-scale organization, the professor can then instruct the student to outline a specific problem area in the paper. Once the outline is completed, the student should compare the results with the structure provided in the course materials or in the professor's written comments. As a straightforward illustration, assume the professor requests the student to prepare an outline of the entire paper, focusing on the Roman numeral sections.

132. See McCALLUM, KUNZ & SCHMEDEMANN, *supra* note 123, at 93-94.

133. At Thurgood Marshall, we use the acronym CRRPAC (Conclusion, Rule, Rule Proof, Application and Conclusion) to teach students how to structure the discussion of each element of issue. See RICHARD NEUMANN, *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* 96-97 (4th ed. 2001). Other legal writing programs employ similar schema, such as IRAC, CREAC, or TREAC, to teach proper organization. See CHRISTINE COUGHLIN, JOAN MALMUD & SANDY PATRICK, *A LAWYER WRITES* 81-85 (2008); McCALLUM, KUNZ & SCHMEDEMANN, *supra* note 123, at 97-99.

134. See McCALLUM, KUNZ & SCHMEDEMANN, *supra* note 123, at 99-101.

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Presume the student's resulting deconstruction outline contains four major sections: introduction, brief answer, statement of facts, and discussion. As the student reviews the professor's feedback and the referenced portions of the course materials and compares this information to the student's deconstruction outline, the student undoubtedly will recognize his or her paper is missing sections for both the question presented and the final conclusion.

The same exercise can be applied to the discussion section for a particular element. For example, consider a predictive memorandum assignment that requires the student to examine the three elements for establishing a common-law marriage under Kansas law: capacity to marry, present marriage agreement, and holding out to the public as husband and wife.¹³⁵ If the professor determines that the student's paper does not clearly address the last element, holding out to the public, in an organized manner, the professor can require the student to prepare a deconstruction outline of this section. In particular, the professor can ask the student to review the course materials on CRRPAC and use this structure to complete the outline exercise. Assume that the student's deconstruction outline reveals the following sequence for the "holding out" section: Rule-Application-Rule Proof-Conclusion. From this visual construct, the student will realize not only that he or she is missing certain components, namely the lead conclusion, but also that he or she did not properly follow the statement of law with the rule proof (or explanation of the rule using the precedent case). The student now can approach the conference with a better understanding of the professor's critique and list of more specific questions.

After identifying what part of the paper the student should outline and providing explicit instructions for completing the exercise, the professor also should provide a series of questions to the student in the professor's written comments about the paper. These questions—for the student's consideration before the conference—should be relevant to the specific writing task at hand and narrowly focus on the diagnosed organizational problems with the paper. For large-scale organization concerns, the professor could ask whether the deconstruction outline reveals that the student used six distinct sections in the paper, identified by roman numerals. The professor then could in-

135. See *In re Hendrickson*, 805 P.2d 20, 21 (Kan. 1992); *Gillaspie v. E.W. Blair Constr. Co.*, 388 P.2d 647, 649 (Kan. 1964).

quire if any sections were omitted from the paper. With respect to small-scale organization problems, the professor could ask if the deconstruction outline shows the student used a CRRPAC format to discuss the elements. The professor then could inquire as to whether the paper is missing a component of CRRPAC and, if so, what section is missing. Further, the professor could ask the student if he or she unnecessarily repeated any sections or materials, or if the student has laid a proper foundation for each section in the paper.

These follow-up questions encourage the student to closely examine his or her own writing and further develop self-diagnosis and editing skills. On several occasions, students have acknowledged they finally understood the value of outlining from this exercise. By requiring the student to prepare the deconstruction outline and answer these questions before the post-grade conference, the professor encourages the proverbial light bulb to come on for the student in a less intense environment, and the student arrives at the conference excited and ready to share his or her new discovery and understanding with the professor.

Revision Assignment with Concept Review: Another possible component of the written critique is the pre-conference Revision Assignment with Concept Review. This assignment prepares a student for the substance part of the post-grade conference. In the Revision Assignment with Concept Review, the professor identifies a section of the paper that the student revises or rewrites before the meeting.¹³⁶ The professor can require the student to revise a part of the statement of facts, the rule section, a rule proof (or explanation), a particular argument, or even a poorly organized paragraph.¹³⁷ Any part of the paper could be the subject of a rewrite, but the assignment should focus on a particular weakness or a specific problem area in the stu-

136. Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How To Achieve It*, 76 NEB. L. REV. 561, 587 (1997) (suggesting that writing professors assign each student a revision task, focused on a particular weakness in the paper, that should be completed before the conference); Wellford-Slocum, *supra* note 7, at 284 (encouraging writing professors to identify a significant weakness in the student's paper that the professor feels the student can improve before the conference as part of an assigned revision).

137. See NEUMANN, *supra* note 1, at 191 (stating that if papers are returned far enough in advance, the writing professor "might give a short preconference assignment, for example asking the student to redraft a paragraph or two in light of your written comments"); McCrehan Parker, *supra* note 136, at 588 (providing examples of revisions tasks to include assignments to substitute paraphrases for all quotations used in a paper or construct an IRAC outline of each point of the discussion).

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dent's paper.¹³⁸ The revision or rewriting exercise should not be daunting or overwhelming for the student.¹³⁹ It should begin with an explanation of the problem area and definitions for relevant concepts; it should be accompanied by clear instructions, detailing the professor's expectations; and it should be relatively easy for the student to accomplish before the meeting. As part of the instructions, the professor should inform the student that his or her grade will not be affected by the revision (neither reduced nor improved) but that the student's serious commitment to completing this task for the meeting will produce a more meaningful discussion during the conference.

For example, if after reviewing a student's predictive memorandum, it becomes apparent that the student had difficulty drafting the fact section, the professor would identify this problem in the written feedback. Then, the professor would explain the purpose of the fact section and any deficiencies in the writing to the student. An explanation would provide that in a predictive memorandum, the fact section serves to educate the reader about what in the client's situation gave rise to the legal problem; and this section should be written in an objective, even-handed manner. After reviewing the concept and purpose of the memorandum fact section, the professor would ask the student to rewrite a couple of paragraphs of the statement of facts and bring the revised sections to the conference for discussion. Also as a revision assignment, a professor could ask a student to rewrite an argument section using an explicit analogy to (or distinction from) the precedent case. The task assigned will depend, of course, on the quality and problem areas in the student's paper.

Given high student-faculty ratios, teaching workloads and limited meeting times, there is seldom enough time during a conference to have a student complete a detailed revision task in person, especially when sessions are no longer than a half hour.¹⁴⁰ Also, by instructing the student to revise his or her written work before the meeting, the professor can make sure the student has studied the comments closely

138. McCrehan Parker, *supra* note 136, at 587 (suggesting that professors tailor revision tasks to a particular weakness in the paper).

139. See NEUMANN, *supra* note 1, at 191 ("A preconference assignment shouldn't take more than an extra hour or two of the student's time.")

140. See Centeno, *supra* note 18, at 29 ("The one potential drawback to live editing is that it is time-consuming."). Centeno explained that her conferences include a partial live edit of a student's written assignment and that all of her conferences lasted at least forty-five minutes, and most were one hour. *Id.* If the professor has sufficient time to conduct a live edit of the student's paper, this exercise in addition to a preconference revision assignment will result in a more interactive exchange between the student and professor. See *id.*

and edited the material after carefully reviewing the relevant concepts. Further, the student has more incentive and time to reflect on his or her writing before the meeting and the conference discussion can address more sophisticated matters. By completing a revision assignment, students will be more engaged during the conference and invested in its outcome because they were each an integral part of the rewriting and editing process.¹⁴¹

Case Briefs, Rule, and Argument Charts: As part of establishing the chronology of the student's writing process, the professor may have already requested that the student gather certain pre-writing materials, such as briefs, charts, pre-writing outlines, and paper drafts. The student and the professor can use some of these same documents to review and assess the student's performance on the substance of the assignment.

For example, the student's case briefs reveal not only that the student took the time to read each case, but also how well the student understood the cases, distilled the relevant rules of law, and analyzed the holdings. From the case briefs, the student ideally prepared rule charts in which he or she synthesized the rules and drafted a working rule statement for the paper. The professor can review these charts to ascertain how well the student used the cases and identified the law's progression and development over a period of time. An argument chart¹⁴² shows what specific facts from the precedent case and the client's situation the student selected to craft his or her argument. This chart also details the inferences generated by the student to support those arguments based on circumstantial evidence.

Essentially, the case briefs and rule and argument charts provide the professor with insight into the student's thought processes, legal analysis skills, and ideas for developing arguments. So, in preparation for a post-grade conference, the professor should consider asking the student to bring these and similar materials to the meeting if the student's paper has such deficiencies.

141. See NEUMANN, *supra* note 1, at 191 (noting that short preconference assignments make the "conference more interactive because the student will have responded already to some of your written comments").

142. At Thurgood Marshall, the professors teach students to prepare detailed argument charts for each writing exercise. In these charts, for each issue addressed in the paper, the students identify relevant similarities (or differences, depending on the case's holding) between the client's situation and the facts of the precedent case and explain why those facts are pertinent to the discussion.

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2. During the Conference—A Student Interview Examining Substance Through Documents

At the meeting, the professor can begin the discussion about the paper's substance by asking the student open-ended questions that encourage the student to actively participate in the learning process and allow the student to contribute to setting the conference agenda.¹⁴³ Such thought-provoking questions could include: What was hard about this paper? What part of your paper do you feel you could significantly improve with more writing time?¹⁴⁴ After this initial dialogue, the professor can turn to the actual substance of the paper by requesting and examining any completed deconstruction outlines, revision assignments, or pre-writing and analysis materials brought to the conference.

a. What Did You Learn from the Deconstruction Outline Exercise?

Often, “a bizarre organization” in a student's paper reflects a student's muddled thinking and current inability to handle a significant number of comments about his or her paper.¹⁴⁵ Consequently, the professor may choose to first focus on the paper's organization, whether large-scale or small-scale organization.¹⁴⁶ The professor will be able to gauge a student's understanding of proper format and argument structure by closely examining the results of his or her Deconstruction Outline exercise.

143. See BLACK, *supra* note 5, at 155 (noting that any writing conference agenda professor “set must be flexible, for as parties learn they change their minds, their goals, their beliefs and values”); DeSanctis & Murray, *supra* note 21, at 38 (“Writing professors largely agree that meetings are most productive and valuable to students when *students* set the agenda.”) (emphasis added); see also Wellford-Slocum, *supra* note 7, at 306 (“[O]pen questions are the most effective means of shifting the power dynamics from a professor-dominated discourse to one dominated by the student.”).

144. See NEUMANN, *supra* note 1, at 192-93 (emphasizing that the questions posed during the opening phase of a conference should encourage the student to help develop the agenda).

145. See Debbie Mostaghel, *Commenting on Student Papers*, 14 SECOND DRAFT: BULL. LEGAL WRITING INST., No. 1 (Legal Writing Inst., Macon, Ga.), Nov. 1999, at 5-6, available at <http://www.lwionline.org/publications/seconddraft1nov99.pdf> (stating that a troublesome organization in a student's paper suggests the student is not ready to tackle significant commentary on the substance of paper).

146. See SHAPO, WALTER & FAJANS, *supra* note 25, at 183 (noting that an assessment of a paper's structure involves such matters as the student's success in ordering the issues and organizing around the issues).

Building upon the example above, assume the student's Deconstruction Outline of the "holding out"¹⁴⁷ section in his or her predictive memorandum reveals the following sequence: Rule-Application-Rule Proof-Conclusion. The professor would ask the student to recite the structure that more typically should be used in the paper, namely Conclusion-Rule-Rule Proof-Application-Conclusion. Next, the professor would ask the student if he or she noticed any organizational problems as he or she compared the outlines. The student will note that his or her paper is missing the lead conclusion and places the rule proof (or rule explanation) after the argument, rather than between the rule and the argument. The professor then could ask the student to mark up his or her paper, noting the needed structural changes. If the student asks, for example, why he or she needs to start the section with a conclusion, the professor can take this opportunity to reiterate that lawyers are conclusion-oriented people; thus, he or she should lead the section with a quick overview of his or her analysis. The student will not only internalize proper schema, but also understand the principled reasons that support the required organization. By examining the post-writing outline together, the student and professor can deconstruct the student's paper, assess its strengths and weaknesses, and chart a plan for improved organization.

b. How Did You Improve Your Paper with the Revision Assignment?

Next, the professor can review the student's revision assignment as part of the conference's substance review and assessment.¹⁴⁸ The professor can begin the discussion by skimming the student's writing and asking the student to explain the revisions and how and why he or she made them.¹⁴⁹ This didactic conversation not only "encourages the student to make conscious choices" about his or her writing,¹⁵⁰ but also allows the professor to ascertain whether the student fully grasps the relevant concept areas and legal writing skills employed in the assignment. Furthermore, by articulating the specific steps taken by the

147. To establish common law marriage under Kansas law, a party must prove a capacity to be married, a present agreement to be married, and a holding out to the public as husband and wife. *See In re Hendrickson*, 805 P.2d 20, 21 (Kan. 1992); *Gillaspie v. E.W. Blair Constr. Co.*, 388 P.2d 647, 649 (Kan. 1964).

148. *See* *McCrehan Parker*, *supra* note 136, at 588 (discussing the benefits of assigning a preconference revision task and how to address it during the conference).

149. *See id.* at 587.

150. *See id.*

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student to resolve a problem presented in his or her paper, “a student may develop general skills that will be useful in future writing projects.”¹⁵¹ If time permits during the conference, the professor can also work with the student to revise other discrete parts of the paper that are problematic. These revisions could focus on parts like a thesis sentence, a leading analogy (or distinction) for an argument, an issue statement, or a wordy sentence.¹⁵²

c. What Information Did You Include in Your Pre-Writing Documents?

The case briefs and rule and argument charts reveal a “snapshot” of the student’s understanding of the assignment and relevant precedent, grasp of the rules, and ideas about viable arguments.¹⁵³ For example, by reading a student’s case brief, the professor can determine whether the student confused dicta with the relevant holding or rule of law. With a student’s rule chart, the professor can identify how the student may have incorrectly synthesized a rule. A student’s argument chart may show that he or she focused too much on policy considerations and neglected to address and apply the rules from the relevant case law. Another student’s argument chart may reveal he or she had difficulty analogizing to authority or articulating clear inferences for factual support. While reviewing each document, the professor should engage the student in a discussion about its content and the student’s decision-making process.¹⁵⁴ From this perspective, the professor can identify any critical reading and thinking problems, help the student resolve them, and develop a plan to tackle any such obstacles encountered on future assignments.

151. *See id.*

152. *See* NEUMANN, *supra* note 1, at 196 (commenting that the professor may opt to leave a page or two of a student’s paper blank so that, during the conference, the professor can ask the student if there are any problems on those pages and how the writing could be improved); Centeno, *supra* note 18, at 28-29 (discussing the pros and cons of conducting a live edit during a conference); Steven D. Jamar, *Written Feedback on Student Writing*, 14 SECOND DRAFT: BULL. LEGAL WRITING INST., No. 1 (Legal Writing Inst., Macon, Ga.), Nov. 1999, at 3-4, *available at* <http://www.lwionline.org/publications/seconddraft1nov99.pdf>; James B. Levy, *Critiquing Student Papers—The Quick and the Dead*, 14 SECOND DRAFT: BULL. LEGAL WRITING INST., No. 1 (Legal Writing Inst., Macon, Ga.), Nov. 1999, at 5, *available at* <http://www.lwionline.org/publications/seconddraft1nov99.pdf> 5 (advocating reserving a part of the student conference time for a self-editing exercise such as revising a wordy sentence).

153. *See* McCrehan Parker, *supra* note 136, at 572 (explaining the value of legal writing pieces as a lens into or “snapshot” of the student’s thinking processes).

154. *See* SHAPO, WALTER & FAJANS, *supra* note 25, at 180-81 (discussing the substantive dimension of a writing conference).

d. Do You Have Concerns with Writing Style or Attention to Detail?

After addressing the paper's organization and legal analysis, the professor can discuss the student's writing style and attention to detail.¹⁵⁵ Writing style relates to the student's grammar and punctuation, word choice and usage, and sentence and paragraph structure. Attention to detail concerns the student's mastery of proper citation form, whether the paper contained typographical errors or other careless mistakes, and, lastly, the paper's overall formatting such as the typeface and font used, margin width, and inclusion of page numbers.

Practitioners and legal educators alike caution that "brilliant analysis ungrammatically written or poorly punctuated will carry less weight than the same analysis with no mistakes . . ."¹⁵⁶ Moreover, a document improperly formatted according to court rules or the supervising attorney's instructions may be rejected.¹⁵⁷ Thus, as part of the discussion about the paper's substance, the professor should mention any writing style problems or attention to detail errors—even if only briefly. If, for example, the professor notices the student consistently misusing semicolons in his or her paper, the professor can point out a problem sentence, ask the student why he or she punctuated the sentence in that manner, and take an opportunity to explain the relevant punctuation rule. When a student uses the wrong citation form for state cases, the professor can correct one citation and note the relevant rule from the manual. Experience has shown that students frequently cite to authorities based on their flawed memory of a rule rather than verifying the rule in the citation manual. Often, style and form are secondary considerations to students, but they are extremely important to the accuracy and effectiveness of a legal document.¹⁵⁸

3. Final Question-Answer Interchange as a Substance Review

Before concluding the discussion about the substance of the student's paper, the professor should engage the student in a brief question-answer session to ensure the student fully understands the

155. See Enquist, *supra* note 118, at 1156 (noting that a few professors who responded to the critiquing survey felt that they should only comment on writing problems that were clear cut errors, such as punctuation and grammar errors).

156. IAN GALLACHER, *A FORM AND STYLE MANUAL FOR LAWYERS* 3 (2005); see LYNN BAHRYCH, *LEGAL WRITING IN A NUTSHELL* 128 (4th ed. 2009).

157. GALLACHER, *supra* note 156.

158. See generally *id.*

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purpose and substance of particular sections of the paper.¹⁵⁹ As one author wrote about his law school experience: “I would ask very few follow-up questions [in conferences] for a number of reasons: I did not always fully understand what my professor was saying, I did not want my professor to realize I did not fully understand what he was saying.”¹⁶⁰ To lessen any such confusion and ensure that the student is on track with developing solid legal writing skills, the professor should engage the student in a short but meaningful review and interchange.¹⁶¹ This interaction should be non-intimidating, and the professor may provide the student with examples when they would be helpful or when the student still seems to be struggling.

For example, if the student’s paper was written persuasively rather than in the required objective tone, the professor could ask the student to explain the purpose of a predictive or objective memorandum. The student’s response will let the professor know how much the student fully understands the comments and the goals of the assignment. If the student had difficulty with analysis or making cogent and concise arguments, the professor could ask the student to explain the difference between rule-based reasoning and analogical reasoning and to give an example of both from his or her paper. The professor also could ask the student why practitioners use court cases to draw comparisons with their client’s factual situation. Again, the student’s response will let the professor know how well the student grasps the nature and purpose of arguments and how to craft an effective argument. The professor’s questions encourage the student to “rethink” the materials and develop a deeper understanding.¹⁶² The possibilities for the question-answer session are limitless, but defined by the prob-

159. This proposed exchange between professor and student may be a review of basic legal writing concepts with a short series of questions, or it may incorporate a more advanced and skilled form of questioning called the Socratic dialogue. See NEUMANN, *supra* note 1. Neumann extensively discusses the use of Socratic dialogue in student writing conferences. *Id.* at 206 (“[R]eal Socratic dialogues are valuable in a student conference, which is their true home in legal education.”). Neumann cautions that incorporating a true Socratic dialogue in a student conference is “probably the most difficult critiquing skill to master” and most likely should be used only after the professor feels confident about other critiquing skills. *Id.* at 190.

160. Broida, *supra* note 37, at 362-63.

161. See Wellford-Slocum, *supra* note 7, at 283 (recognizing that giving students the task of completing a self-edit with focused questions can help students assume the role of “critical self-editor” before the conference).

162. See Nancy Soonpaa, *Some Thoughts on Commenting*, 14 SECOND DRAFT: BULL. LEGAL WRITING INST., No. 1 (Legal Writing Inst., Macon, Ga.), Nov. 1999, at 9, available at <http://www.lwionline.org/publications/seconddraft1nov99.pdf> (advocating use of the questioning form of commentary to encourage students to rethink material).

lem areas reflected in the student's paper and highlighted by the conference discussion.¹⁶³

III. INDIVIDUALIZED WRITING TARGETS: SOME HOPE AND A PLAN FOR FUTURE ASSIGNMENTS

The post-grade writing conference prepares students for future writing assignments, while explaining how a past assignment was graded. But future class performance requires more than technical understanding. If a student has suffered disappointment due to a low grade, the conference can help diffuse anger and permit the student to perform well on future assignments.

A poor grade can derail students, causing them to disconnect from class and perform poorly on future assignments;¹⁶⁴ some students never quite recover.¹⁶⁵ By holding a conference and showing a path forward, professors strive to help their students “develop rewriting and self-diagnosis skills.”¹⁶⁶ Thus, as an integral part of the discussion, the professor and the student should work together to identify “curative goals for the rewrite or the next assignment.”¹⁶⁷ These goals may be memorialized as Writing Targets that detail how the student can improve both his or her writing processes and the substance of his or her next assignment.¹⁶⁸ The list of Writing Targets, discussed in detail below, can be identified by the professor based on the initial review of the paper, and then completed by the student and the professor during the final phase of the post-grade conference.¹⁶⁹ The student should be able to leave the writing conference “persuaded, motivated, and able to articulate the weaknesses and strengths shown in the critiqued work.”¹⁷⁰ By soliciting active student participation in the development of his or her Writing Targets, the professor secures the student's personal investment in the identified goals and “in-

163. *See id.* at 14 (advocating use of questioning form of commentary to encourage students to rethink material); *see also* Wellford-Slocum, *supra* note 7, at 329 (noting that student writing problems that reflect faulty legal analysis “merit extended didactic dialogue or Socratic inquiry as a means of helping students develop and clarify their thinking”).

164. Enquist, *supra* note 6, at 672.

165. *Id.*

166. NEUMANN, *supra* note 1, at 196.

167. *Id.* at 190.

168. Wellford-Slocum, *supra* note 7, at 346 (explaining that having the student summarize the important themes of the conference and goals following the conference “allows the professor to reinforce schemata that will be valuable to the student when engaging in other writing projects”).

169. *Id.* at 347.

170. *See* NEUMANN, *supra* note 1, at 198.

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creases the likelihood that the student will successfully meet his goals.”¹⁷¹

What should the student’s Writing Targets look like?¹⁷² This Article proposes that writing professors adopt a template that has separate sections for the student’s writing process goals and substance objectives. Under the heading of writing process, the Writing Targets would list the most important steps that the professor wants each student to take as part of the writing process. These can include initial case briefing and charting, brainstorming, outlining or otherwise organizing, drafting, and editing. Spaces for individualized notes of conference discussion should be next to each entry. Not every stage of the writing process can be analyzed—the practical constraints of class sizes and schedules do not permit such detail. But the most important points should be addressed with guidance as to how the student can tackle the steps on the next assignment. In addition, the chart should contain entries for practical concerns that affect the writing process—time management, focus, and technology points. If the student’s grade suffered due to procrastination, for example, the Writing Targets chart can contain pointers on how to tackle that issue going forward. The “Technology” section might contain a pledge to back up work and print after each hour of work. The Writing Targets chart is therefore partially prepared in advance and customized during the conference.

Under the section for substantive product, the Writing Targets chart would identify key points the professor wants each student to consider as the student prepares, reviews, and edits his or her next written piece. These topics include “Organization,” “Issue/Statement of Facts,” “Case Selection,” “Rule Synthesis,” “Use of Precedents,” “Argument Development,” and “Writing Style and Attention to Detail.” For each substantive category, there should be space for the professor to provide details about the agreed upon objectives. As mentioned, given time constraints, the professor will not be able to address every issue raised in his or her written critique or discussed in the conference, but should instead focus on the main areas of concern. Under “Case Selection,” the professor might remind the student to select and address helpful mandatory authority before discussing persuasive, non-binding authority. For “Argument Development,” the

171. Wellford-Slocum, *supra* note 7, at 347.

172. See Appendix to this Article for a sample Writing Targets document that may be used in post-grade student-faculty conferences.

professor could address the student's need to articulate clear inferences for arguments based on circumstantial evidence and include any helpful examples from the current paper. The professor also could provide references to relevant pages or chapters in the course reading materials. Moreover, as part of any entry, the professor should note the areas in which the student performed well and should duplicate on future assignments.¹⁷³ With these writing objectives, the student will have a clear basis for revising his or her work and well-defined criteria for evaluating his or her next paper.¹⁷⁴

Lastly, the Writing Targets chart should provide editing tasks the student can complete for any future assignments—a Deconstruction Outline and/or discrete revision assignments. For example, if the student's performance on the assignment was below par due to poor organization of the paper, the Writing Targets chart can provide suggestions on how to improve his or her writing structure going forward. The "Organization" section could include a commitment to outline the entire memorandum or brief once it is completed and compare his or her post-writing outline against the relevant course materials, notes, or sample documents. The "Use of Precedent" section could instruct the student to select and rewrite at least one of the rule proofs (or rule explanations) in the paper. Under "Writing Style and Attention to Detail," the professor could ask the student to identify the topic sentences for each paragraph in the finished paper or remind the student to run the word-processor's spelling and grammar check program and then manually proofread the paper. As with the writing process section, the professor can write his or her initial comments in the chart before the conference and further develop the guidance based on the conference discussion.

CONCLUSION

Although writing is an individual struggle, legal writing professors are the students' coaches in this endeavor.¹⁷⁵ To coach students effectively, professors can look for existing opportunities ripe for further

173. See SHAPO, WALTER & FAJANS, *supra* note 25, at 183 ("Praise not only helps students to understand your standards, but it also provides encouragement.")

174. See *id.* at 180 ("Establishing criteria for evaluating work is something that goes on in both class and conference.")

175. Broida, *supra* note 37, at 364.

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development, such as the post-grade conference.¹⁷⁶ The process and substance assessment discussed in this Article is not intended to substantially add to legal writing professors' workload—most legal writing professors already spend substantial time conferencing with students. Instead, these techniques can be used as needed to refocus and refine the post-grade conference by separately analyzing students' writing process and substance.

The professor wishing to use the post-grade conference as a process and substance assessment can adapt the following chronology to the professor's writing program and preferences:

1. Upon receiving a post-grade conference request, the professor explains that the conference includes a process and substance diagnostic, and asks the student to bring the pre-writing materials described above.
2. The professor briefly reviews the graded paper¹⁷⁷ and determines whether a pre-conference deconstruction outline or revision assignment with concept review would illuminate areas in the paper needing further development.
3. The professor selects, in advance, the highest priority issues to be discussed, bearing in mind the brevity of most student conferences.
4. As the conference begins, the professor discerns the most pressing student concerns—if grading is the most important issue, the professor places that issue on the agenda for discussion after process and substance.
5. The professor progresses through the writing process interview described above and determines as quickly as possible which aspects of the writing process caused problems and, thus, require further discussion.
6. After discussion of the writing process, the conference shifts to substance: professor and student examine and analyze

176. See BLACK, *supra* note 5, at 167 (“So far, conferencing practice seems to have escaped the net of ‘accountability’ that has caught up the rest of the academic world, and we continue with a practice that is cherished but unexamined.”).

177. Professors who do not generally retain copies of their graded papers may consider either asking the student to submit a copy of the graded paper in advance of the conference or conducting the conference in two stages—an initial diagnostic stage and a subsequent stage in which the student brings a deconstruction outline or revision assignment with concept review.

the paper's structure as described above, focusing on the one or two most problematic areas.

7. As the conference progresses, professor and student complete the Writing Targets document using brief, handwritten notes.

8. The student retains the Writing Targets document at the conference's conclusion.

“The goal, of course, is not to tell [students] what [*specific professors*] want them to write but, instead, to foster high-level and transferable thought about writing choices”¹⁷⁸ A separate process and substance assessment promotes this kind of thought and discussion and allows students to overcome past process and substance problems. Once captured in the Writing Targets document, this individualized assessment gives students a means to take on future writing assignments with greater confidence and success.

178. DeSanctis & Murray, *supra* note 21, at 38.

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APPENDIX

WRITING TARGETS

Category	Goals/Tasks for Next Assignment	Completed (v)
I. Writing Process		
Work Environment		
Time Management		
Pre-Writing Documents		
Draft Documents		
Editing Process		
Technology		

Howard Law Journal

Category	Goals/Tasks for Next Assignment	Completed (v)
II. Substantive Product		
Organization		
Issue/Statement of Facts		
Case Selection		
Rule Synthesis		
Use of Precedents		
Argument Development		
Writing Style & Attention to Detail		

Private Dispute Resolution and the Future of Institutional Workplace Discrimination

STEPHEN PLASS*

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INTRODUCTION

Scholars have expressed a great deal of frustration with the failure of employment discrimination laws to more fairly promote em-

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ployment opportunities.¹ This failure is due in part to judicial hostility toward worker-plaintiffs.² Strident expressions³ and neutral practices⁴ of the judiciary substantially contribute to an extraordinarily high loss rate for plaintiffs.⁵

An emphasis on confidential settlement of cases has also weakened antidiscrimination laws.⁶ When parties undergo private dispute resolution, they deprive the public of any record of the occurrence

1. See Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 887-905 (2008) (describing how employees suppress knowledge of discrimination and rarely report perceived discrimination and how Title VII fails to adequately protect employees from retaliation); Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 590, 603-04 n.76 (2000) (noting the belief that merit governs, that discrimination is aberrational, and that discrimination is overt bias denies workers protection from discrimination); Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 915 (1999) (asserting that a legal regime focused on intentional bias is unsuited to address biased conduct which is often unconscious); David A. Strauss, *The Law and Economics of Racial Discrimination in Employment: The Case for Numerical Standards*, 79 GEO. L.J. 1619, 1629 (1991) (arguing Title VII's focus on employer misconduct, rather than on incentives to hire minorities in representative numbers, is misplaced); Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 436 (1995) (stating Title VII is incapable of protecting black workers from the societal forces that limit their job opportunities).

2. See Theresa M. Beiner & Robert B. Chapman, *Take What You Can, Give Nothing Back: Judicial Estoppel, Employment Discrimination, Bankruptcy, and Piracy in the Courts*, 60 U. MIAMI L. REV. 1, 70-71 (2005) (noting that negative judicial attitudes produce high loss rates for employment discrimination plaintiffs); Lee Reeves, *Pragmatism Over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 MO. L. REV. 481, 508 (2008) (noting employment discrimination plaintiffs place heavy burdens on the judiciary given the substantial increase in filings and the tedious, time-consuming nature of their claims); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1152-55 (2008) (discussing the judicial intuition that employment discrimination is rare and that plaintiffs are hypersensitive or dishonest results in extraordinarily high loss rates for plaintiffs).

3. See *Edwards v. Interboro Inst.*, 840 F. Supp. 222, 231 (E.D.N.Y. 1994). The district court concluded the following:

[Title VII] unquestionably has served to deter, if not entirely eradicate, the pernicious practice of discrimination in employment decisions. It has, however, also unquestionably served to embolden disgruntled employees, who have been legitimately discharged because they were incompetent, insubordinate, or dishonest, to file suits alleging that they have been the victims of discrimination.

Id.; see also Jack A. Raisner & Wayne N. Outten, *Employment Discrimination in the Second Circuit District Courts 1993-94*, 14 QUINNIPIAC L. REV. 707, 724 (1994) (“As Judge Glasser takes up the plight of the defendant in *Edwards*, he shows just how antagonistic sitting federal judges are permitted to be towards the laws they are bound to interpret and uphold.”).

4. See Brake & Grossman, *supra* note 1, at 911 (revealing that judges are dismissive of plaintiffs' evidence and perceptions of discrimination unless tangible harm is shown); Robinson, *supra* note 2, at 1154 (noting the judicial perspective that discrimination is rare and that the majority of plaintiffs' claims lack merit).

5. See Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 429 (2004).

6. See Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 929-32 (2006) (stating confidential settlements have become the norm and detract from the remedial and deterrence functions of the law).

and prevent disclosure of settlement terms.⁷ Concealing this information impedes the deterrence function of the judicial process, which refines the law, educates the public, and shapes public opinion.⁸

To make matters worse, a jurisprudential shift in favor of arbitral resolution of employment discrimination disputes creates the prospect for greater secrecy and the further weakening of statutory protection.⁹ The arbitral forum is defined by its rules of confidentiality,¹⁰ and in the ambit of employment discrimination, denies the public access to information regarding the identity of employers who break the law and the legal consequences for such violations.¹¹ Moreover, the privacy of the arbitral forum stymies the development of the law in publicly accountable courts.¹²

This Article offers a broad perspective on the sources of judicial hostility and the increasing privatization of employment discrimination disputes. It shows that judicial hostility developed not only because of frivolous lawsuits but also because of employer compliance with the law and the subtlety and secrecy of discrimination itself.¹³ Additionally, this Article demonstrates that the ramifications of arbitral privatization have been grossly underestimated. Private dispute resolution is not merely a means to avoid frivolous lawsuits and large jury verdicts.¹⁴ Rather, it also fuels a discriminatory workplace culture. Secret resolutions impede the remedial and deterrence functions of the law and remove the incentive employers often need to embrace the philosophy of equal treatment that antidiscrimination law envi-

7. *See id.* at 929.

8. *See id.* at 970-71.

9. *See* Geraldine Szott Mohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 400 (1995) (describing how arbitration eliminates the deterrence benefits of public adjudication, which are imbued with state authority); *see also* Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration's Image*, 30 HARV. J.L. & PUB. POL'Y 579, 584 (2007) (noting that a public forum produces precedents and other advantages not available in arbitration).

10. *See* Mohr, *supra* note 9, at 402.

11. *See* Laurie Kratky Doré, *Public Courts Versus Private Justice: It's Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 484-88 (2006).

12. *See id.* at 491.

13. *See infra* text accompanying notes 108-48.

14. *See* Minna J. Kotkin, *Secrecy in Context: The Shadowy Life of Civil Rights Litigation*, 81 CHI.-KENT L. REV. 571, 577 (2006) (“[A]rbitration eliminates the one characteristic of employment litigation that strikes fear in the hearts of employers: the possibility of a jury trial.”); Theodore J. St. Antoine, *Gilmer in the Collective Bargaining Context*, 16 OHIO ST. J. ON DISP. RESOL. 491, 509-10 (2001) (“Making arbitration the exclusive forum for all discrimination claims would relieve the employer of the threat of the six-or-seven-figure award that is much likelier to come from a jury than an arbitrator.”).

sions.¹⁵ Equal employment laws succeed by compensating victims and deterring violators, thereby persuading employers that it serves their business interests to treat all workers fairly.

As an initial matter, this Article describes how the culture of workplace discrimination was originally forged. The culture's origin is traced to the exploitation of black labor during slavery. Slave codes played a major role in oppressing black workers by publicly institutionalizing a system of unfair pay and racially oppressive workplace conditions. In the post-slavery era, the culture of workplace discrimination remained prevalent. In stereotyping black labor as inferior, the culture survived and, in turn, justified the low salaries and the exclusion of blacks from certain desirable job opportunities.¹⁶

Despite constitutional and statutory declarations of equality, Court rulings that upheld workplace discrimination as a permissible practice reinforced the discriminatory culture.¹⁷ This perpetuated an employment landscape in which race and color were proxies for the jobs one could hold and the pay one could receive. As race-based employment decision-making gained approval, workplace abuses became ubiquitous and unremarkable, and society grew immune to the exploitation of black workers.¹⁸

15. See *infra* text accompanying notes 178-96.

16. ROBERT SAMUEL SMITH, RACE, LABOR & CIVIL RIGHTS 8-10 (La. State Univ. Press 2008). White managers and white employees teamed with racialized public policy, state codes, and unions to create "racially biased employment structures to preserve their elevated economic status and to minimize the economic opportunities of black workers." *Id.* at 10. This forced blacks into unskilled positions, such as "domestics, waiters and waitresses, bellhops, janitors, caddies, delivery boys, washerwomen, and so on." *Id.* at 9. In the industrial sector, black workers performed "the toughest and dirtiest jobs in coal mines, iron and steel factories, foundries, tobacco processing plants, and fertilizer plants." *Id.*

17. See *infra* notes 56-62 and accompanying text.

18. GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 207-09 (Harper Brothers Publ'g 1944) (stating racism and racial exploitation is a cultural and institutional tradition of whites); see also 110 CONG. REC. 6554 (1964). Twenty years after Myrdal released his findings, Congressional testimony relating to the 1964 Civil Rights Act confirmed that the culture of discrimination remained widespread and was producing devastating consequences for blacks. Congressman Kuchel declared:

188 years after our country's independence, and in the time of the Congress which began in the centennial year of the Emancipation Proclamation . . . some of our fellow Americans are not yet able to participate fully in our way of life solely because of discrimination based on their race. Such discrimination is not limited to one section of our land. It can and does occur in all parts of our country to a greater or lesser degree. . . . Discrimination has been demonstrated and documented in a long and sordid series of illegal and unconstitutional denial of equal treatment under law in almost every activity of many of our fellow men.

110 CONG. REC. 6554.

Employers, unions, and society in general came to accept the assignment of hard and dirty work and low compensation to blacks.¹⁹ Further, the reservation of semi-skilled, skilled, and professional jobs for whites became a workplace norm despite its harsh consequences for blacks.²⁰ Undoing this centuries-old cultural norm became the challenge for legislators in 1964 when the effects of employment discrimination could no longer be ignored.

The second part of this Article reveals that public disapproval of employment discrimination was essential to its prohibition. Civil protests,²¹ testimony before Congress,²² and executive condemnation²³ created a national awareness that workplace discrimination should be shunned. This publicity provided the foundation for a national policy geared toward eradicating employment discrimination. However, despite the gravity of this issue, Congress' agenda in 1964 was narrow and conservative.²⁴

Although Congress was concerned about the economic impact of employment discrimination on blacks, it did not fashion a zero tolerance response to the culture. In enacting Title VII, Congress settled

19. MYRDAL, *supra* note 18, at 195, 206-07 (concluding that blacks faced discrimination in employment by employers, unions, and white workers and, as a result, were relegated to low-skilled, low-paying maintenance jobs such as being janitors and floor sweepers).

20. *Id.* at 380-83 (discussing how race discrimination in the North and South barred blacks from certain occupations and accepted them only in unskilled or semiskilled positions in others); *see also* 110 CONG. REC. 6562 (1964). In discussing Title VII on March 30, 1964, Senator Kuchel asserted:

At the most, the outlook for many has been dismal as they attempt to secure unskilled jobs in an economy which has a little less room for the unskilled as each day passes. . . . What jobs they can secure are usually interwoven with periods of unemployment. Negro citizens have consistently fallen behind white citizens in terms of employment.

110 CONG. REC. 6562.

21. *See* MICHAEL I. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* 9-10 (Twentieth Century Fund 1966).

22. *See* 110 CONG. REC. 7204 (1964). Senator Clark asserted:

Since 1944, Congress—both Houses included—has taken more than 5,000 printed pages of testimony and statements on fair employment practices legislation; 481 witnesses have been heard; 85 days of hearings have been held. . . . So it cannot be said that Congress has not had an opportunity over the past 20 years to inform itself fully of the need and desirability of legislation dealing with fair employment practices.

Id.

23. *See* Radio and Television Report to the American People on Civil Rights, 1 PUB. PAPERS 468 (June 11, 1963). President Kennedy noted, "The Negro baby born in America today . . . has about . . . one-third as much chance of becoming a professional man, twice as much chance of becoming unemployed, [and] about one-seventh as much chance of earning \$10,000 a year . . ." *Id.* at 468-69.

24. *See* 110 CONG. REC. 6563 (1964) ("Title VII might justly be described as a modest step forward."); *see also* PAUL BURSTEIN, *DISCRIMINATION, JOBS, AND POLITICS: THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY IN THE UNITED STATES SINCE THE NEW DEAL* 128 (Univ. Chicago Press 1998) (stating Title VII was conservative and was a delayed piece of New Deal legislation).

on a general aspirational prescription, the precise meaning of which was left for judicial determination.²⁵ This flaw has haunted the statute because discrimination is a dynamic phenomenon capable of camouflaging itself as innocent behavior.²⁶ When statutory prescriptions deterred overt discrimination, judges deemed the culture in decline. When covert discrimination was prohibited through statutory interpretation, judges considered the culture contained. With this perspective, judges grew increasingly dubious about employees' allegations of discrimination. The filing of frivolous claims exacerbated their view of the situation.

The third part of this Article addresses the implications of private contractual resolutions of employment discrimination claims. It accounts for the harmful effects of private confidential settlements and discusses the likely effects of Supreme Court jurisprudence that further privatizes these disputes.²⁷ Privatization stifles the development of the law and deprives the public of useful information about discrimination. It also serves to protect employers' economic interests and allows employers to ignore discrimination.²⁸ Public monitoring and condemnation of discrimination are critical factors that spur employers to make company-wide reforms essential to combating discrimination.²⁹ Public monitoring and diversity plans, which are often the product of negative publicity, attack institutional discrimination at its roots by influencing change in company cultures that foster discriminatory practices. Without publicity, discrimination thrives underground and could regain its pre-1964 institutional acceptability.

I. CREATING A CULTURE OF DISCRIMINATION

A. Creating a Culture of Workplace Bias: Slave Codes

Employment discrimination laws should not be regarded narrowly as legal prescriptions prohibiting discrimination. Rather, they should be viewed more broadly as inclusive of laws that mandated

25. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2006) (prohibiting discrimination in employment "because of an individual's race, color, religion, sex, or national origin"). The Supreme Court interpreted Title VII as placing the burden of persuasion on the plaintiff employee to show that the defendant employer engaged in intentional discrimination. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

26. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (stating practices fair in form but discriminatory in effect are also prohibited by Title VII).

27. *See infra* text accompanying notes 149-86.

28. *See infra* text accompanying notes 193-203.

29. *See infra* text accompanying notes 187-217.

discrimination. Before considering legal initiatives enacted from 1964 to the present, focus should be placed on slave codes, which provided the foundation for boundless exploitation of human labor. Slave codes mandated that blacks must be the property of their owners based on their race. This meant that blacks could not freely dispose of their labor and were required to work without pay for their entire lives.³⁰ For example, Article 35 of the Louisiana Civil Code provided that “[a] slave is one who is in the power of his master, to whom he belongs. The master may sell him, dispose of his person, his industry and his labor, he can do nothing, possess nothing, nor acquire any thing but what must belong to his master.”³¹ Slave codes endowed masters with property rights in slaves and with rights to the profits of slave labor and allowed masters to rigorously control the activities of black entrepreneurs and blacks who were self-employed. For example, “[n]o slave [could] possess any thing in his own right or dispose of the produce of his own industry, without the consent of his master.”³² The law effectively denied slaves legal rights to the fruits of their labor.

The absolute authority of a slave owner permitted the owner to set, with few limitations, the rules of the workplace. Masters could legally set hours and impose terms and conditions of employment that were generally inapplicable to white workers or even to prisoners sentenced to hard labor.³³ And this they did. Work days extending sixteen hours or more and the use of corporal punishment for serious or

30. This command extended to the children of slaves. See THE SLAVERY CODE OF THE DISTRICT OF COLUMBIA 19 (Washington L. Towers & Co., Printers 1862). Section 54 provided, “All negroes and other slaves already imported or hereafter to be imported into this province, and all children now born or hereafter to be born of such negroes and slaves, shall be slaves during their natural lives.” *Id.*

31. *Extracts from the American Slave Code, in THE MAKING OF MODERN LAW: LEGAL TREATISES, 1800–1926*, at 1 (2004) [hereinafter THE MAKING OF MODERN LAW].

32. *Id.* (quoting E15). Section 38 stated, “No slave may buy, sell or exchange any kind of goods, or hold any boat, or bring up for his own use any horses or cattle, under a penalty of forfeiting the whole.” *Id.* The slave code of the District of Columbia inflicted harsh financial penalties on owners who permitted their slaves to work for their own benefit. See THE SLAVERY CODE OF THE DISTRICT OF COLUMBIA, *supra* note 30, at 25. Section 78 stated:

Any master or owner of any negro or other slaves that shall suffer any such slaves to them belonging to keep any horses or mares, or to raise any cattle or hogs, as the proper right of such slaves, the master or owner of such slaves shall forfeit and pay five hundred pounds of tobacco, to be recovered and applied as aforesaid, and also all such horses and mares, cattle and hogs, shall likewise be forfeited, one-half to the informer, the other half to be applied as aforesaid.

Id.

33. See THE MAKING OF MODERN LAW, *supra* note 31, at 3 (“[I]n several of the slave states, the time of work for *criminals* whose *punishment* is hard labour, is eight hours a day, for three months, nine hours for two months, and ten for the rest of the year.”).

minor infractions were common. Abuses of discretion in controlling black workers and setting workplace rules prompted the legislators of South Carolina to act. The resulting preamble of the legislation stated:

“[M]any owners of slaves and others that have the management of them do confine them *so closely to hard labour* that they have *not sufficient time for natural rest*,” and enacts that no slave shall be compelled to labour more than *fifteen* hours in the twenty-four, from March 25th to September 25th, or *fourteen* in the twenty-four for the rest of the year.³⁴

With respect to work-related disciplinary measures, slave codes gave masters wide discretion to punish by word and deed. A master could use words of any type, no matter how hurtful, and could physically punish or “correct” a slave with few restraints.³⁵ The South Carolina slave code provided that “[f]or beating with a *horse whip*, cow-skin, switch or small stick, or putting irons on, or imprisoning a slave, *no penalty or prohibition*.”³⁶ For “cruelly scalding or burning a slave, cutting out his tongue, putting out his eye, or depriving him of any limb, a fine of £100.”³⁷ Accordingly, a culture of verbal and physical abuse developed with the law’s express approval.

B. Stereotyping Labor by Race

The exploitation of slave labor and the unconstrained use of severe disciplinary measures were permissible for centuries and established a social and cultural reality, which still haunts the workplace. Because slave codes legitimized workplace discrimination against blacks, it was extremely difficult for employers generally, and former masters in particular, to accept new legal rules for the workplace after the abolition of slavery.³⁸

34. *Id.* at 2-3 (internal quotations omitted).

35. *See id.* at 1. Section 18 of the Louisiana slave code provided, “A slave’s subordination to his master is susceptible of no restriction, (except in what incites to crime,) and he owes to him and all his family, respect without bounds, and absolute obedience.” *Id.*

36. *Id.* at 3.

37. *Id.*

38. This codified inferiority is similar to other caste systems that are extremely difficult to eradicate. *See* MARGARET L. ANDERSEN & HOWARD F. TAYLOR, *SOCIOLOGY: UNDERSTANDING A DIVERSE SOCIETY* 213-14 (4th ed. 2005) (discussing the caste system in South Africa); Ali Khan, *The Dignity of Labor*, 32 *COLUM. HUM. RTS. L. REV.* 289, 319 (2001) (comparing old-English caste system with the caste system of India); Smita Narula, *Equal by Law, Unequal by Caste: The “Untouchable” Condition in Critical Race Perspective*, 26 *WIS. INT’L L.J.* 255 (2008) (describing the caste system in India).

Planters argued that a system of free labor would never work and that “the negroes were idle and worthless, and showed no disposition to work, and were wandering about the country utterly demoralized, and were plundering and stealing indiscriminately from the citizens.”³⁹ Planter-employers and state legislators viewed the emancipation of blacks and the accompanying freedom to work for compensation as an improper governmental intrusion into their private affairs.⁴⁰ Hence planter-employers balked at paying blacks wages and resisted regulations that required them to pay below subsistence wages.⁴¹ They also pursued a contractual right to discipline with physical force.⁴² When Freedmen Bureau officials tried to impress upon farmers that “bodily coercion fell as an incident of slavery,” some farmers agreed, but “others growl[ed] and wish[ed] to be allowed to enforce their contracts, the simple English of which is to ‘*whip the nigger.*’”⁴³ One Bureau official noted that, in parts of Texas, blacks “[had] received thus far for their work, as a class, curses, blows, poor clothing, and poorer food.”⁴⁴ Planters fiercely complained that blacks were “lazy and insolent” and maintained that nothing would improve unless they could “resort to the overseer, whip, and hounds.”⁴⁵ The law permitted these practices and helped to strengthen the culture of attributing marginal value to black labor and treating black workers cruelly.

Centuries of legally sanctioned discriminatory practices against black workers instilled the belief that blacks were best suited for the most undesirable work.⁴⁶ Even those who were the caretakers of free blacks shared this view. One Bureau official reported:

39. REPORT OF THE ASS'T COMM'RS OF THE BUREAU OF REFUGEES, FREEDMEN, & ABANDONED LANDS, S. EXEC. DOC. NO. 27, at 83 (1866).

40. *See id.* at 86-87. Planters and legislators alike sought to circumvent federal efforts at ensuring that free blacks were paid for their labor. *Id.* In order to obstruct the Freedmen Bureau's efforts to resolve labor or pay disputes, the Georgia legislature passed a law giving blacks the right to testify in their own cases. *Id.* This measure was intended to move all civil disputes into local courts and oust the Bureau of its jurisdiction. *Id.*

41. *See id.* at 84-85. One Bureau official noted:

[Blacks] have universally been treated with bad faith, and few have received any compensation for work performed up to the close of the year 1865. I cannot blame them for hesitating about making contracts which were to bind them for a year, and with no guarantee that they were to be treated better than when they were slaves.

Id.

42. *See id.* at 28.

43. *Id.*

44. *Id.* at 84-85.

45. *Id.* at 83.

46. *See id.* at 80 (“Most of the planters believe that the negro is constitutionally adapted to the raising of southern products—sugar and cotton . . .”).

Free labor will succeed, and will be the social, financial, and political redemption of the south. The free negro, unlike the North American Indian, is agricultural in his propensities. He is a tiller of the soil, and hence cannot become extinct. His status as an industrial being is a decree of God, and hence irrevocable.⁴⁷

Slavery also created and fostered the belief that black labor was worthy of little remuneration⁴⁸ and that black workers could be treated poorly or punished harshly.⁴⁹ Some planters refused to hire blacks and switched to white workers when confronted with the requirement of pay,⁵⁰ while others were willing to buy black labor but only on the condition that they were given “absolute control over the freedmen as though he were his slave.”⁵¹ Because most blacks lived in the proslavery South post emancipation, they had few employment options and were generally agreeable to any paying job.⁵² Formerly enslaved blacks were a vulnerable group of workers, who lacked the liberty to freely dispose of their labor.⁵³ Aware of these conditions, many employers abused black workers.⁵⁴

Many Southern employers resented the elimination of their absolute freedom to discipline and dispose of black labor, so they sought to obtain labor at the lowest rates possible. In many instances, black workers worked under oppressive conditions. Antidiscrimination laws, such as the Emancipation Proclamation⁵⁵ and constitutional amendments abolishing slavery,⁵⁶ that gave blacks equal rights as whites⁵⁷ did not protect black workers against workplace discrimination. Although race-based atrocities were pervasive both in and out of the workplace, Congress drafted the Thirteenth Amendment very narrowly by failing to prohibit racial discrimination which was a precept of slavery and involuntary servitude. Thereafter, the Supreme

47. REPORT OF THE ASS'T COMM'RS OF THE BUREAU OF REFUGEES, FREEDMEN, & ABANDONED LANDS, S. EXEC. DOC. NO. 6, at 157 (1861).

48. *See id.* at 70. Planters often concocted frivolous reasons to discharge black workers, and some conspired to keep down the price of black labor. *Id.* at 50.

49. *See id.* at 113.

50. *See id.*

51. *Id.*

52. *See* MYRDAL, *supra* note 18, at 182-93 (stating that blacks did not begin the great migration North until 1915 and that there were few opportunities for blacks North or South).

53. *See id.* at 223 (noting that the South reverted to a slave-like employment structure when they realized that the North would not insist on equal treatment for blacks).

54. *See id.* at 191-93.

55. Proclamation No. 17 of 1863, *reprinted in* 12 Stat. 1268 (1863).

56. *See* U.S. CONST. amend. XIII. “Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.” *Id.* § 1.

57. *See* U.S. CONST. amend. XIV.

Court limited the scope of the Thirteenth Amendment by ruling that it prohibited only conduct that actually enslaved blacks or literally committed them to involuntary servitude.⁵⁸

C. Formalizing a Culture of Workplace Discrimination

Instead of focusing on the culture of labor exploitation that evolved due to slavery and segregation, the Court constructed a fictional world in which Congress passed the Thirteenth Amendment to protect the Chinese, Italians, and Anglo-Saxons from racial abuse.⁵⁹ The Court stated that Congress had emancipated blacks and protected them solely against forced labor, had made them citizens, and had released them into the world to navigate the vagaries of the workplace like all others.⁶⁰ This meant that the Thirteenth Amendment could not protect blacks from unfair employment terms and other workplace indignities.

Congress also failed to specifically confront the institution of workplace exploitation in the Fourteenth Amendment. Although blacks were made citizens and granted equal protection of the laws, Congress directed its proscriptions to state discriminators, leaving the private sector free reign to do as it pleased. This facilitated the Court's interpretation of the Fourteenth Amendment as permitting employment discrimination in the private sector.⁶¹ In addition to limiting the Amendment's prohibitions to the states, the Court also required complaining blacks to prove the elusive element of discriminatory intent as a precursor to establishing a violation of their

58. *See Hodges v. United States*, 203 U.S. 1 (1906). In this case, black workers alleged that their contractual freedoms were violated by a group of whites who used threats and violence to compel them to desist from performing their jobs. *See generally id.* They relied on the Thirteenth Amendment and laws passed in pursuance thereof as prohibiting such conduct, but the Court rejected their argument, finding no Congressional intent to protect black workers from such private abuses. *Id.* at 16-18. This narrow interpretation survived until the 1964 Civil Rights Act was passed. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438-39 (1968) (asserting the Thirteenth Amendment not only outlawed slavery and involuntary servitude but also the vestiges and incidents of slavery, that is, the right to free enjoyment without discrimination of all rights enjoyed by white citizens).

59. *See Hodges*, 203 U.S. at 17.

60. *See id.* at 19-20. The Court noted that Congress opted to give black citizens rights equal to white citizens through constitutional amendments instead of making blacks wards of the government like Indian tribes. *Id.* Therefore, blacks were expected to venture into the workforce and take their chances at gaining fruitful employment alongside their white counterparts. *See id.*

61. *See United States v. Cruikshank*, 92 U.S. 542, 543 (1875).

rights.⁶² This approach essentially gutted the existing laws' ability to address workplace bias.

As a result, most employers in the North and South freely operated their private businesses in environments that negatively stereotyped black character and severely marginalized the work and undermined the compensation of black laborers. Occupations such as laborers, floor sweepers, servants, porters, janitors, and other low-paying jobs were the only kinds of employment generally made available to black workers.⁶³ This was rationalized, in part, by stereotyping the black worker as unintelligent, unskilled, lazy, inefficient, and unreliable.⁶⁴ Employers operated in a society in which workers were not troubled by all-white workplaces or the absence of blacks from skilled, semi-skilled, and professional jobs.⁶⁵ Moreover, employers faced a culture of white employees' resistance to blacks' presence in desirable jobs.⁶⁶

As blacks migrated North to escape the oppression of the Southern workplace, they often found more job opportunities. Although work opportunities increased, the quality and desirability of those assignments did not correlate.⁶⁷ Because no law operated to control the institutional practices of exploitation, black workers advanced little in boom times and suffered terribly when there was a bust.⁶⁸ Millions of jobs created by industrialization and two world wars fell prey to the culture of racial exploitation.⁶⁹ With no law curbing their behavior, employers preferred European immigrants over native black work-

62. DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 171 (2d ed. 1989).

63. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317, 372 (1987) (explaining blacks have been assigned menial jobs such as being servants, porters, janitors, and maids for so long that whites regard such race-based assignments as culturally acceptable).

64. See Anthony R. Chase, *Race, Culture, and Contract Law: From the Cottonfield to the Courtroom*, 28 *CONN. L. REV.* 1, 44 (1995).

65. See William E. Forbath, *Civil Rights and Economic Citizenship: Notes on the Past and Future of the Civil Rights and Labor Movements*, 2 *U. PA. J. LAB. & EMP. L.* 697, 711 (2000).

66. See James W. Fox, Jr., *Intimations of Citizenship: Repressions and Expressions of Equal Citizenship in the Era of Jim Crow*, 50 *HOW. L.J.* 113, 173-74 (2006) (observing that even whites who in principle wanted blacks to do better reacted violently when blacks succeeded).

67. See Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship*, 55 *UCLA L. REV.* 1161, 1205 (2008) (noting that during the Jim Crow era, work and pay was racialized with whites at the top and blacks at the bottom rungs of the economic ladder).

68. See John Valery White, *The Turner Thesis, Black Migration, and the (Misapplied) Immigrant Explanation of Black Inequality*, 5 *NEV. L.J.* 6, 35 (2004).

69. See David L. Rose, *Twenty-Five Years Later: Where Do We Stand on Equal Employment Opportunity Law Enforcement?*, 42 *VAND. L. REV.* 1121, 1126 (1989) (providing examples of racial stratification of jobs in the trucking, paper, and steel industries).

ers.⁷⁰ When technological advances or other changes caused mechanization, employers, with the cooperation of unions, sometimes refused to award such easier and better-paying jobs to blacks.⁷¹

Usually, only at times when white workers were unavailable or disinterested did black workers gain exposure to closed opportunities. For example, labor scarcity created by war, limits on immigration, or strikes were rare moments when employers recruited black labor.⁷² But as soon as the emergency ended, employers discarded black workers for whites, much as the North did as it reconciled with the South following the Civil War.⁷³

The culture of exploitation not only dominated the behavior of private employers but also unions. Unions' efforts to protect exploited workers during the Reconstruction period and throughout the first half of the twentieth century consciously excluded blacks.⁷⁴ In 1935, the National Labor Relations Act⁷⁵ armed unions with tremendous power to control the labor market by making them the exclusive representative when chosen by a majority of workers.⁷⁶ Unions used this power to refine their practices of racial exploitation by excluding blacks from membership and negotiating labor contracts that required

70. AUDREY SMEDLEY, *RACE IN NORTH AMERICA: ORIGIN AND EVOLUTION OF A WORLDVIEW* 276-77 (2d ed. 1999).

71. See David E. Bernstein, *Roots of the "Underclass": The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 133 (1993).

72. See Berta Esperanza Hernandez-Truyol & Shelbi D. Day, *Property, Wealth, Inequality, and Human Rights: A Formula for Reform*, 34 IND. L. REV. 1213, 1219 (2001).

73. See Taunya Lovell Banks, *Exploring White Resistance to Racial Reconciliation in the United States*, 55 RUTGERS L. REV. 903, 926 (2003); Norman Redlich, "Out, Damned Spot; Out, I Say": *The Persistence of Race in American Law*, 25 VT. L. REV. 475, 485-86 (2001) (explaining that after the Civil War, the North was eager to protect the dignity of a vanquished South with its myth of Southern culture and states' rights); see also REPORT OF THE ASS'T COMM'RS OF THE BUREAU OF REFUGEES, FREEDMEN, & ABANDONED LANDS, S. EXEC. DOC. NO. 27, at 140-41 (1866) (noting that soon after the Civil War, Northern protectors of blacks informed blacks that their lands would be transferred back to white owners, who were quickly and easily being pardoned for their war crimes).

74. See HERBERT HILL, *BLACK LABOR AND THE AMERICAN LEGAL SYSTEM: RACE, WORK, AND THE LAW* 104-06 (1985) (discussing how Congress and the executive branch settled on labor legislation in 1935 that consciously excluded a provision to protect blacks from racially discriminatory union practices); see also Bernstein, *supra* note 71, at 95-96 (discussing how pro-union legislative initiatives during the *Lochner* era harmed black workers); Madelyn C. Squire, *The National Labor Relations Act and Unions' Invidious Discrimination—A Case Review of a Would Be Constitutional Issue*, 30 HOW. L.J. 783, 783-84 (1987) (discussing the unions' use of labor contracts to exclude and deny blacks employment opportunities); White, *supra* note 68, at 35-36 (discussing how unions excluded blacks from shipyard jobs using closed-shop contracts).

75. 29 U.S.C. §§ 151-69 (2006).

76. 29 U.S.C. § 9(a).

membership as a condition of employment.⁷⁷ Collective bargaining contracts also placed quotas on opportunities for blacks, robbed black workers of desirable jobs that were transferred to or reserved for white employees, and forced blacks to accept more arduous work with less pay.⁷⁸ Exploitation of black workers seemed so natural a right that some unions felt it was constitutional.⁷⁹ Unions abused their newfound powers with the cooperation and assistance of employers, thereby expanding and perpetuating black worker exploitation.⁸⁰ Some unions simply acquiesced to the discriminatory practice of transferring black workers' jobs to white workers, which caused the discharge or demotion of black employees.⁸¹

Congressional inaction from the Reconstruction years to 1964 compounded the problem.⁸² Retiring South Carolina Senator Fritz Hollings partly explained this inaction as part of a sweetheart deal between the Democrats and the South.⁸³ He described the deal as follows: “[w]e’ll go along with all your programs, if you’ll go along with our segregation.”⁸⁴ The deal unraveled once the Civil Rights Act

77. See 61 Stat. 136 (1947) (revealing that closed-shop practices were not abolished until 1947 when the National Labor Relations Act was amended).

78. See *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 194-97 (1944) (revealing that a union empowered by law to represent all locomotive firemen excluded black firemen from membership and used its powers as exclusive representative to make collective bargaining contracts, which robbed or excluded blacks from firemen and engineer jobs and reserved those jobs for white employees).

79. See *Ry. Mail Ass’n v. Corsi*, 326 U.S. 88, 93 (1945) (explaining a union’s argument that it had Fourteenth Amendment, property, and liberty of contract rights to exclude blacks from membership, which state law requiring equal membership violated); see also *Lincoln Fed. Labor Union No. 19129 v. Nw. Iron & Metal Co.*, 335 U.S. 525, 530-31 (1949).

80. See *Bhd. of R.R. Trainmen v. Howard*, 343 U.S. 768, 770-71 (1952) (describing how a whites-only union used its power as bargaining representative to eliminate the train porter position occupied by black workers, to reclassify porter jobs as that of brakemen, to prohibit porters from doing brakemen duties, and to reserve brakemen jobs for whites).

81. See *Conley v. Gibson*, 355 U.S. 41, 43 (1957) (stating that the company used pretext of abolishing forty-five jobs held by black workers to create openings and give these positions to whites, with no complaints from the union); see also Harry Hutchison, *Toward a Critical Race Reformist Conception of Minimum Wage Regimes: Exploding Power of Myth, Fantasy, and Hierarchy*, 34 HARV. J. ON LEGIS. 93, 120-21 (1997) (commenting on the institutional nature of union racism).

82. Congress did not revisit the issue of the denial of black civil rights until the late 1950s. Even then, the focus was not on workplace discrimination but rather on voting discrimination. The net result was two modest and ineffective measures, the Civil Rights Act of 1957, 71 Stat. 634 (1957) (current version at 42 U.S.C. § 1971 (2006)), and the Civil Rights Act of 1960, 74 Stat. 86 (1960) (current version at 42 U.S.C. § 1971 (2006)).

83. See Rebecca Leung, *Parting Shots from Fritz Hollings*, 60 MINUTES (Dec. 12, 2004), <http://www.cbsnews.com/stories/2004/12/10/60minutes/main660368.shtml>.

84. *Id.* (internal quotations omitted) (explaining that by signing the Civil Rights Act of 1964, President Lyndon B. Johnson’s status changed from friend to enemy of the South).

of 1964 was passed.⁸⁵ And so from the time of Reconstruction until the passage of the 1964 Civil Rights Act, the culture of race discrimination was essentially unchecked and thereby became fully entrenched.

II. REVERSING THE CULTURE OF DISCRIMINATION

Despite a judicial perception that discrimination is aberrational, 93,277 private sector discrimination charges were filed with the Equal Employment Opportunity Commission (“EEOC”) in 2009.⁸⁶ If one credits studies that demonstrate that discrimination victims dramatically under-perceive and under-report employment discrimination, then the real universe of employment discrimination is much more expansive than the EEOC filings suggest.⁸⁷

This reality contrasts sharply with a judicial perception that statutory prescriptions deterred or virtually eliminated workplace discrimination.⁸⁸ Recent Supreme Court decisions approving the contracting away of the judicial forum in discrimination cases⁸⁹ now create the prospect that the disconnect between judicial perception and reality will widen. By approving arbitration as an effective forum for resolving discrimination claims, the Court is expanding employers’ ability to keep discriminatory practices secret. Because most employment discrimination claims end in private undisclosed settlements, and arbitration allows the parties to avoid the courts, judges will see a declining number of discrimination complaints. This will further perpetuate the judicial perception that discrimination seldom occurs and will likely lead to greater judicial hostility towards plaintiffs.

85. *Id.*

86. *See* 220 BNA DAILY LAB. REP. A-7 (2009) (reporting that the 2009 charge count was the second highest in twenty years).

87. *See* Brake & Grossman, *supra* note 1, at 862-63, 887-89 (stating that when discrimination is subtle and protection against retaliation is absent, employees’ failure to perceive and hesitancy to report discrimination is common).

88. *See* Clermont & Schwab, *supra* note 5, at 441 (noting that employment discrimination plaintiffs fare substantially worse in bench trials than in jury trials); Robinson, *supra* note 2, at 1152-55 (reporting that employment discrimination plaintiffs fail at an alarming rate from pre-trial adjudication through appellate review and referring to studies showing that judicial hostility to plaintiffs with employment discrimination claims greatly exceeds that directed to litigants asserting other causes of action).

89. *See* 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1465-66, 1474 (2009); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

Scholarship has focused on proving the existence of judicial hostility and offering ideas about its causes.⁹⁰ The popular consensus is that judges dislike discrimination plaintiffs because they believe that most allegations are meritless.⁹¹ One key explanation offered for judicial hostility is that judges see too few cases because most disputes end in private settlements.⁹² This invisibility of discriminatory workplace practices leads the judiciary to believe that discrimination has been eradicated.⁹³ But private litigation settlements tell only part of the story. Other developments have negatively influenced judges. More importantly, the bench, the bar, Congress, and academia have greatly underestimated the fallout of the growing privatization of employment discrimination disputes.

A. Condemning the Culture of Workplace Bias

Prior to 1964, the culture of employment discrimination was tolerated even when publicly displayed. Employers openly refused to hire blacks or to pay blacks wages equal to those of whites for similar labor.⁹⁴ These patently discriminatory employment practices were brought to the nation's attention through protests and Congressional hearings.⁹⁵

The fair employment practice movement gained traction from publicity campaigns aimed at shaming the nation into action. In the 1940s, A. Philip Randolph, leader of the Pullman Porters' Union,

90. See, e.g., Beiner & Chapman, *supra* note 2, at 71-72; Raisner & Outten, *supra* note 3, at 724; Robinson, *supra* note 2, at 1152-55.

91. See Robinson, *supra* note 2, at 1154.

92. See generally Kotkin, *supra* note 6, at 929-32, 962-65 (addressing the secrecy problem and noting that studies that revealed that employees usually do not succeed in court might be regarded as proof that most claims are frivolous as opposed to evidence of judicial bias).

93. See *id.* at 927, 930-31.

94. See, e.g., *Alston v. Sch. Bd. of Norfolk*, 112 F.2d 992, 994 (4th Cir. 1940) (explaining that an employer established and maintained a salary schedule that paid black teachers much less than white teachers even though black teachers had the same qualifications and experience and performed the same duties as white instructors); see also BURSTEIN, *supra* note 24, at 1 (noting that through the 1960s employers seeking employees for white-collar jobs specified that they desired individuals with Nordic or Protestant backgrounds).

95. See, e.g., BURSTEIN, *supra* note 24, at 1 (describing how employers expressly excluded blacks from white-collar jobs); Davison M. Douglas, *Contract Rights and Civil Rights*, 100 MICH. L. REV. 1541, 1547-48, 1551 (2002) (noting that white workers openly refused to work alongside blacks and pressured employers to not hire or promote black workers and that unions publicly displayed their disdain for black workers, expressing their taste for discrimination in constitutions that excluded blacks from membership and negotiating collective bargaining agreements that harmed blacks); see also *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 196 (1944); Steven H. Kropp, *Deconstructing Racism in American Society—The Role Labor Law Might Have Played (but did not) in Ending Race Discrimination: A Partial Explanation and Historical Commentary*, 23 BERKELEY J. EMP. & LAB. L. 369, 380 (2002).

threatened to march 100,000 blacks into Washington⁹⁶ to protest discriminatory workplace treatment.⁹⁷ Racially abusive workplace practices that were previously tolerated “became psychologically and economically intolerable in a period distinguished by mass job openings and appeals to democratic ideals”⁹⁸ In order to avoid the march, President Franklin D. Roosevelt struck a deal with black leaders to prohibit discrimination in the Defense Department by an executive order.⁹⁹ Although Roosevelt’s executive initiative turned out to be weak and ineffective, the potential of government regulations to promote workplace equality was recognized.¹⁰⁰

Civil rights protests in the early 1960s spurred Congress into action and forced a reconsideration of the treatment of blacks in the workplace.¹⁰¹ Black passivity to racial subordination had shifted to public non-violent protests for equal treatment. These protests helped to coerce Presidents John F. Kennedy and Lyndon Johnson to promote equal employment opportunity through executive orders¹⁰² and legislative initiatives.¹⁰³ In 1964, Congress observed:

The Negro is the principal victim of discrimination in employment. . . . Discrimination also affects the kind of jobs Negroes can get. Generally, it is the lower paid and less desirable jobs which are

96. Louis C. Kesselman, *The Fair Employment Practice Commission Movement in Perspective*, 31 J. NEGRO HIST. 30, 38 (1946).

97. *Id.*

98. *Id.* at 30.

99. See Exec. Order No. 8802, 3 C.F.R. 957 (1938-1943) (prohibiting discrimination based on “race, creed, color, or national origin” in defense contracts and establishing the President’s Committee on Fair Employment Practice); SOVERN, *supra* note 21, at 9 (“The disquieting reality is that President Roosevelt was embarrassed into acting by the threat of a demonstration march on Washington.”).

100. See Kesselman, *supra* note 96, at 40 (“[T]he experience with the President’s Committee convinced Negro and sympathetic white groups that, if properly implemented, the principle of government protection of minority employment rights offers promise.”); see also HILL, *supra* note 74, at 173 (stating a quarter century of federal executive initiatives prohibiting employment discrimination provided the foundation for Title VII).

101. See HUGH DAVIS GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 4* (Oxford Univ. Press 1990). Protests were met with harsh and sometimes violent responses by segregationists and others who opposed the equal rights principle. *Id.* These clashes, which were often televised, forced the nation to confront the practices of racial subordination, including employment. *Id.* at 100, 145.

102. See, e.g., 26 Fed. Reg. 1977 (1961) (revealing President Kennedy issued Executive Order 10,925 to prohibit discriminatory hiring by federal contractors and to set the foundation for a broader national policy against workplace bias); 30 Fed. Reg. 12,319, 12,935 (1965) (revealing President Johnson issued Executive Order 11,246, which required federal contractors to hire minorities and to treat them fairly).

103. See, e.g., 109 CONG. REC. 22,839 (1963) (showing President Johnson championed Kennedy’s initiatives in Congress); Special Message to the Congress on Civil Rights and Job Opportunities, 1 PUB. PAPERS 483 (June 19, 1963).

filled by Negroes . . . Even within their professions non-whites earn much less than white people. It is a depressing fact that a Negro with 4 years of college can expect to earn less in his lifetime than a white man who quit school after the eighth grade. In fact, Negro college graduates have only half the lifetime earnings of white college graduates . . . The crux of the problem is to open employment opportunities for Negroes in occupations which have been traditionally closed to them.¹⁰⁴

Congress acknowledged that black workers were not being treated equally and that the exploitation of blacks was public and ubiquitous. The effects of such exploitation were clearly visible.¹⁰⁵ What legislators did not emphasize and what a legislative compromise did not permit were laws responsive to a centuries-old culture of workplace discrimination. History had demonstrated that workplace exploitation is dynamic and responsive to prevailing economic conditions and laws.¹⁰⁶ Failure to tailor the law to defeat the culture of discrimination had already destroyed the goals of the Thirteenth and Fourteenth Amendments and the Reconstruction civil rights statutes.¹⁰⁷ The legislative compromise, resulting in Title VII, endorsed some aspects of workplace discrimination and left ample room for it to morph.

B. Eradicating the Culture of Employment Discrimination with Title VII's Prescriptions

In enacting Title VII, Congress exempted past discriminatory employment practices from any further regulation, thereby approving the national preference for white workers over black workers.¹⁰⁸ The ju-

104. 110 CONG. REC. 6547-48 (1964).

105. See 110 CONG. REC. 6554 (1964) (noting that discrimination occurs in every part of the country to some degree).

106. See, e.g., MYRDAL, *supra* note 18, at 207 (discussing how labor laws, which improved pay and working conditions through unionism, were circumvented when employers, sometimes with the help of unions, switched from black to white workers). After emancipation, liberty of contract rules were used to facilitate exploitation of black labor. See *Lochner v. New York*, 198 U.S. 45, 64 (1905) (holding that liberty of contract was a fundamental right protected by the Constitution and confirming that racially discriminatory employment practices were legally acceptable); *Allgeyer v. Louisiana*, 165 U.S. 578, 590-93 (1897). And after the Great Depression in the 1920s, legislation intended to protect oppressed workers did not protect black workers from exploitative practices of employers and unions. See MYRDAL, *supra* note 18, at 207.

107. See *The Civil Rights Cases*, 109 U.S. 3, 25 (1883) (concluding race discrimination is not a badge or incident of slavery); *The Slaughter-House Cases*, 83 U.S. 36, 80-81 (1872) (holding that the Fourteenth Amendment only limits states' ability to discriminate).

108. See 110 CONG. REC. 7206-07 (1964) (stating that Title VII will neither displace white workers who benefitted from discrimination nor disturb their vested seniority rights).

diciary readily affirmed this.¹⁰⁹ For example, in *International Brotherhood of Teamsters v. United States*, the Court ruled that Congress immunized seniority systems from challenges with full recognition that these systems protected benefits that white workers accrued as a direct result of racial discrimination.¹¹⁰ In effect, Title VII did not prohibit all conduct that effectively served to lock blacks and others into undesirable positions. Hence, the perpetuation of a racially stratified workforce was perfectly lawful in some instances, and judges were instructed to give deference to employers when reviewing seniority systems.¹¹¹

With respect to aspects of the culture Congress targeted, the legislature did not provide a forceful mandate. By broadly prohibiting employers, employment agencies, and unions from discriminating in employment “because of . . . race, color, religion, sex, or national origin,”¹¹² Congress did not express a zero tolerance policy for discrimination.¹¹³ Judges logically interpreted the phrase “because of” to mean plaintiffs must prove intent as overt discrimination was the cultural norm.¹¹⁴ But the stringent requirement of intent left employees vulnerable to employer creativity.

109. See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 350 (1977) (explaining that Congress immunized seniority systems even when they operated to freeze black workers in discriminatorily assigned jobs).

110. *Id.* at 349-50. The Court stated:

Where, because of the employer's prior intentional discrimination, the line drivers with the longest tenure are without exception white, the advantages of the seniority system flow disproportionately to them and away from Negro and Spanish-surnamed employees who might by now have enjoyed those advantages had not the employer discriminated before the passage of the Act. This disproportionate distribution of advantages does in a very real sense “operate to ‘freeze’ the status quo of prior discriminatory employment practices.” But both the literal terms of § 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them.

Id.

111. George K.H. Schell, *Bona Fide Seniority Systems: Guidelines for the Use of Disparate Impact in the Teamsters Analysis*, 31 UCLA L. REV. 886, 904 (1984) (stating the Supreme Court gave lower courts broad discretion when reviewing seniority systems, but many judges focus narrowly on whether there is direct evidence of intent to discriminate).

112. 42 U.S.C. § 2000e-2(a) (1964), amended by 42 U.S.C. § 1981 (1991).

113. See, e.g., *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (stating that the plaintiff must prove not only that illegal considerations played a role in the employer's decisionmaking but also that they had a determinative influence); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 503 (1993) (concluding that proof that an employer's defense is fabricated does not mandate a conclusion that an employer was motivated by a prohibited reason); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973) (holding that plaintiff must provide proof of illegal motivation).

114. See *id.*

After 1964, employers decreasingly announced or displayed their discriminatory animus.¹¹⁵ The elimination of overt discriminatory practices was naturally viewed as a cultural or behavioral change.¹¹⁶ But this was a false perception; belief systems and attitudes generally do not change overnight.¹¹⁷ Even though the law has coercive powers to change behavior¹¹⁸ some employers and employees were unable to abandon race-based workplace practices. As a result, overt discriminatory behavior was replaced with subtle and covert discriminatory conduct.

Employees who did not want competition from black workers remained proactive in their efforts to insulate their jobs and statuses.¹¹⁹ Some employers did not relinquish their stereotypical views of black labor,¹²⁰ and unions continued to prioritize the interests of their white members.¹²¹ This translated into action tailored to circumvent the law and to maintain workplace conditions that perpetuated white privilege and black inferiority.

115. See, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). The Court explained: In its opinion of November 9, 1971, the [trial] court found that the [employers] had “strictly segregated” the plant’s departmental “lines of progression” prior to January 1, 1964, reserving the higher paying and more skilled lines for whites. The “racial identifiability” of whole lines of progression persisted until 1968, when the lines were reorganized under a new collective-bargaining agreement. The court found, however, that this reorganization left Negro employees “locked” in the lower paying “job classifications”. . . . Because of the plant’s previous history of overt segregation, only whites had seniority in higher job categories.

Id. at 409; see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 426-27 (1971). The Court noted: The District Court found that prior to July 2, 1965, the effective date of the Civil Rights Act of 1964, the Company openly discriminated on the basis of race in the hiring and assigning of employees at its Dan River plant. . . . Negroes were employed only in the Labor Department where the highest paying jobs paid less than the lowest paying jobs in the other four “operating” departments in which only whites were employed.

Id.

116. See Ann C. McGinley, *¡Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL’Y 415, 417-18 (2000) (observing that overt discriminatory behavior was generally eliminated with the passage of Title VII combined with educational efforts).

117. See *id.* (“Racial and gender discrimination have gone underground. Social Science research demonstrates beyond debate that discriminatory attitudes and behavior still exist today and a large percentage of bias and prejudice and the resultant discriminatory behavior is due to unconscious factors.”).

118. Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 U. RICH. L. REV. 1195, 1320 (2008) (explaining how the law coerces change by taxing prohibited conduct and enforcing prescribed sanctions).

119. Marion Crain, *Colorblind Unionism*, 49 UCLA L. REV. 1313, 1320 (2002) (discussing how black employees faced discrimination by white co-workers who sought to hold them back).

120. *Id.*

121. *Id.* at 1324 (“Unionists failed to appreciate fully the moral energy and vision emanating from the civil rights movement in the 1960s, viewing it instead as a potential threat to the labor movement’s respectability and as a diversion from its primary commitment to economism.”).

Because national condemnation of workplace discrimination made practices once regarded as normal as shameful and potentially costly, it became imprudent to overtly discriminate. Employers who desired to perpetuate the culture of discrimination designed and implemented seniority systems,¹²² employment tests that measured verbal and nonverbal intelligence,¹²³ and educational requirements¹²⁴ that were unrelated to the job but had the effect of denying blacks desirable opportunities.¹²⁵

Employers also utilized subjective criteria for hiring, promotion, and other evaluative decisions in order to broaden their discretion in awarding and denying benefits.¹²⁶ Management discretion was buffered by stringent policies designed to ensure that personnel records were kept secret.¹²⁷ Employees who did not want to work alongside

122. See *California Brewers Ass'n v. Bryant*, 444 U.S. 598 (1980) (explaining how the company and union instituted a seniority system that protected employees who worked forty-five weeks in a calendar year, and how the employer's discretion to hire and lay off workers allowed them to control which employees acquired the forty-five weeks and, thus, precluded blacks from working forty-five weeks in a year); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (stating that the company hired minorities for lower paying and less desirable servicemen and city drivers jobs and locked them into those positions by instituting an employment system that eliminated their seniority if they transferred to more desirable jobs).

123. See, e.g., *Connecticut v. Teal*, 457 U.S. 440, 442-44 (1982) (stating how a black employee provisionally promoted to supervisor was required to pass a written test to be eligible for a permanent promotion even though the black passage rate was much lower than that of whites); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 427-29 (1975) (explaining that the company instituted general ability tests for verbal and nonverbal intelligence on the premise that this was necessary as the plant modernized but grandfathered whites in the desirable jobs and excused them from testing, even though many could not pass the test, and required blacks to pass the test in order to transfer to more desirable positions); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (detailing how the company instituted a testing requirement for placement and transfer for all departments except the labor department, which paid the least and was the only department in which blacks were hired, and how these tests were unrelated to the job).

124. See, e.g., *Moody*, 422 U.S. 405 (explaining that the company required a high school diploma for employment in skilled jobs, even though this requirement had no effect on workforce quality, and reserved skilled jobs for whites); *Griggs*, 401 U.S. at 426-28 (stating that the company extended its high school diploma requirement to jobs in the Labor Department staffed exclusively by blacks after the enactment of Title VII).

125. See *supra* notes 123-25 and accompanying text.

126. See, e.g., *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988). In *Watson*, the Court rejected the employer's contention that the application of disparate impact theory to subjective employer decision-making would force employers to use quotas. *Id.* at 978-79. The Court found that a failure to apply impact analysis would permit employers to circumvent their obligation under Title VII not to discriminate. *Id.*

127. See, e.g., Leonard Bierman & Rafael Gely, *Love, Sex and Politics? Sure. Salary? No Way*: *Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 171-75 (2004). Employers strictly regulate the disclosure of employees' pay or salary information and often provide severe penalties for violation of disclosure rules. *Id.* But very little attention has been given to the use of pay secrecy rules to hide discriminatory animus. Pay secrecy rules are common particularly in the private sector and reflect a cultural or social norm even though they may violate federal labor laws. *Id.*; Adrienne Colella et al., *Exposing Pay Secrecy*, 32 ACAD. MGMT.

blacks demanded superior terms and vented their anger by humiliating blacks through conduct and language reminiscent of slavery and segregation.¹²⁸ Unions also resorted to covert devices to deny blacks job opportunities.¹²⁹ The camouflaging of discriminatory animus initially evaded detection and suggested a cultural shift. In many cases, years passed before the exploitation surfaced through its cumulative effects.¹³⁰

Neutral devices that produced the same effects as overt practices alerted judges that the culture of abuse had not been eliminated but had changed form.¹³¹ Initially, the Court viewed this as a serious problem.¹³² The Supreme Court confronted covert attempts to discriminate in *Griggs v. Duke Power Co.*¹³³ In *Griggs*, the Court struck at the evolutionary potential of discrimination by ruling that Congress intended practices fair in form but discriminatory in effect to be illegal.¹³⁴ This decision meant that both intentional and unintentional

REV. 55, 56 (2007) (stating that England enacted disclosure laws to assist employees who suspect discrimination, recognizing that pay secrecy produces high societal costs by hiding discrimination); David A. Logan, *The Perils of Glasnost*, 38 U. TOL. L. REV. 565 (2007) (arguing that employees' ability to pursue grievances is limited without specific pay information). Although pay secrecy rules are implemented to advance some legitimate employer interests, such as protecting privacy and avoiding conflict, they also hide the ugly culture of workplace discrimination and limit the discrimination victim's ability to pursue his or her case. Logan, *supra*, at 567. Further, pay secrecy is a cultural workplace reality even though disclosure likely better advances employer and employee interests in a merit-based workplace. *Id.* at 569; Jay R. Schuster & Jerome A. Colletti, *Pay Secrecy: Who Is for and Against It?* 16 ACAD. MGMT. J. 35, 35-40 (1973) ("A number of pay planners are now advocating more open pay systems because they feel that organizations can get more potential motivational value from their compensation expenditures if it is known throughout the organization that better performers get better financial rewards.").

128. See Bernstein, *supra* note 71, at 95; Crain, *supra* note 119, at 1320 ("White workers constructed Black workers as 'other' and defined themselves in relation to and as superior to Blacks.").

129. See *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 669 (1987) (finding that the union deliberately ignored the grievances of black workers and refused to complain about race-based terminations); *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 427 (1986) (finding that the union discriminated against non-white employees by excluding them from its apprenticeship program through nepotism, exam, diploma, and sponsorship requirements, among other things).

130. See William Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 3 (1999) (noting that legal declarations of equality can mislead people about the reality of equal treatment).

131. See Leroy D. Clark, *Employment Discrimination Testing: Theories of Standing and a Reply to Professor Yelnosky*, 28 U. MICH. J.L. REFORM 1, 4 (1994) ("As experience with Title VII has matured, the courts have developed interpretations which help neutralize covert discrimination in hiring, although the present solutions are insufficient.").

132. See *id.* at 3 ("Upon the adoption of Title VII, some commentators were skeptical about its efficacy in eradicating racial discrimination. They predicted that determined employers would mask discrimination by claiming that the applicant lacked the requisite job qualifications and that plaintiffs would not be able to prove otherwise.").

133. See generally *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

134. *Id.* at 436. The Court observed:

discrimination was unlawful. It helped to convince many judges that the culture no longer had any place to run or hide. The Court's holding firmly established that employers could not actively pursue discriminatory policies.

C. Formal Rejection of Discrimination and the Rise of Judicial Skepticism

With the belief that employment discrimination and its mutations have been arrested and eliminated, judges now adopt a very skeptical view of plaintiffs.¹³⁵ This skepticism manifests itself in the judicial expectation that employees provide overwhelming proof of prohibited treatment to succeed.¹³⁶ The reality that discriminators are more sophisticated, secretive, or subtle is decreasingly being viewed as normative. Therefore, judges are not receptive to employees who believe that they are being treated unfairly but cannot overcome their employers' legal explanations for their adverse actions. When employees sue for unintentional discrimination, judges are likely to be deferential to employers' business explanations for their challenged conduct.¹³⁷

For some judges, the large number of charges reflect employees' propensity to file frivolous claims. As one judge openly noted, "[t]he motives prompting those baseless filings may be inferred to be harassment or intimidation with a view towards being rehired."¹³⁸ Adjudicating with this notion in mind, some judges find it very difficult to

Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any tests used must measure the person for the job and not the person in the abstract.

Id.

135. Reeves, *supra* note 2, at 556 (discussing a study which revealed that judges of both political parties share the perception that most discrimination claims are meritless).

136. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 523-24 (1993) (holding proof that an employer's defense is fabricated is not sufficient to prove intentional discrimination); see also Leland Ware, *Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMP. RTS. & EMP. POL'Y J. 37, 60 (2000) (voicing skepticism of judicial expectation that employees provide overwhelming proof of discrimination).

137. See, e.g., *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1127 (11th Cir. 1993) (deferring to the employer's contention that its no-beard policy was required for safety reasons although black employees were permitted to wear shadow beards for six years without any safety concerns); see also *Zamlen v. City of Cleveland*, 906 F.2d 209, 219 (6th Cir. 1990) (deferring to an employment test that emphasized speed and strength although this approach made it virtually impossible for women to get firefighter jobs).

138. *Edwards v. Interboro Inst.*, 840 F. Supp. 222, 231 (E.D.N.Y. 1994).

credit complaining employees' assertions over those of employers. This results in an almost routine grant of summary judgment for employers because employees' bare assertions and the absence of direct evidence make it extremely difficult to offer proof of discrimination.¹³⁹

Judges are concerned because meritless claims not only negatively impact employers but also burden the judiciary.¹⁴⁰ One judge noted that "the frequency with which such cases are filed unduly burdens the federal courts and subjects innocent employers to incredible expense which they cannot [generally] recoup if successful notwithstanding. . . ."¹⁴¹ This concern about employment discrimination claims helps to explain judicial hostility towards plaintiffs and adjudicative resolutions that favor employers. Bad-faith filings and pressures on judicial resources have likely increased this judicial antagonism.

Since the passage of Title VII, judges have been influenced by a combination of historical, cultural, and jurisprudential factors, which have combined to subtly mask the real universe of employment discrimination. The rules of adjudication permit judges to reaffirm their perception that discrimination is a narrow practice of a few rogue employers. The problem originates partly from the fact that judges work primarily with legal doctrine that is detached from the slavery and post-slavery culture of worker exploitation. As a result, judges do not evaluate employment discrimination cases as camouflaged cultural or institutional phenomena.¹⁴² Although case reporters and the EEOC docket provide evidence that large numbers of workers suspect or ex-

139. *See id.* at 229 (holding that plaintiff cannot survive summary judgment by merely alleging his employer was motivated by discriminatory animus, "he must point to admissible facts upon which a reasonable jury could reach the conclusion that he was the victim of discrimination").

140. *See id.* at 231; *see also* Vargas v. Peltz, 901 F. Supp. 1572, 1580-82 (S.D. Fla. 1995) (finding plaintiff's fabrication of evidence and dishonesty constituted perjury, fraud on the court, a threat to the integrity of the judicial process, and an obstruction of the employer's ability to conduct discovery and defend); Charles B. Craver, *The Use of Non-Judicial Procedures to Resolve Employment Discrimination Claims*, 11 KAN. J.L. & PUB. POL'Y 141, 141-42 (2001) (asserting federal judges fuss about the need to increasingly dedicate judicial resources to employment discrimination claims).

141. *See Edwards*, 840 F. Supp. at 231; *see also* Craver, *supra* note 140, at 141-42 ("Federal judges often complain informally about the increasing amount of judicial time spent on such relatively low value cases.").

142. *See Brake & Grossman*, *supra* note 1, at 887 (maintaining judges and the general public wrongly believe that employment discrimination plaintiffs are simply "hypervigilant"); *see also* Robinson, *supra* note 2, at 1153-54 (noting judges view employment discrimination as rare).

perience discrimination,¹⁴³ judges and society at large increasingly view workplace bias as isolated or aberrant conduct.¹⁴⁴ This ahistorical approach has contributed to the creation and the fostering of a narrow universe of recognized employment discrimination.¹⁴⁵

The enactment of antidiscrimination laws and the elimination of overtly discriminatory practices are critical events that shape judges' views about the pervasiveness of discrimination. Legal doctrine does not require judges to evaluate whether centuries-old exploitative systems and practices are lurking in the shadows.¹⁴⁶ The legal regime they must follow does not lend itself to tracking the migration of the discriminatory workplace culture.¹⁴⁷ As more meritorious claims get slated for arbitration, the judiciary's perception of what is occurring in the workplace will become more skewed.

143. See 226 BNA DAILY LAB. REP. A-1 (2008) (reporting 95,402 charges of discrimination were filed against private sector employers in 2008).

144. See Robinson, *supra* note 2, at 1106-07, 1153-54 (observing the judicial intuition is that discrimination is rare and that white and black employees strongly disagree about whether employers treat all employees fairly and take allegations of discrimination seriously).

145. Even law students, our future judges, are deprived of context. Casebook writers devote little space to the history and culture of discrimination forcing professors to present this information as supplemental, if at all. See, e.g., JOEL WM. FRIEDMAN, THE LAW OF EMPLOYMENT DISCRIMINATION, CASES AND MATERIALS 9-11 (6th ed. 2007) (devoting approximately two pages to federal regulation of discriminatory workplace practices prior to the twentieth century and summarily concluding that the Supreme Court nullified the potential of reconstruction civil rights statutes through narrow interpretations); THOMAS R. HAGGARD, UNDERSTANDING EMPLOYMENT DISCRIMINATION 4-5 (2d ed. 2008) (mentioning Reconstruction Civil Rights statutes only to the extent they have present-day applicability); MACK A. PLAYER, FEDERAL LAW OF EMPLOYMENT DISCRIMINATION IN A NUTSHELL 5-27 (5th ed. 2004) (providing historical context solely through the common law without mentioning the late nineteenth century and subsequent legal attempts to curb widespread workplace exploitation of blacks); MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 761-77 (7th ed. 2008) (reserving for the last chapter a summary of the scholarly debate about whether regulating employment discrimination is sound social policy while omitting the historical and institutional context of the problem).

146. See Beiner & Chapman, *supra* note 2, at 71 (noting that a Second Circuit Task Force opined that judicial hostility may be a product of judges being removed from the daily realities of the business world and the complexities of workplace behavior); Reeves, *supra* note 2, at 508 ("The practices and patterns of discrimination that were both widespread and obvious in the 1960s and 1970s are now neither widespread nor obvious.").

147. Judges utilize rules that require employees to complain about adverse action about which they are not even aware, to provide proof they do not have, and then defer to employer explanations even when they are incredible. See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 641-43 (2007) (holding that an employee must complain about a discriminatory pay decision within the statute of limitations period regardless of when the employee learns of the decision); see also *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 524 (1993) (holding that proof that the employer's defense is fabricated is not proof that the employer engaged in intentional discrimination).

III. THE SHIFT TO ARBITRATION

A. A Jurisprudential Shift at the Supreme Court

Although employees who suspect that they have suffered injury due to discriminatory employment practices have a statutory right to go to court, judges do not get the opportunity to hear or decide most of the cases that are filed. On average, seventy percent of cases filed are settled through private bargains, and these settlements do not become a part of any court record.¹⁴⁸ These private deals contain gag orders that prevent the employee from discussing the nature of his allegations and the terms of settlement.¹⁴⁹ As a result, the lion's share of meritorious cases are shielded from the eyes of the judiciary, and the perception that few meritorious discrimination claims exist is reaffirmed.¹⁵⁰

Supreme Court decisions approving the contracting away of the judicial forum have increased the shift to the private resolution of discrimination disputes. Since 1991, the Supreme Court has increasingly endorsed the arbitration forum as an effective substitute for court resolution of employment discrimination claims. In *Gilmer v. Interstate/Johnson Lane Corp.*, the Court considered an age discrimination claim by an employee who was subject to a New York Stock Exchange rule that required the employee to settle disputes with his employer—including discrimination claims—through arbitration.¹⁵¹ The Court found that the Age Discrimination in Employment Act (“ADEA”) did not prohibit arbitration of age claims.¹⁵² It held that in order to avoid arbitration, the employee must show that Congress intended the employee's age claim to be non-arbitrable, and *Gilmer*, the employee, had failed to provide such proof.¹⁵³ The Court grounded its decision in the Federal Arbitration Act (“FAA”) and determined that an employee does not forego his statutory rights by substituting one adjudicative method for the other.¹⁵⁴ Moreover, the Court concluded that

148. See Kotkin, *supra* note 6, at 929.

149. See *id.*

150. See *id.* at 927, 932 (asserting that employers secretly settle cases with great merit and litigate the more questionable ones).

151. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 36-33 (1991).

152. *Id.* at 26-33.

153. *Id.* at 29.

154. *Id.* at 24 (maintaining that the purpose of the FAA “was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts”).

concerns about the suitability of the arbitral forum, such as arbitrator competence and bias for employers and limited discovery and relief options, were misplaced¹⁵⁵ and that the remedial and deterrent functions of the statutory provisions could be effectuated in the arbitral forum.¹⁵⁶

After the *Gilmer* decision, it became clear that an individual employee could contract away his or her statutory judicial forum in favor of arbitration even if the employee had no real choice or bargaining power when striking the deal.¹⁵⁷ The Court later suggested that unions could waive their members' forum rights as long as the waiver is "clear and unmistakable."¹⁵⁸ This finding gave unions and employers more contractual freedom to negotiate waivers of employees' judicial forum rights.

The Court continued to broaden the class of workers who could arbitrate discrimination claims when it subsequently decided *Circuit City Stores v. Adams*.¹⁵⁹ In *Circuit City*, the Ninth Circuit held that an employee was not bound to an arbitration provision in an employment application because the FAA did not apply to contracts of employment.¹⁶⁰ The court relied on the FAA's exclusion of "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from its coverage.¹⁶¹ The Supreme Court disagreed with the Ninth Circuit, finding that the quoted provision should be narrowly construed and limited to transportation workers.¹⁶² By limiting this exclusion to workers who move goods in interstate commerce, the Court found that the strong pro-arbitration mandates of the FAA supported the arbitration of discrimination claims outside the collective bargaining context.

Then, in *14 Penn Plaza L.L.C. v. Pyett*,¹⁶³ the Court demonstrated further assent to waiving the judicial forum. In *Pyett*, the

155. *Id.* at 30-33.

156. *Id.* at 28.

157. *See id.* at 33 ("Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.")

158. *See Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70, 79-81 (1998) (comparing a union's contractual waiver of forum to instances when unions contractually waive their members' NLRA substantive rights). Having found that waivers under the NLRA are permitted when "explicitly stated" the Court concluded that this standard would be equally applicable to any discrimination forum waiver provision. *Id.* at 80.

159. *See generally* *Circuit City Stores v. Adams*, 532 U.S. 105 (2001).

160. *Id.* at 109.

161. *Id.*

162. *Id.*

163. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009).

Court held that the National Labor Relations Act (“NLRA”),¹⁶⁴ which makes collectively bargained contracts and arbitration provisions enforceable, supports the conclusion that a union-negotiated waiver of the judicial forum is binding.¹⁶⁵ The Court found that there was no distinction between individual and union waivers, and therefore concluded that its pro-arbitration principles from *Gilmer*, and the NLRA’s broad pro-arbitration mandates governed.¹⁶⁶ The net result is that a union-negotiated waiver “must be honored unless the ADEA itself removes this particular class of grievances from the NLRA’s broad sweep.”¹⁶⁷

This movement by the Court to permit contracting for arbitration of discrimination claims without any real employee consent has provoked heavy criticism.¹⁶⁸ However, not everyone views this as a negative development.¹⁶⁹ Those who oppose arbitration contend that the arbitral forum is not an effective substitute for courts both on a substantive and procedural level.¹⁷⁰ Beginning with the premise that

164. 29 U.S.C. § 159(a) (2006).

165. *Pyett*, 129 S. Ct. at 1465. The Court found that freedom of contract was a fundamental policy of the NLRA; therefore courts should not interfere with the deal brokered by the parties to produce a forum waiver clause. *Id.* at 1464.

166. *Id.* at 1465 (“The *Gilmer* Court’s interpretation of the ADEA fully applies in the collective-bargaining context. Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.”).

167. *Id.* at 1459.

168. See Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 225 (1998) (asserting that forum waiver agreements are contracts of adhesion); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1036-37 (1996) (maintaining that employers’ mandating arbitration is equivalent to the old practice of requiring employees to abstain from unionism as a condition of employment).

169. See Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 563-64 (2001). A properly designed arbitration system is better than courts in part because litigation is beneficial only to claimants with sufficient wealth to bear the financial risks of a lawsuit. *Id.*; St. Antoine, *supra* note 14, at 499-501 (stating arbitration is attractive because it is more accessible than courts, avoids delay harmful to employees, and provides a better chance of recovery).

170. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-33 (1991). The employee argued that arbitrators will have a bias for employers, that the limited discovery permitted in arbitration hinders the employee’s ability to prove his or her case, that there is limited appellate review of arbitral awards, that arbitrators seldom issue written opinions resulting in little publicity of discriminatory practices, and that all statutory relief options are not available in the arbitral forum. *Id.* See generally Ronald Turner, *Employment Discrimination, Labor and Employment Arbitration, and the Case Against Union Waiver of the Individual Worker’s Statutory Right to a Judicial Forum*, 49 EMORY L.J. 135 (2000) (arguing that unions have no right to waive workers’ statutory employment discrimination claims pursuant to collective bargaining agreements and that such waivers should not be enforced absent workers’ voluntary relinquishment of their right to a judicial forum).

Congress never intended statutory discrimination forum rights to be waivable, critics of the Court point to the holdings in *Alexander v. Gardner-Denver* and other Court precedents.¹⁷¹

In *Gardner-Denver*, the Court ruled that in the collective bargaining context, Title VII rights “are not susceptible of prospective waiver.”¹⁷² The Court specifically held that “Title VII’s strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII.”¹⁷³

In addition to Congressional intent, Court critics point to the defects and limitations of arbitration. However, these arguments have been routinely rejected by the Court as being misplaced.¹⁷⁴ Additionally, the privacy of the arbitral forum has been cited as a substantial defect.¹⁷⁵ Proponents of this view argue that courts are a more suitable forum because courts produce publicity and accountability through precedents that benefit the litigants and the public.¹⁷⁶ Documents filed with the court are presumptively available to the public, whereas confidentiality is the norm in arbitration.¹⁷⁷

B. The Implications of More Secrecy

The judiciary, Congress, and scholars have not fully considered the implications of less publicity. In the *Gilmer* case, this issue was raised in the context of the general absence of written opinions in ar-

171. See *McDonald v. City of West Branch*, 466 U.S. 284, 289-97 (1984) (holding that arbitration proceedings are inadequate substitutes for judicial proceedings); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 744-45 (1981) (holding that arbitral procedures and authority are less protective of individual statutory rights than judicial procedures); *Alexander v. Gardner-Denver*, 415 U.S. 36, 56-58 (1974) (holding that while arbitral procedures and the arbitrator’s competence are well suited to resolve contract disputes, they are inappropriate to resolve statutory employment discrimination claims); see also *Turner*, *supra* note 170, at 187. *But see Pyett*, 129 S. Ct. at 1470-71 (holding that concerns about the inadequacy of the arbitral forum and the arbitrator’s competence are no longer legitimate).

172. *Alexander*, 415 U.S. at 51-52.

173. *Id.* at 51.

174. See *Pyett*, 129 S. Ct. at 1470-71 (holding that the Court’s dramatic change of attitude about the suitability of arbitration cautions all to not rely on precedents to the contrary); *Gilmer*, 500 U.S. at 30-33.

175. See *Noyes*, *supra* note 9, at 584, 589 (discussing the confidentiality of the arbitral forum).

176. See *id.* at 584; *Kotkin*, *supra* note 6, at 968-70.

177. See *Noyes*, *supra* note 9, at 589-91.

bitration.¹⁷⁸ Specifically, *Gilmer* argued that few written opinions translate into little public knowledge of employers' discriminatory practices, the absence of appellate review, and the stifling of the law.¹⁷⁹

The Court addressed and disposed of this contention, as well as a few others, in one paragraph. It noted that the rules governing arbitration in the *Gilmer* case required written opinions which are available to the public¹⁸⁰ and that a great deal of publicity will emerge because most ADEA claims will be decided by courts.¹⁸¹ Concluding that only a minority of ADEA claimants would be subjected to forum waiver clauses, the Court suggested that the deterrence benefits of publicity would be achieved.¹⁸²

As further support for its position that secrecy is not harmful, the Court in *Gilmer* noted that Congress itself encouraged the private settlement of discrimination claims. Congress' promotion of informal resolution procedures "suggests that out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress."¹⁸³ Not only did Congress envision the parties avoiding the courts but it also contemplated them avoiding the EEOC. The Court ruled that "nothing in the ADEA indicates that Congress intended that the EEOC be involved in all employment disputes."¹⁸⁴

This approval of the lack of involvement of the EEOC and the judiciary presumes that private resolutions act as a check on the culture of discrimination. However, private resolutions impair the remedial and deterrence goals of the law and its voluntary compliance element. The success of the law depends on employer cooperation, and the expansion of secrecy could be the demise of employer self-examination and reform. Although employers sometimes have a legitimate concern that litigation publicity will produce a deluge of meritless claims and large jury verdicts,¹⁸⁵ it must be acknowledged that

178. *Gilmer*, 500 U.S. at 31.

179. *Id.*

180. *Id.* at 31-32.

181. *Id.* at 32.

182. *Id.*

183. *Id.* at 29.

184. *Id.* at 28.

185. See Kotkin, *supra* note 6, at 929; St. Antoine, *supra* note 14, at 509-10.

negative publicity is often the catalyst for reforming discriminatory workplace cultures.¹⁸⁶

1. Beyond Litigation Costs – Public Image and Goodwill

Hiding the existence and terms of resolution of employment discrimination claims will likely reduce compliance efforts dramatically. Management lawyers, supervisors, and department heads know the premium companies place on keeping discrimination allegations confidential. Victims of discrimination also find value in keeping discrimination allegations confidential. No one wants to be labeled a discriminator or racist—not even members of the Ku Klux Klan.¹⁸⁷ Employers' concern about their public image is usually a priority, and this concern may supersede concerns about the cost of litigation. The reality is that “[c]orporate reputations influence the products we choose to buy, the securities in which we invest our savings, and the job offers we accept.”¹⁸⁸

When allegations of discrimination are made, the employer is publicly branded with a label that is culturally obnoxious. This label, whether justified or not, is not one that an employer can easily erase.¹⁸⁹ Allegations invariably have economic ramifications. For example, when evidence became public, showing that Texaco was intentionally hiding proof of race discrimination from plaintiffs' counsel, the company's stock prices dropped by three dollars per share.¹⁹⁰ The company also faced the prospect that large investors would withdraw

186. See Geoffrey Colvin, *The 50 Best Companies for Asians, Blacks, and Hispanics*, FORTUNE, July 19, 1999, at 58 (noting that some of the companies that are most hospitable to minorities got that way because of lawsuits and public condemnation).

187. See *State v. Henderson*, 277 Neb. 240, 248 (2009). In this case, which evaluated the discharge of a state trooper for joining the Knights Party, an affiliate of the Ku Klux Klan, the group portrayed itself as a white, Christian, non-violent political party that served as an alternative to the Democrats and Republicans. *Id.* at 251-52. However, the court found that “there [is no] doubt that the Knights Party is heir to the historical Ku Klux Klan. The Knights Party attempts to make itself respectable by presenting itself as representing Christian family values, and this approach has made it one of the largest traditional Ku Klux Klan groups operating today.” *Id.* at 257. But “the Knights Party’s attempt to disclaim violence is insufficient to excuse its continued endorsement of a historical legacy of violence, and the inevitably violent consequences of its hateful political and social propaganda.” *Id.* at 259.

188. See CHARLES J. FOMBRUN, REPUTATION: REALIZING VALUE FROM THE CORPORATE IMAGE 4 (1996).

189. See *Henderson*, 277 Neb. at 256 (noting that over a century after its creation and despite its efforts to gain respectability, the Ku Klux Klan still cannot distance itself from its racist reputation).

190. Kenneth Labich, *No More Crude at Texaco*, FORTUNE, Sept. 6, 1999, at 205. This price drop reduced the company's market capitalization by \$1 billion. *Id.* at 208.

from the company.¹⁹¹ In effect, being labeled a discriminator is bad for business because it can produce public condemnation, lead to loss of goodwill, and result in greater economic effects than the cost of litigation and compensation to victims.

Because public allegations can tarnish an employer's image and produce public condemnation and economic loss, employers place a premium on shielding discrimination lawsuits from the public. This includes stamping out rumors circulating within the company. One of the best ways to end talk of discrimination is to make the complaining employee and his allegations disappear. Employees who allege discrimination are often viewed as ingrates who no longer belong on the company team and become *persona non grata* in the workplace the instant allegations are made.¹⁹²

Employer responses to allegations of discrimination are shrouded in secrecy. Secret meetings, securing incriminating personnel data, and highly confidential decision-making often follow. Often, employees with meritorious claims do not receive apologies or monetary relief for exposing discrimination. Generally, they are ostracized and sometimes offered confidential settlements in exchange for their resignation. If they accept, the allegations disappear without any involvement from the EEOC or from the court system.

Such secret responses dispose of many claims and give employers no real incentive to take additional action. They excise the employee from the workplace and preclude publicity and its negative, deterrent effects. In cases where the employee continues to work, the quality of the work experience often changes dramatically. Working conditions and relationships with supervisors and co-workers tend to change for the worse.¹⁹³ Because the complaining employee is deemed a traitor,

191. *Id.* at 208.

192. *See* Brake & Grossman, *supra* note 1, at 900-03 (asserting that one of the inevitable consequences of complaining about discrimination is ostracism in the workplace).

193. *See* Kessler v. Westchester Cnty. Dep't of Soc. Serv., 461 F.3d 199, 207-08 (2d Cir. 2006) (stating that a reasonable employee must prove that employer action was materially adverse). The law governing retaliation gives employers wiggle room to humiliate employees who complain. *See id.* at 207-09. Because retaliation is only actionable if it causes material harm, employers may move complaining workers to undesirable locations, assign them undesirable tasks, and subject them to other indignities without running afoul of the law. *See id.* at 208; Brake & Grossman, *supra* note 1, at 902-03 (reporting that retaliation is regular and severe); *Charge Statistics FY 1997 Through FY 2009*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Sept. 18, 2010) (revealing retaliation claims filed with the EEOC were second only to race claims in 2007 and 2008); *see also* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 72-73 (2006) (finding that reassignment to a harder job and a thirty-seven day suspension without pay is material harm even though the harder job was within the employee's job description, and the suspension was rescinded and full

a relationship of trust is destroyed. Even if the allegation is meritorious, damage to the employer's image has been done, and the employer may desire a secret resolution to limit the fallout. Without a confidential settlement or a private arbitration, the publicity of a discrimination claim can continue for months or years, creating a cultural shake-up and economic losses substantially greater than the cost of litigation.¹⁹⁴ Public interest in how employers treat their workers forces employers to continually engage in self-assessment and corrective measures in order to promote a fair treatment culture.¹⁹⁵

2. Major Reforms That Can Change the Culture

Paying victims or punishing employers who discriminate is only a small part of the equal employment opportunity equation. The Supreme Court recognized the broad purpose of Title VII:

[T]o achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. . . . What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.¹⁹⁶

Congress was concerned that discrimination robbed the workplace of talented individuals¹⁹⁷ and denied the nation their productive capacity.¹⁹⁸ Employers must first believe that hiring, training, promoting, and retaining minorities are good for the bottom line in order to respond positively to this broad national concern.¹⁹⁹ If top manage-

back pay was given). Complaining employees can be subjected to indignities provided they are not fired or demoted and do not lose a tangible job benefit. *Id.* The Supreme Court has recognized that permitting some of the humiliating conduct can have a deleterious effect on the employee. *White*, 548 U.S. at 70-71.

194. See Colvin, *supra* note 186, at 53 (noting that to be ranked as one of the best companies for minorities "requires big-deal initiatives on hiring, training, promoting, purchasing, and giving, all of which take time and most of which cost money").

195. See Labich, *supra* note 190, at 212 (stating that Texaco officials recognize that transforming workplace culture is an ongoing, long-term process).

196. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429-31 (1971).

197. See 110 CONG. REC. 6547 (1964) ("We all know of cases where fine Negro men and women with distinguished records in our best universities have been unable to find any kind of job that will make use of their training and skills.").

198. See 110 CONG. REC. 7205 (1964) (providing that the Council of Economic Advisors reported "that [they] could add \$13 billion to [the] gross national product if Negroes could fully utilize the skills [Negroes] already ha[d] in the job markets").

199. See Colvin, *supra* note 186, at 53-54 (revealing evidence that companies that embrace diversity have a competitive advantage because they have outperformed S&P 500 companies in the past).

ment does not see a competitive advantage to embracing diversity, then a minimalist response—grounded in a desire to shield discriminatory practices and settle discrimination disputes—is likely to exist.²⁰⁰

While financial punishment for specific violations has deterrent effects, it does not translate into an embrace of equal employment opportunity policy. Employers need other incentives to review their employment practices to ensure compliance with the law. Changing discriminatory workplace culture requires embracing an equality philosophy,²⁰¹ financial commitment, educational initiatives, and a commitment to change.²⁰² In reality, changing workplace culture can be as difficult as defending allegations of discrimination.²⁰³

Because the requirements for change are so demanding, employers often undertake serious reforms when being monitored or when ignoring the problem becomes untenable.²⁰⁴ The heads of major corporations acknowledge that the huge drop in Texaco's market capitalization which followed allegations of discrimination provided a wake-up call.²⁰⁵ It is also conceded that pressure from civil rights organizations such as the National Association for the Advancement of Colored People ("NAACP") and the National Urban League influence corporate policies and practices on diversity.²⁰⁶ A major factor in the resolution of the Texaco case was a threatened boycott of the company by Jesse Jackson.²⁰⁷

200. See Cora Daniels, *50 Best Companies for Minorities*, FORTUNE, June 28, 2004, at 138 (asserting the key to effective diversity efforts is the involvement of top management because they shape company culture).

201. See JIM ADAMSON, *THE DENNY'S STORY: HOW A COMPANY IN CRISIS RESURRECTED ITS GOOD NAME* 10 (2000) (stating that to keep allegations of discrimination permanently at bay the culture of the company itself must change); Labich, *supra* note 190, at 205 (noting that in response to evidence of race discrimination at Texaco, the company's chief executive officer embarked on diversity programs and set goals and timetables intended to reverse a culture that had stifled minority hiring, retention, and advancement).

202. See Labich, *supra* note 190, at 208 (stating that Texaco instituted diversity training for all workers, hired and promoted a significant number of minority employees, tied top executives' and managers' evaluations to their success in implementing diversity initiatives, and instituted a zero tolerance policy for disrespectful treatment by announcing that the company will "show little patience with old-line managers who resisted the new paradigm").

203. See *id.* at 212 (noting that despite the compelling evidence that race discrimination was institutional at Texaco, some company officials still refused to admit it or contend that they did not recognize it).

204. See *id.* (noting that the lead plaintiff in the Texaco lawsuit felt that the key to the company's turnaround was an independent task force that would monitor the company for five years, otherwise "they would have paid and moved on").

205. See Colvin, *supra* note 186, at 58.

206. See *id.*

207. *Id.*

Privatization of employment disputes will greatly reduce these public condemnation and monitoring efforts that instigate company-wide reforms. Disadvantaged employees reap great rewards from employers with diversity programs.²⁰⁸ If employers were to voluntarily implement programs to recruit minorities and women; provide diversity training to supervisory personnel; provide fair targets or goals for hiring, promotions, and the allocation of benefits; and reward management personnel for advancing a diversity plan, the net result would be more equality in the workplace than any amount of private litigation or EEOC efforts could provide.²⁰⁹

Class action lawsuits and the protests of organizations representing workers show the importance of these activities to workplace equality. Well-known employers such as Morgan Stanley, American Express, Coca-Cola, and Texaco provide examples of this phenomenon. For example, in 2007, Morgan Stanley agreed to pay \$62 million to settle class action lawsuits alleging race and sex discrimination.²¹⁰ Equally important, however, are the reforms that the litigation triggered. As part of the settlement, the company agreed to recruit more diverse candidates for jobs, provide diversity training to managers annually, and add a diversity component to the performance appraisal of managers.²¹¹

In the case of American Express, the company agreed to spend \$31 million to settle a class action sex and age discrimination lawsuit.²¹² In addition, the company agreed to “appoint a diversity director, provide diversity training to all financial advisers and managers, change its account distribution process, and revise its internal complaint and promotion policies.”²¹³ Coca-Cola agreed to pay \$192.5 million to settle a race discrimination lawsuit and promised to spend

208. In addition to addressing the concerns of the complaining group, diversity programs make employment opportunities more accessible and workplaces more hospitable for all minorities and women. Diversity programs produce recruitment and retention efforts that benefit non-victims of discrimination. See *infra* text accompanying note 216.

209. See Labich, *supra* note 190, at 206 (revealing that soon after Texaco’s diversity initiatives were implemented, minorities represented a substantial percentage of those hired and promoted, and more than half a billion dollars was spent with minority or women-owned businesses). Diversity programs produce broader and longer lasting relief than compensation to individual victims in the form of jobs and job benefits to a broad group of people who otherwise would not have had those opportunities. *Id.*

210. See Cathleen S. Yonahara, *Morgan Stanley Agrees to \$16 Million Settlement of Race Bias Claims*, 17 CAL. EMP. L. LETTER 7 (Nov. 12, 2007).

211. See *id.*

212. Hinkle et al., ‘*And They Don’t Accept American Express*,’ 8 NO. 7 N.M. EMP. L. LETTER 7 (2002).

213. See *id.*

\$1.5 million on a diversity program for management plus \$1 billion on a diversity campaign “to boost entrepreneurship and other business opportunities for minorities and women in the United States.”²¹⁴

After almost three years of litigation, Texaco agreed to pay \$175 million to settle a race discrimination lawsuit after secret tapes revealed the company’s culpability.²¹⁵ One year later, the company reported the following accomplishments: managers were retrained in interviewing and hiring, recruiting at colleges with high black enrollment expanded, minority hiring increased to 26.4%, minority representation on the board of directors and the human resources department increased, performance evaluations of managers were restructured to make success at meeting diversity goals a 25% pay factor, and the number of minority law firms utilized increased from six to twenty-one, among other things.²¹⁶

Such institutional changes which benefit millions of workers also reform the culture of bias which thrives when kept hidden. These accomplishments will be less likely if arbitration becomes the dominant forum for resolving employment discrimination claims. In addition to excluding class action claims, arbitration keeps wrongful conduct hidden from worker advocacy groups and from the public, who can prod or sanction employers to make broad reforms.

Many organizations—from the prominent to the obscure—boycott, picket, and negotiate with employers to change practices perceived to be unfair or in violation of the law. For example, the NAACP was instrumental in negotiating reform at Denny’s.²¹⁷ The Committee for Corporate Justice’s boycott efforts helped to coerce Coca Cola in committing to a diversity program.²¹⁸ The Restaurant Opportunity Center’s weekly demonstrations helped to produce a settlement with Restaurant Daniel that included sensitivity training for managers and fair promotion procedures.²¹⁹ With the decline of a public complaint process, these organizations, the EEOC, and plaintiff lawyers will have little information on which to act. Although individ-

214. See *Coke Pact Brings a Resolution to Boycott*, THE STAR-LEDGER, Dec. 8, 2000, at 13.

215. See Labich, *supra* note 190, at 205.

216. See Gannett News Service, *Texaco’s Progress Report*, USA TODAY, Dec. 23, 1997.

217. See ADAMSON, *supra* note 201, at 57.

218. See *Coke Pact*, *supra* note 214 (revealing that Coca-Cola’s spokesman commented that they were “pleased that the Committee for Corporate Justice recognize[d] the sincerity of [their] commitment to diversity and the actions [they were] taking to help foster a positive and engaging work environment at the company.”).

219. See Adam B. Ellick, *Boulud Settling Suit Alleging Bias at a French Restaurant*, N.Y. TIMES, July 31, 2007, at B3, available at LEXIS (search for source).

ual claimants will get some relief from arbitrators, the disruption of institutional practices that perpetuate the culture of discrimination will be minimal.

CONCLUSION

The evasiveness created by resolving discrimination matters in confidential arbitral settings has transformed judicial perceptions about its pervasiveness. This subtle and hidden culture has created a false perception of a shrinking universe of workplace abuse and has promoted low judicial tolerance for such allegations. Expanding arbitral resolution of employment discrimination disputes will provide more secrecy for a culture which thrives when hidden.

Consistent public condemnation of employment discrimination is the foundation and lifeblood of the fair employment practice movement. This movement reminds employers that it is illegal to discriminate and that it is advantageous to embrace diversity. The publicity of lawsuits, protests, and boycott campaigns forces employers to not only remedy existing problems but also to implement measures that tap valuable minority talent. These voluntary measures, which benefit all workers instead of giving a few victims relief, represent the greatest potential for changing discriminatory workplace culture. Privatization, which hides an employer's identity, the existence of charges, and the terms of resolution, leaves employers with few incentives to engage in self-examination and to root out discrimination in the workplace.



Article I Torture Courts: A Constitutional Means of Compensation and Deterrence?

LYNN C. PERCIVAL, IV*

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INTRODUCTION

Does the Constitution allow the use of Article I tribunals to compensate torture victims? Can these tribunals be used to adjudicate private claims for damages against federal officials in order to deter torture? This Article argues that, under a permissive reading of *Granfinanciera v. Nordberg*,¹ the Constitution allows Congress to cre-

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1. *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989).

ate Article I tribunals to adjudicate torture claims against the federal government and federal officials.²

Individuals who are tortured by federal officials and their associates in the course of the war on terror³ are generally without recourse. Congress has exempted the federal government and federal officials from most forms of civil liability.⁴ Thus, torture victims are generally unable to bring claims for money damages against the United States and its officials.⁵ Part I of this Article builds on Professor Seamon's work on the subject to explain how the federal government has effectively barred torture victim recovery.

Of course, utilizing specialized tribunals to deter torture and to provide remedies for torture victims is hardly a novel idea. Commentators have offered a variety of proposals, most of which envision a new agency that can adjudicate lawsuits or investigate abuses and recommend remedial action.⁶ A basic proposal is introduced in Part II. Unfortunately, subjecting the government to monetary liability for the

2. The wisdom of such a policy is *not* the central focus of this Article.

3. For a description of the enhanced interrogation techniques utilized by the United States in the war on terror, see Joseph P. Terry, *Torture and the Interrogation of Detainees*, 32 CAMPBELL L. REV. 595, 600–05 (2010).

4. See generally Richard Henry Seamon, *U.S. Torture As a Tort*, 37 RUTGERS L.J. 715 (2006) (explaining when the United States and its officials can be held liable for torture and arguing for changes to current law). Compensation has not, however, been *completely* foreclosed. Federal law does not prohibit claims against federal officials for constitutional violations; *Bivens* claims are still an option (theoretically). The remedies provided by the FTCA are exclusive with the exception of claims brought for violation of the Constitution. See 28 U.S.C. §§ 2679(a)–(b)(2)(a) (2006); see also Seamon, *supra*, at 773–74 (explaining that the FTCA allows victims to bring a *Bivens* claim). Torture victims likewise face significant obstacles in asserting claims against federal officials due to the doctrines of qualified and absolute immunity, as well as the difficulties of asserting a *Bivens* claim. See Seamon, *supra*, at 723–24; *infra* Part I.

5. Those who are familiar with the nuances of the Federal Tort Claims Act and Professor Seamon's work on the subject can safely bypass all of Part I.A except for the discussion accompanying notes 31–37 *infra*, which explains why suits against *foreign* officials will likely fail.

6. See, e.g., ASS'N OF THE BAR OF THE CITY OF N.Y., REAFFIRMING THE U.S. COMMITMENT TO COMMON ARTICLE 3 OF THE GENEVA CONVENTIONS: AN EXAMINATION OF THE ADVERSE IMPACT OF THE MILITARY COMMISSIONS ACT AND EXECUTIVE ORDER GOVERNING CIA INTERROGATIONS 49 (2008) [hereinafter BAR OF CITY OF N.Y.] (advocating the creation of a separate agency to adjudicate torture claims); George D. Brown, "Counter-Counter-Terrorism Via Lawsuit"—*The Bivens Impasse*, 82 S. CAL. L. REV. 841, 908–10 (2009) (exploring the option of creating a special national security court and a separate administrative agency to adjudicate torture claims); *Access to Courts*, 122 HARV. L. REV. 1151, 1154 (2009) (suggesting Congress could create an independent commission to investigate torture allegations on a case-by-case basis); Laura N. Pennelle, Comment, *The Guantanamo Gap: Can Foreign Nationals Obtain Redress for Prolonged Arbitrary Detention and Torture Suffered Outside the United States?*, 36 CAL. W. INT'L L.J. 303, 340–47 (2006) (arguing for an "Ombudsman Commission" that would investigate allegations of federal agency human rights abuses and recommend remediation); cf. Thomas J. Madden et al., *Bedtime for Bivens: Substituting the United States as Defendant in Constitutional Tort Suits*, 20 HARV. J. ON LEGIS. 469, 486–89 (1983) (arguing for an independent agency or entity with investigatory and potentially prosecutorial power).

acts of federal officials might be insufficient to deter torture; claims against federal officials in their individual capacity might be necessary. Part II explains why.

Part III argues Article I adjudicatory solutions can be constitutional if structured correctly. The Supreme Court has indicated the question of whether a particular type of action can be adjudicated by a non-Article III court hinges on whether the claim implicates a public or private right. Therefore, Section III.A explains the public–private rights dichotomy, tracing the case law from its inception in *Murray’s Lessee v. Hoboken Land & Improvement Co.* to the Court’s most recent significant discussion of the public rights doctrine in *Granfinanciera*. Sections III.B and III.C argue Article I courts can adjudicate torture claims for money damages against the United States and its officials under a permissive reading of *Granfinanciera*. Finally, Section III.D briefly explores the extent to which Congress could curtail judicial review of torture court decisions.

I. THE TORTURE VICTIM’S QUANDARY

This part considers three potential sources of redress for victims of U.S. torture⁷: the United States government, individual U.S. officials, and foreign officials. Professor Seamon has meticulously analyzed potential claims against the United States government and U.S. officials, concluding monetary recovery is highly unlikely.⁸ Section A draws on his work to explain why suits against the federal government will fail. Section B.1 discusses suits against individual government officials and builds on Professor Seamon’s work by explaining why suits against *foreign* officials will likely fail.

Section B.2 discusses the *Bivens* claim framework and argues Jose Padilla’s recent success against former Deputy Attorney John Yoo will be short-lived—meaning the outlook for torture victims is as dire as Professor Seamon originally forecasted.

7. For an international comparative article discussing torture remedies, see, for example, Susan Matthews, *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, 25 HUM. RTS. Q. 267 (2003).

8. See Seamon, *supra* note 4, at 805 (“The United States will avoid liability for most torture claims because of limits that the FTCA places on U.S. liability, and most officials will avoid liability for torture claims because of limits on the [*Bivens*] remedy.”).

A. Suits Against the United States Government

Sovereign immunity bars suits against the United States unless the federal government consents to being sued.⁹ By enacting the Federal Tort Claims Act (“FTCA”), the federal government has consented to jurisdiction over monetary claims brought for “negligent or wrongful acts” committed by federal employees acting within the scope of their employment.¹⁰ The acts that constitute “torture”—assault, battery, and possibly intentional infliction of emotional distress, in the language of tort—can be classified as intentional torts, meaning they likely fit within the definition of “wrongful acts.”¹¹ A plaintiff must, however, hurdle a variety of obstacles before he can bring a claim under the FTCA immunity waiver. Some hurdles are contained within the limited language of the waiver itself, while others are enumerated exceptions to that waiver.

The language of the immunity waiver contained in § 1346(b)(1) of the FTCA requires plaintiffs to demonstrate three things: (1) negligent or wrongful conduct (2) committed by a U.S. government em-

9. See, e.g., *Gray v. Bell*, 712 F.2d 490, 506–07 (D.C. Cir. 1983).

10. See Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (2006) (consenting to claims “for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred”). See generally *Seamon*, *supra* note 4, at 724–58 (discussing torture conducted by the U.S. as a tort).

11. *Seamon*, *supra* note 4, at 726 (stating that torture consists of assault and battery in most jurisdictions and that intentional torts qualify as wrongful conduct under the FTCA); see also *Duffy v. United States*, 966 F.2d 307, 313 (7th Cir. 1992) (rejecting the argument that intentional torts do not fall within the FTCA); *Seamon*, *supra* note 4, at 726 n.43 (finding that sexual battery qualifies as wrongful conduct under the FTCA (citing *Leleux v. United States*, 178 F.3d 750, 755 (5th Cir. 1999))). Federal law has criminalized torture, providing the following extensive definition:

- (1) “torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;
- (2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from—
 - (A) the intentional infliction or threatened infliction of severe physical pain or suffering;
 - (B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
 - (C) the threat of imminent death; or
 - (D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality

18 U.S.C. § 2340(1)–(2) (2006).

ployee (3) in the scope of his employment.¹² The requirement that a U.S. government employee commit the act makes it difficult for a victim to recover from the U.S. government when the torture has been perpetrated by a foreign government employee in connection with United States' extraordinary rendition policy.¹³ Assuming a plaintiff can also establish the scope of employment prong (which itself can be problematic), he must then bypass the FTCA's enumerated exceptions.

There are four major relevant FTCA exceptions: (1) combatant activities, (2) foreign country, (3) intentional torts, and (4) discretionary function.¹⁴ The combatant activities exception defeats the immunity waiver with regard to claims "arising out of combatant activities of the military or naval forces . . . during time of war."¹⁵ Professor Seamon persuasively argues this exception would likely apply to the interrogation of enemy combatant detainees whose detainment arose from their participation in combat against U.S. forces.¹⁶ The foreign country exception, exempting "any claim arising in a foreign country" from the FTCA,¹⁷ has been interpreted to refer to the place where the injury occurs—not where the injury was ordered (which could often be the United States).¹⁸ The intentional tort exception removes most relevant intentional torts from the FTCA sovereign immunity waiver, including assault, battery, false imprisonment, and false arrest.¹⁹ There is a caveat to this exception: if federal law enforcement personnel commit these torts, they do not fall within the exception.²⁰ This does not mean, however, that these torts fall outside *all* FTCA exceptions when committed by law enforcement officials; rather, they merely fall outside the intentional torts exception.

12. See 28 U.S.C. § 1346(b)(1); see also Seamon, *supra* note 4, at 725.

13. Professor Seamon notes that even if foreign officials are acting "on behalf of" the U.S. government, they are not "acting on behalf of a federal agency in an official capacity," meaning it is "debatable" whether they are "employees of the United States." Seamon, *supra* note 4, at 727–29.

14. *Id.* at 732–53.

15. See 28 U.S.C. § 2680(j) (2006).

16. See Seamon, *supra* note 4, at 733–35.

17. 28 U.S.C. § 2680(k) (2006).

18. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 703–12 (2004) (rejecting the "headquarters exception" to the foreign country exception); see also Seamon, *supra* note 4, at 735.

19. See 28 U.S.C. § 2680(h) (2006); see also Seamon, *supra* note 4, at 750–53.

20. See 28 U.S.C. § 2680(h).

The discretionary function exception is the most complex.²¹ It contains two components: the due-care clause and the discretionary function clause.²² The due care clause is triggered if a government employee's act was controlled by "mandatory statutes or regulations."²³ If the employee was acting with due care under the appropriate standard, his conduct cannot be imputed to the government. The due care clause bars an FTCA suit if the conduct is specifically required by statute or regulation.²⁴ In order to avoid the exception, the conduct must therefore involve some degree of discretion. Unfortunately, the discretionary function clause is capable of swallowing a good portion of viable claims remaining untouched by the due care clause. The discretionary function clause exempts "discretionary decisions that are susceptible to [public] policy analysis."²⁵

This brief discussion reveals that torture victims face a steep uphill battle if they want to recover against the United States. Broadly speaking, the following types of claims will fail: claims based on conduct that arose in foreign countries, claims based on acts committed by non-federal employees, and claims based on the acts of officials exercising due care or discretionary authority. Claims based on most intentional torts committed by non-law-enforcement personnel will also be barred.²⁶

21. See generally Richard H. Seamon, *Causation and the Discretionary Function Exception to the Federal Tort Claims Act*, 30 U.C. DAVIS L. REV. 691, (1997) [hereinafter *Causation and the Discretionary Function Exception*]; Amy M. Hackman, Note, *The Discretionary Function Exception to the Tort Claims Act: How Much is Enough?*, 19 CAMPBELL L. REV. 411 (1997).

22. See 28 U.S.C. § 2680(a) (2006). Section 2680(a) states:

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Id.

23. *United States v. Gaubert*, 499 U.S. 315, 328 (1991) (stating that courts must first inquire as to "whether the challenged actions were discretionary, or whether they were instead controlled by mandatory statutes or regulations").

24. This exception, which seems odd at first, can be explained by the rationale behind the due care clause. Seamon, *supra* note 4, at 738 (citing *Dalehite v. United States*, 346 U.S. 15, 33 (1953)). Congress did not intend for FTCA "torts suits to be used as vehicles for judicially challenging" statutory or regulatory validity. *Id.*

25. Seamon, *supra* note 4, at 747 (quoting *Gaubert*, 499 U.S. at 325 (alteration in original)).

26. See *supra* text accompanying notes 19–20 (explaining the intentional tort exception).

B. Suits Against Individual Officers

Suits against individual officers can be divided into two basic categories: (1) non-constitutional remedies and (2) the quasi-constitutional *Bivens* claim.

1. Non-constitutional Remedies

In addition to the limitations listed above, the FTCA also limits the types of claims that can be asserted against federal employees.²⁷ Section 2679(b)(1) mandates that the remedies provided by the FTCA for actions committed by government employees acting within the scope of their employment are exclusive of any potential action against those employees.²⁸ While some might point to the Alien Tort Statute (“ATS”) as an alternative source of redress, it does not contain a statutory cause of action or authorize constitutional claims; therefore reliance on the ATS is misplaced.²⁹ The inherent caveat contained in the FTCA exclusivity rule is that the employee is not protected when acting outside the scope of his employment. This allows torture victims to bring *state law* tort claims if the commission of the tort fell outside the scope of the officer’s conduct.³⁰

Since the FTCA only applies to federal *employees*, it appears at first glance that a torture victim might be able to bring suit against a foreign government official acting in concert with U.S. officials.³¹ Traditionally, foreign officials received broader immunity than domestic

27. See generally Seamon, *supra* note 4, at 762–73 (explaining the limitations on torts claims under the FTCA).

28. See 28 U.S.C. § 2679(b)(1) (2006). Section 2679(b)(1) states that [t]he remedy against the United States . . . arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim

Id.

29. See Seamon, *supra* note 4, at 767–70. See generally *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (exploring the relationship between the FTCA and the ATS and explaining the ATS does not proscribe any specific conduct); Karen Lin, Note, *An Unintended Double Standard of Liability: The Effect of the Westfall Act on the Alien Tort Claims Act*, 108 COLUM. L. REV. 1718 (2008). Professor Seamon argues that commentators who state that the ATS *does* provide a remedy against U.S. officers participating in the extraordinary rendition of terrorist subjects are incorrect because they fail to account for the FTCA exclusivity provision. See *Causation and the Discretionary Function Exception*, *supra* note 21, at 769 (citing Julian G. Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT’L L. REV. 105 (2005)).

30. See Seamon, *supra* note 4, at 771–72.

31. See *id.* at 772 (stating that a claim *might* be available against foreign officials, and at the very least, the claim is not barred by the FTCA).

officials.³² Under common law principles, foreign officials' official acts are entitled to the same level of absolute sovereign immunity to which their government is entitled.³³ But the Torture Victim Protection Act ("TVPA") has abrogated that immunity to some extent; it subjects foreign officials to civil liability for acts of torture committed under color of foreign law.³⁴ This would be of use to an individual harmed as a result of U.S. extraordinary rendition policy.

Unfortunately, it will be difficult to pursue TVPA claims, and even when they are feasible, they are unlikely to deter torture. First, it will likely be very difficult to gain jurisdiction over most foreign officials or attach judgments to their assets. Foreign officials would be unlikely to travel to the United States to defend these claims and may not have any assets in the United States that can be seized to satisfy default judgments. A plaintiff might be able to bring a claim if the United States obtains custody over a torturer through an extradition agreement in order to bring criminal charges against the torturer.³⁵ But since the acts were likely committed at the behest of the foreign official's home government, that government is unlikely to subject its officials to U.S. criminal law. And even if this were not the case, the official's resources would likely be drained from his criminal defense. Furthermore, because these actions are often government-sponsored, potential civil claims in a U.S. court will have little deterrent effect.

Section 2679(b)(2) provides two exceptions from the FTCA's exclusivity: claims explicitly authorized by other statutes³⁶ and claims

32. See generally Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity and Domestic Officer Suits*, 13 GREEN BAG 2d 137 (2010) (explaining the rationale behind the difference between immunity rules for foreign officials under international law and domestic officials under U.S. law).

33. *Id.* at 141.

34. See Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2000)) (creating a civil claim against individuals who subject another individual to torture "under actual or apparent authority, or color of law, of any foreign nation"); cf. Bradley & Goldsmith, *supra* note 32, at 145-47 (demonstrating that Congress has generally left foreign official sovereign immunity in place). Of course, if the torture is not committed under color of foreign law, foreign officials can be held liable under state tort law because there is no need for common law sovereign immunity since it only applies to conduct committed under color of foreign law. See Bradley & Goldsmith, *supra* note 32, at 144 n.29 ("The court [in *Lyders v. Lund*] also noted that the private or unauthorized acts of such officials would not warrant immunity, and outlined the process whereby the consul could make a showing that his acts were in fact official." (discussing *Lyders v. Lund*, 32 F.2d 308, 309 (N.D. Cal. 1929))).

35. Bankruptcy courts (which must be distinguished from regular Article III courts) have been weary of hearing pure state law claims. See *infra* note 185 and accompanying text.

36. It is important to note that the ATS, discussed above, proscribes no specific conduct according to the Supreme Court. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004) (stating that the ATS is "a jurisdictional statute creating no new causes of action").

brought for violations of the Constitution.³⁷ Therefore, Congress could create an additional statutory claim that would not be barred by the FTCA. It has not done so. The remaining exception to the FTCA, and current potential avenue of redress, is therefore the *Bivens* claim.

2. The *Bivens* Claim

A private individual whose constitutional rights have been violated can bring a *Bivens* claims against the federal officials who are responsible for the violation. The *Bivens* claim is an implied constitutional remedy; it can be seen as the federal corollary to 42 U.S.C. § 1983, which allows individuals to bring claims for the violation of their constitutional rights against *state* officials.³⁸ The *Bivens* claim was conceived in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* when a divided Supreme Court declared that because there were “no special factors counseling hesitation in the absence of affirmative action by Congress,”³⁹ Webster Bivens (the plaintiff) could pursue a damages claim against federal officials for the violation of his Fourth Amendment rights.⁴⁰ Neither those that support the doctrine of implied constitutional remedies nor those that vigorously oppose it are happy with the complex *Bivens* framework.⁴¹

37. See 28 U.S.C. § 2679(b)(2) (2006).

38. See 42 U.S.C. § 1983 (2006). For a leading assessment of federal civil rights legislation, see Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981 (2002).

39. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971).

40. *Id.* at 397. Several Justices vigorously dissented, arguing the Court was overstepping its bounds. See, e.g., *id.* at 429 (Black, J., dissenting) (“Congress has not provided that any federal court can entertain a suit against a federal officer for [constitutional] violations. . . . A strong inference can be drawn from creation of such actions against state officials that Congress does not desire to permit such suits against federal officials. Should the time come when Congress desires such lawsuits, it has before it a model of valid legislation, 42 U. S. C. § 1983, to create a damage remedy against federal officers.”).

41. Compare, e.g., George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the Bivens Dissenters Prevailed?*, 64 IND. L.J. 263, 298–99 (1989) (questioning the Supreme Court’s current approach to *Bivens*), Gene R. Nichol, *Bivens, Chilicky, and Constitutional Damages Claims*, 75 VA. L. REV. 1117, 1153 (1989) (arguing that the special factors analysis should be completely abolished, because, for “values” to legitimately defeat *Bivens* claims, they should at least possess a constitutional “pedigree”), and Joan Steinman, *Backing Off Bivens and the Ramifications of this Retreat for the Vindication of First Amendment Rights*, 83 MICH. L. REV. 269, 270–97 (1984) (criticizing recent Supreme Court *Bivens* decisions), with *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (“*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action”), and *Carlson v. Green*, 446 U.S. 14, 32–34 (1980) (Rehnquist, J., dissenting) (stating that the Supreme Court took a “wrong turn” in the *Bivens* decision). For a brief summary of several arguments in favor

This section will discuss that framework, including the three major defenses government officials have at their disposal, which possess a unique “analytical kinship”⁴²: the special factors counseling hesitation against creating new *Bivens* claims, qualified immunity, and the state secrets doctrine.

The framework is heavily influenced by the above-quoted “special factors” language from the *Bivens* decision. Courts conduct a two-part inquiry before creating a previously unrecognized *Bivens* claim.⁴³ First, they must ascertain whether the availability of an alternative remedy justifies declining to create a novel claim.⁴⁴ Under this inquiry, the courts are very deferential to Congress—they will not recognize a new *Bivens* claim if Congress has provided a remedy and explicitly declared it to be a substitute for direct recovery under the Constitution.⁴⁵ Thus, the Constitution does not *require* a monetary remedy for constitutional violations.

Second, even if there is no alternative remedy, courts must consider whether there are “any special factors counseling hesitation before authorizing a new kind of federal litigation.”⁴⁶ It has been said that these factors relate to determining who should decide whether there should be a remedy—not to the merits of the remedy itself.⁴⁷ In other words, which branch of government should create a remedy or address public policy concerns over an alleged constitutional violation—the executive, Congress, or the judiciary? The purpose of this inquiry is to avoid usurping authority constitutionally committed to the executive and legislative branches.⁴⁸

The judiciary’s initial fondness for the *Bivens* claim has shifted to outright hostility. Professor Brown has offered two models to categorize and explain these differing approaches to implied constitutional

of the *Bivens* remedy, see James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 120–21 (2009).

42. Brown, *supra* note 6, at 876 (describing the close-knit relationship of defenses to *Bivens* claims).

43. For a more extensive treatment of the subject, including *Bivens* case law and scholarship, see generally RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 726–42 (6th ed. 2009).

44. *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007).

45. *Davis v. Passman*, 442 U.S. 228, 245–47 (1979).

46. *Wilkie*, 551 U.S. at 550 (quoting *Bush v. Lucas*, 462 U.S. 367, 378 (1983)).

47. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 (D.C. Cir. 1985) (citing *Lucas*, 462 U.S. at 380).

48. *Cf. In re Iraq & Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 103 (D.D.C. 2007) (stating that when determining whether special factors exist, “courts should avoid creating a new, non-statutory remedy when doing so would be ‘plainly inconsistent’ with authority constitutionally reserved for the political branches”) (citing *Chappell v. Wallace*, 462 U.S. 296, 304 (1983)).

claims: the “*Marbury*–rights model” and the “prudential–deferential model.”⁴⁹ Under the *Marbury*–rights model, the judiciary reaches the merits of constitutional tort claims because hearing these types of suits is part of the judiciary’s “role as interpreter and enforcer of the Constitution.”⁵⁰ On the other hand, the prudential–deferential model is highly deferential towards Congress (as its name suggests).⁵¹ Jurists utilizing this model are particularly deferential when Congress has regulated a particular area. But extensive regulation is not required for deference—respecting Congress’ expertise in providing enforcement mechanisms for constitutional law can also require deference to congressional *nonaction*.⁵² The prudential aspect of this model involves the judiciary determining “the best method of advancing the constitutional order in the context of a proposed damages action.”⁵³

The prudential–deferential model is entrenched as the current approach. In *Correctional Services Corp. v. Malesko*, for example, the Supreme Court noted that the 1971 *Bivens* decision relied “largely on earlier decisions implying private damages actions into federal statutes.”⁵⁴ and recognized that the Court had abandoned those cases long ago.⁵⁵ Having suggested that *Bivens* (the case) itself rests on shaky ground, the *Malesko* Court expressed disdain for new *Bivens* remedies,⁵⁶ noting that it had only crafted two new types of claims in over thirty years of *Bivens* jurisprudence⁵⁷ and that it had “consistently refused to extend *Bivens* liability to any new context or new category of defendants” since 1980.⁵⁸ The lower courts have followed suit. For instance, the Eighth Circuit, in *Nebraska Beef, Ltd. v. Greening*, has explicitly professed a “presumption against judicial recognition of direct actions for violations of the Constitution by federal

49. Brown, *supra* note 6, at 853–54.

50. *Id.*

51. *Id.* at 854.

52. *See id.* (“The factors usually turn out to be some combination of Congress’s expertise in the area of the suit’s subject matter, particularly if Congress has acted, and its presumed expertise in providing enforcement of federal law, including the Constitution.”).

53. *Id.*

54. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 67 (2001).

55. *Id.* at 67 n.3 (citing *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)). In *Alexander v. Sandoval*, Justice Scalia colorfully explained the Court’s rejection of these cases: “Respondents would have us revert in this case to the understanding of private causes of action that held sway 40 years ago when Title VI was enacted. . . . Having sworn off the habit of venturing beyond Congress’s intent, we will not accept respondents’ invitation to have one last drink.” 532 U.S. at 287.

56. *See Malesko*, 534 U.S. at 67–70.

57. *Id.* at 70.

58. *Id.* at 68.

officers.”⁵⁹ When a *Bivens* remedy is created, the court declared, it should be “the best way to implement a constitutional guarantee.”⁶⁰ This is a prime example of the prudential aspect of the prudential–deferential model.

The recent *Padilla v. Yoo* district court decision is an example of the *Marbury*–rights model. Jose Padilla, a post-9/11 detainee, successfully avoided summary judgment in his lawsuit against John Yoo, a former deputy attorney general and current University of California Berkley Law Professor. Padilla alleged Professor Yoo violated his constitutional rights when Yoo crafted the “torture memos” that permitted interrogators to torture Padilla (among other things).⁶¹ The decision largely distinguished cases in which the Supreme Court identified special factors, rather than recognize the current strong presumption against *Bivens* claims.⁶² As such, it is highly likely to be reversed on appeal by the Supreme Court, if not earlier by the Ninth Circuit.⁶³

Even if the *Marbury*–rights model prevails, federal officials can still fall back on qualified immunity. *Harlow v. Fitzgerald* embodies the current overarching qualified immunity rule⁶⁴: government officials are immune from civil claims for damages provided “their conduct does not violate any clearly established statutory or constitutional rights of which a reasonable person would have

59. *Nebraska Beef v. Greening*, 398 F.3d 1080, 1084 (8th Cir. 2005) (quoting *McIntosh v. Turner*, 861 F.2d 524, 526 (8th Cir. 1988)); see also *In re Iraq and Afg. Detainees Litig.*, 479 F. Supp. 2d 85, 93–94 (D.D.C. 2007) (noting that recognizing novel *Bivens* claims is disfavored despite their value in deterring constitutional violations); Pfander & Baltmanis, *supra* note 41, at 119 (recognizing the presumption against novel *Bivens* claims).

60. See *Nebraska Beef*, 398 F.3d at 1080.

61. See *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1030 (N.D. Cal. 2009).

62. *Id.* at 1025 (“Here, the Court does not find that special factors counsel hesitation where there is no authority evidencing a remedial scheme for designation or treatment of an American citizen residing in America as an enemy combatant.”).

63. *But see* Brown, *supra* note 6, at 893–900 (discussing the possibility that war on terror cases will trigger the *Marbury*–rights model). At oral argument, the Ninth Circuit panel hearing Yoo’s appeal appeared divided. See Oral Argument at 15:25, 24:45, *Padilla v. Yoo*, 633 F. Supp. 2d 1005 (No. 09-16478), available at <http://www.ca9.uscourts.gov/datastore/media/2010/06/14/09-16478.wma>; Ashby Jones, *Ninth Circuit Panel Seems Torn Over Yoo Lawsuit*, WALL ST. J.L. BLOG, (June 15, 2010, 11:59 AM), <http://blogs.wsj.com/law/2010/06/15/ninth-circuit-panel-seems-torn-over-yoo-lawsuit/> (suggesting Judge Fisher is in favor of affirming the decision, Judge Rymer is in favor of reversal, and the decision could hang on the vote of Judge Pallmeyer, who “did not tip her hand”).

64. Since the modern test’s inception in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), the Supreme Court has continuously tinkered with the doctrine. See Aviva A. Orenstein, Recent Development, *Presidential Immunity From Civil Liability: Nixon v. Fitzgerald*, 68 CORNELL L. REV. 236, 240–42 (1983) (discussing qualified immunity case law and explaining the evolution of the qualified immunity test).

known.”⁶⁵ Qualified immunity is an affirmative defense; therefore, the official asserting the defense must establish the privilege.⁶⁶ Determining whether the official is immune from suit requires a two-part test: courts must first ascertain whether there has been a constitutional violation, and then determine “whether that law was clearly established at the time . . . [the violation] occurred.”⁶⁷

In order for a constitutional right to be clearly established, “[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”⁶⁸ An official’s action is not protected by qualified immunity merely because the conduct in question has not previously been held to violate a constitutional right.⁶⁹ Without a bright-line approach available, courts inquire as to whether the law placed the official on notice that his conduct was clearly illegal,⁷⁰ often using the amorphous “fair warning” concept.⁷¹ The result has been incoherent, inconsistent, and often counterintuitive decisions that have drawn substantial criticism from commentators.⁷² Still, it is a powerful weapon for officials, particularly with respect to the murky, ill-defined law related to torture.⁷³

Finally, a plaintiff must hurdle the state secrets doctrine.⁷⁴ This privilege can be further segregated into two sub-privileges: (1) the *Totten* bar and (2) the *Reynolds* privilege. In a narrow class of obvious cases where it is clear the very subject matter of the lawsuit involves state secrets, courts can avoid much of the intricacy required by the

65. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). “Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009).

66. *Harlow*, 457 U.S. at 812–15.

67. *Id.* at 818; *see also* *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (“[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the ‘objective legal reasonableness’ of the action, assessed in light of the legal rules that were ‘clearly established’ at the time it was taken.” (quoting *Harlow*, 457 U.S. at 818–19)).

68. *Anderson*, 483 U.S. at 640.

69. *Id.*

70. *Saucier v. Katz*, 533 U.S. 194, 195, 202 (2001).

71. *See, e.g.*, *Clement v. Gomez*, 298 F.3d 898, 906 (9th Cir. 2002).

72. *See, e.g.*, Richard B. Golden & Joseph L. Hubbard, *Section 1983 Qualified Immunity Defense: Hope’s Legacy, Neither Clear Nor Established*, 29 AM. J. TRIAL ADVOC. 563 (2006).

73. *But see* *Padilla v. Yoo*, 633 F. Supp. 2d 1005, 1038 (N.D. Cal. 2009) (concluding Padilla alleged violations of basic constitutional rights that were clearly established at the time of the conduct in question).

74. *See generally* Robert M. Chesney, *State Secrets and the limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249 (2007) (discussing the challenge plaintiffs face in attempting to overcome the state secrets privilege for claims arising out of counter-terrorism policies after 9/11).

Reynolds privilege under the *Totten* bar.⁷⁵ In all other situations, the government must rely on the *Reynolds* privilege, which takes its name from *United States v. Reynolds*,⁷⁶ a landmark state secrets decision. Professor Chesney describes the *Reynolds* framework as follows:

(a) the claim of privilege must be formally asserted by the head of the department charged with responsibility for the information; (b) the reviewing court has the ultimate responsibility to determine whether disclosure of the information in issue would pose a “reasonable danger” to national security; (c) the court should calibrate the extent of deference it gives to the executive’s assertion with regard to the plaintiff’s need for access to the information; (d) the court can personally review the sensitive information on an *in camera*, *ex parte* basis if necessary; and (e) once the privilege is found to attach, it is absolute and cannot be overcome by a showing of need or offsetting considerations.⁷⁷

Consider the following example. Suppose an enemy combatant is tortured at a top secret U.S. military base located in Israel. If the existence of the base becomes known it might threaten U.S.–Middle East relations and result in terror attacks on the United States. The combatant is later incarcerated in the United States and brings a lawsuit based on the torture he endured. Further suppose the enemy combatant, and now plaintiff, must establish two things to have a reasonable chance of prevailing at trial: the identity of his torturers (to show they were employed by the U.S. government) and the location of the base (in order to prove these officials were capable of being at the base when the torture occurred). Even if the claim was against a private individual, the United States could assert the state secrets privilege. The local U.S. Attorney would describe the nature of the information and explain why revealing the information to the plaintiff and the public (via publicly accessible court documents) would threaten national security. The judge could then conduct an *in camera* review if he desired.

Mohamed v. Jeppesen Dataplan, Inc., a recent state secrets case, provides a good example of how the privilege can come into play. The plaintiffs alleged the CIA, operating in concert with other agencies and foreign governments, was operating an extraordinary rendition

75. *E.g.*, *Mohamed v. Jeppesen Dataplan, Inc.*, No. 08-15693, 2010 U.S. App. LEXIS 18746, at *37 (9th Cir. Sept. 8, 2010) (en banc).

76. *United States v. Reynolds*, 345 U.S. 1 (1953).

77. Chesney, *supra* note 74, at 1283 (discussing *United States v. Reynolds*, 345 U.S. 1 (1953)).

program.⁷⁸ They claimed to have been tortured by individuals participating in the program.⁷⁹ The plaintiffs attempted to recover from *Jepesen Dataplan*, a subsidiary of Boeing, because the company allegedly helped plan and support the aircraft that transported the plaintiffs to and from the locations where they were tortured.⁸⁰ The United States intervened, moving to dismiss under the state secrets doctrine.⁸¹

The Ninth Circuit Court of Appeals ultimately applied the *Reynolds* privilege, stopping the lawsuit dead in its tracks. After reviewing public and classified documents, the court sided with the government, concluding, “that at least some of the matters it seeks to protect from disclosure in this litigation are valid state secrets, ‘which, in the interest of national security, should not be divulged.’”⁸² Of course, it is difficult to ascertain *why* the potential evidence was privileged because the court was unable to disclose the nature of privileged documents.⁸³ Alas, such is the nature of state secrets review.

Obviously, the state secrets privilege involves quite a bit of judicial discretion. But the government is fairly successful in seeking the dismissal of complaints based on the privilege, with a nearly seventy-seven percent success rate between 1971 and 2006.⁸⁴ There is a significant chance a judge would conclude that allowing access to the information would pose a significant danger to national security. Based on this brief explanation, it is clear the state secrets privilege is a powerful weapon in the government’s repertoire, particularly in torture-related cases.

C. Conclusion: Torture Victims Are Presently out of Luck

The above discussion demonstrates that torture victims will have a very difficult time obtaining any type of monetary relief from the United States or its officials. Pursuing a claim against the government itself requires victims to navigate a tangled web of a largely illusory sovereign immunity waiver in the form of the FTCA. Plaintiffs must

78. *Mohamed Jeppesen Dataplan*, 2010 U.S. App. LEXIS 18746, at *5.

79. *Id.* at *5–10.

80. *Id.* at *10–11.

81. *Id.* at *14.

82. *Id.* at *43–44 (quoting *United States v. Reynolds*, 345 U.S. 1, 10 (1953)).

83. *See id.* at *44 (“We are precluded from explaining precisely which matters the privilege covers lest we jeopardize the secrets we are bound to protect.”) (citing *Black v. United States*, 62 F.3d 1115, 1119 (8th Cir. 1995)).

84. *See Chesney*, *supra* note 74, at 1307 (showing that there were forty-three state secrets dismissal motions between 1971 and 2006, and that thirty-three of them were successful).

first demonstrate that the torture was negligent or wrongful and committed by a U.S. government employee within the scope of his employment.⁸⁵ Assuming the plaintiff can meet this hurdle, he must evade the four exceptions: the torture cannot be closely related to combat activities, it must occur within the United States,⁸⁶ it cannot fall under one of the enumerated intentional torts, and it cannot involve discretionary policy decisions.⁸⁷

Theoretically, torture victims will have a *slightly* easier time recovering against private officials. If a victim can demonstrate the official's conduct fell outside the scope of his employment, the FTCA's exclusivity provision will not bar the claim.⁸⁸ The victim might be able to bring a state law claim. It is important to keep in mind, however, that the government can still assert the state secrets doctrine to prevent the disclosure of sensitive information.

This narrow window of recovery leaves the *Bivens* claim as a potential avenue for redress. That route, however, is unlikely to prove fruitful in the long run due to the strong presumption against recognizing novel *Bivens* claims, particularly under the prudential-deferential model that has dominated recent federal *Bivens* decisions.⁸⁹ Furthermore, even if the *Marbury*-rights model prevails,⁹⁰ federal officials can still avail themselves of the highly effective qualified immunity defense,⁹¹ and the government might intervene by using the state secret privilege.

II. POTENTIAL SOLUTIONS

Before proceeding to the question of whether an Article I tribunal and administrative law solution can pass constitutional muster, this part discusses several proposals⁹² and the rationales behind holding the government and government officials accountable. Only suits against the government and suits against individual officers are considered here and in Part III because torture victims will have a *very*

85. See *supra* note 10 and accompanying text.

86. See *supra* text accompanying notes 15–18 (discussing the combatant activities and foreign country exceptions).

87. See *supra* text accompanying notes 19–25 (discussing the intentional tort and discretionary function exception).

88. See *supra* note 10 and accompanying text.

89. See *supra* notes 54–63 and accompanying text.

90. See *supra* text accompanying note 50 (describing the *Marbury*-rights model).

91. See *supra* notes 64–73 and accompanying text (discussing the qualified immunity doctrine).

92. See, e.g., *supra* note 6 (citing several proposals).

difficult time suing foreign officials even if there is a viable cause of action.⁹³

At the outset, it is important to note that there are multiple justifications for allowing torture victims to recover damages. Deterrent and compensatory justifications are likely the most prominent, but at least one proposal has also argued for governmental liability in order to restore the United States to a position of “moral leadership.”⁹⁴ From a practical perspective, it is critical the United States refrains from employing torture techniques—and therefore imperative that we deter unauthorized torture—so that the United States can retain the “moral high ground.”⁹⁵ As Joseph Falvey and Brian Eck have explained, by retaining the moral high ground, we can maintain our warfighters’ morale, combat the erosion of public support that is necessary to prevail in long-term military engagements, and enjoy more cooperative relationships with foreign states.⁹⁶

The Bar of the City of New York’s Task Force on National Security and The Rule of Law (“NYC Bar”) proposed an administrative law solution in 2008. The proposal was motivated in part by the war chest of defenses the government and its officials have at their disposal.⁹⁷ The NYC Bar argued for the creation of an independent agency

93. See *supra* notes 31–35 and accompanying text.

94. BAR OF CITY OF N.Y., *supra* note 6, at 2.

95. Joseph L. Falvey, Jr. & Brian D. Eck, *Holding the High Ground: The Operational Calculus of Torture and Coercive Interrogation*, 32 CAMPBELL L. REV. 561, 579–83 (2010) (explaining that a permissive approach to torture will have a detrimental “effect on our warfighters’ morale and our country’s belief that the United States occupies the moral high ground”).

96. *Id.* at 593; cf. Robert F. Turner, *What Went Wrong? Torture and the Office of Legal Counsel in the Bush Administration*, 32 CAMPBELL L. REV. 529, 534 (2010) (expressing the view that it is “imperative that America retains the moral high ground in its dealings with the world”). Falvey and Eck’s closing comments in a recent article eloquently express this point:

Ultimately, then, we suggest that maintaining our awareness of the distinction between ourselves and the enemies we fight is the key to holding the moral high ground. Many justifications for torture and coercive interrogation are inadequate because they fail to address this problem. Regardless of a detainee’s status, the duration of the harm a particular technique inflicts, or the value of the information gathered through coercive interrogations, such policies erode our warfighters’ awareness that our cause is just and worth fighting for. In addition to diminishing the armed forces’ effectiveness, torture erodes the public support necessary to win a long engagement by betraying our beliefs, tarnishing our self-image, and falsifying our promises to host countries and the rest of the world. Whatever tactical and logistical flexibility will be necessary to fight jihadist extremism in this age of asymmetric warfare, the worst defeat may well be to use our enemies’ weapons against them at the cost of undermining the principles that we hope to inculcate in their culture and to preserve in ours.

Falvey & Eck, *supra* note 95, at 593.

97. See BAR OF CITY OF N.Y., *supra* note 6, at 48 (“U.S. courts have consistently dismissed, at the pleading stage, suits seeking compensation for alleged mistreatment in violation of U.S. and international law, invoking such doctrines as the state secrets privilege, qualified immunity, Westfall Act immunity, political question or ‘special factors’ counseling against a *Bivens* remedy.”). Westfall Act immunity refers to the extension of federal official FTCA immunity to

that could compensate victims and deter torture, while minimizing evidentiary problems related to the imposition of the state secrets doctrine and deterring frivolous claims.⁹⁸ Several components were proposed to accomplish these goals: (1) establishing expertise in handling torture claims, (2) customizing pleading standards and summary dismissal procedures, (3) imposing costs for claims filed “without a reasonable basis,” and (4) creating procedures to better cope with the state secrets doctrine.⁹⁹ The NYC Bar approach advocates creating claims against only the federal government because it recognizes the potential political costliness of creating a claim against federal officials.¹⁰⁰ The NYC Bar proposal states that government liability will have a deterrent effect, but concedes individual liability would better accomplish that goal.¹⁰¹

The components proposed by the NYC Bar encapsulate many of the qualities an Article I tribunal can bring to the table that justify removing these claims from the typical Article III landscape. A small, highly-trained unit of judges can develop expertise related to a variety of matters unique to this type of litigation. This is particularly helpful with respect to the difficulties posed by the state secrets doctrine, which, by itself has garnered a proposed administrative law solution.¹⁰² That proposal astutely recognizes that, by creating a select cadre of judges, lawyers frequently engaged in this type of specialized litigation will have an incentive not to bring questionable claims lest they harm their credibility with judges they will surely encounter in the future.¹⁰³

include acts committed within the scope of employment. For a discussion of these defenses, see *supra* Part I.

98. See BAR OF CITY OF N.Y., *supra* note 6, at 49.

99. *Id.*

100. *Id.*

101. See *id.* (stating these claims would not have *as much* deterrent value as suits against individual officials).

102. See Beth George, Note, *An Administrative Law Approach to Reforming the State Secrets Privilege*, 84 N.Y.U. L. REV. 1691 (2009) (arguing that judicial review is unlikely to solve the issues posed by the privilege, and that administrative-law based reforms can effect positive change in the doctrine’s application by discouraging government overreach).

103. See *id.* at 1718–19 (“Judges who are intimately familiar with the process can easily identify a series of abuses, and individual attorneys associated with the abuses could suffer increased scrutiny or complete loss of credibility.”). Ms. George makes this observation in the context of state secrets litigation; it holds true in the more general context as well. See *id.* State secrets privilege assertions will often involve a relatively small group of DOJ lawyers appearing before a select group of ALJs. See *id.* at 1718. This same principle is likely to hold true, although to a lesser extent, with regard to members of the plaintiff and defense bars. *Id.* In fact, the adjudicatory body might enhance this principle by permitting only certain attorneys to appear before them through stringent quasi-bar admission standards. *Id.*

Unfortunately, government liability alone may be insufficient to produce the intended deterrent effect. Unless damage awards are massive, there appears to be little motivation to refrain from engaging in torture or borderline interrogation techniques, particularly when one considers the potential reward that can be gleaned by extracting valuable intelligence. If the information or result is important enough to the government, or to specific actors, the government might be willing to pay whatever damages could be imposed.¹⁰⁴ An agency would effectively be able to budget for a monetary damage award when the “need” to torture arises. Since a threat to civilian or military lives will often be at stake in these types of situations, it seems that a cost–benefit analysis might cause officials to torture now and pay later. In situations like these, we would depend on the individual officer’s conscience—not the government’s potential monetary liability—to deter torture. It stands to reason that damage awards will have *little* or *no* deterrent effect on the government.¹⁰⁵

An Article I solution can address the hurdles to victims’ lawsuits without disturbing the general application of these hurdles to other areas of the law. In other words, unintended immunity waivers and doctrinal disturbances can be avoided. If the government is to be liable, it will have to waive its sovereign immunity to a greater extent than it has done under the FTCA. Congress could pass a single statute stating that government immunity is waived only in the context of the Article I torture courts. The exact nature of this waiver could be addressed by agency rulemaking. An agency might be able to fine-tune the qualified immunity and state secrets doctrines in a way that has no effect on other areas of the law. Furthermore, Congress could declare that the remedy afforded by the torture court is wholly in lieu of any *Bivens* remedy, which would avoid the uncertainty the *Bivens* claim injects into any situation.

Creating highly specialized rules at the agency level (which would likely be impossible for Congress to accomplish) can help ensure these rules are fair to those who must follow them. As Professor Robert Turner has suggested, there are few things that could be more harmful to U.S. national security than railroading civilian and military person-

104. Cf. Seamon, *supra* note 4, at 761 (arguing that courts should be able to impose equitable relief in order to prevent situations in which the government would be willing to pay after engaging in torture).

105. Cf. Daryl J. Levinson, *Making Government Pay: Market Politics and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 361–63 (2000) (arguing that there is little reason to believe that constitutional cost remedies can influence government behavior).

nel who have in good faith relied on pronouncements from the Office of Legal Counsel that certain interrogation techniques are legal.¹⁰⁶ By creating enforceable, specific regulations, agency rulemaking can ensure intelligence and military personnel cannot rely on such pronouncements in good faith. Interrogators will know “the rules” before they act. And provided the rules are sufficiently clear and specific, interrogators who follow the rules should be confident they will not incur liability. Ideally, the tribunal will never be required to hear a claim. Of course, whether these tribunals and rulemaking bodies actually *should* be created is a policy question beyond the scope of this Article.

III. CAN IT BE DONE—CONSTITUTIONALLY?

The remainder of this Article explores whether liability can be imposed on the government and federal officials through Article I courts that do not provide traditional jury trials. To find the answers to these questions, this Part trudges through one of the murkiest and unsettled thickets of constitutional law: the public–private rights dichotomy. Section A explains the public–private right framework. Section B applies that framework to claims litigated against the government, while Section C applies it to claims litigated against government officials. In both instances, an Article I court may adjudicate these claims under a permissive reading of *Granfinanciera v. Nordberg*. Finally, Section D considers the extent to which judicial review can be precluded, concluding Article III judicial review of most factual and legal rulings can be proscribed.

A. The Public–Private Right Dichotomy

An explanation of the public rights doctrine frequently begins with a discussion of *Crowell v. Benson*,¹⁰⁷ but as Professors Levy and Shapiro explain, the doctrine was actually conceived in *Murray’s Lessee v. Hoboken Land & Improvement Co.*,¹⁰⁸ a mid-nineteenth century decision.¹⁰⁹ In *Murray’s Lessee*, the Court explained that

106. See Turner, *supra* note 96, at 556–57 (rejecting the possibility of prosecuting members of the intelligence community).

107. *Crowell v. Benson*, 285 U.S. 22, 50 (1932).

108. *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1855).

109. See Richard E. Levy & Sidney A. Shapiro, *Government Benefits and the Rule of Law: Toward a Standards-Based Theory of Judicial Review*, 58 ADMIN. L. REV. 499, 507 (2006) (explaining that the “public rights doctrine originated in *Murray’s Lessee*”).

there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.¹¹⁰

The Supreme Court did not explain what these rights were, and since the decision, the federal judiciary has been unable to develop a satisfactory principle with which to define them. Thus, the public rights doctrine is an “incoherent muddle.”¹¹¹

The modern starting point for the public rights doctrine is *Crowell v. Benson*, a decision that upheld a maritime workers’ compensation scheme.¹¹² Under the scheme, the United States Employees Compensation Commission made awards based on compensation tables after determining the nature and extent of workers’ injuries.¹¹³ Unless these factual determinations were patently incorrect or unsupported by the evidence, the courts were bound by the agency’s factual determinations.¹¹⁴ According to the Court, Congress had “provide[d] for the appropriate exercise of the judicial function” by allowing for judicial review of questions of law.¹¹⁵ With regard to “private rights,” the Court stated that maintaining the essential functions of judicial power did not require all factual findings to be made by Article III courts.¹¹⁶ Referring to “public rights” in *dicta*, the Court stated:

Congress, in exercising the powers confided to it, may establish “legislative” courts (as distinguished from “constitutional courts in which the judicial power conferred by the Constitution can be deposited”) . . . “to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.” But “the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals.”¹¹⁷

110. *Murray’s Lessee*, 59 U.S. at 284.

111. See Levy & Shapiro, *supra* note 109, at 508. See generally RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE, § 2.8, 132–45 (5th ed. 2010) (explaining agency adjudication authority).

112. *Crowell v. Benson*, 285 U.S. 22, 50–51 (1932).

113. See *id.* at 54.

114. See *id.* at 49–50.

115. *Id.* at 54.

116. See *id.* at 63.

117. *Id.* at 50 (citations omitted).

Although a significant portion of the Court's public-private rights discussion was *dicta*, the dichotomy stuck, creating an incoherent and unsettled regime.

*Northern Pipeline Co. v. Marathon Pipeline Co.*¹¹⁸ took a formalist, and short-lived, approach to the public-private rights dichotomy. The plurality stated that public rights "at a minimum arise between the government and others," while private rights involve "the liability of one individual to another."¹¹⁹ Only public rights, the Court continued, may be removed from the Article III courts and adjudicated by legislative courts or administrative agencies.¹²⁰ The Court stated that contract rights were quintessentially private rights because they were state-created causes of action involving the liability of one private party to the other.¹²¹ Consequently, the Court struck down § 1471 of the Bankruptcy Act of 1978, a statute that gave Article I bankruptcy judges jurisdiction over state contract claims.¹²² In dissent, Justice White argued that the plurality's framework lacked coherence and ravaged the Court's administrative adjudication case law.¹²³ Under the *Northern Pipeline* approach, the question of whether an Article I tribunal could adjudicate a dispute depended on whether there was potential liability between the parties or liability between the government and the public. The decision suggests federally created claims between individuals might not be classified as private rights because they are not state-created, but the import of that factor is far from clear. Many were concerned that the trend towards agency dispute resolution was incompatible with *Northern Pipeline*, and that the decision would require "massive restructuring" of the federal government.¹²⁴

*Thomas v. Union Carbide Agricultural Products Co.*¹²⁵ involved an agency adjudicated dispute between two private parties under the

118. *N. Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982) (plurality).

119. *Id.* at 69-70 (internal quotations omitted).

120. *See id.* (citing *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n.*, 430 U.S. 442, 450 n.7 (1977); *Crowell v. Benson*, 285 U.S. 22, 50-51 (1932)).

121. *See id.* at 71-72.

122. *Id.* at 87.

123. *See id.* at 94 (White, J., dissenting) ("This Court's cases construing that text must also be considered. In its attempt to pigeonhole these cases, the plurality does violence to their meaning and creates an artificial structure that itself lacks coherence.").

124. *See Levy & Shapiro, supra* note 109, at 134 (noting the potential need for "massive restructuring" as a result of the *Northern Pipeline* decision) (citing Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988)).

125. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985).

Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”).¹²⁶ *Thomas* represents an acquiescent, pragmatic approach to agency adjudication.¹²⁷ The Court rejected the strict categorical approach adopted in *Northern Pipeline*, noting that *Northern Pipeline* failed to command a majority of the Court when it was decided, and that the Court had rejected a formalistic approach to the public-private rights inquiry in *Crowell*.¹²⁸ Channeling the *Northern Pipeline* dissent, the Court noted that the *Northern Pipeline* approach, which focused exclusively on the identity of the parties, called a significant number of agency adjudicatory activities into question.¹²⁹ The Court declared that Congress could create “seemingly ‘private’ right[s]” that could be adjudicated by agencies with limited Article III court involvement if the rights were “closely integrated into a public regulatory scheme.”¹³⁰ It is important to note that the scheme upheld in *Thomas* provided for *minimal* judicial review—courts could review the arbitrator’s decision only for “fraud, misconduct, or misrepresentation.”¹³¹ This level of review was sufficient to “preserve[] the ‘appropriate exercise of the judicial function.’”¹³²

Decided just two years after *Thomas*, *Commodity Futures Trading Commission v. Schor*¹³³ purported to establish a flexible, comprehensive framework for determining when agency adjudication is appropriate. At issue was the constitutionality of a Community Futures Trading Commission (“CFTC”) rule allowing the agency to hear common law counterclaims associated with a primary CFTC func-

126. *See id.* at 573–74 (explaining that FIFRA permitted either party to a “use of data” dispute to initiate *binding* arbitration that was subject to judicial review only for “fraud, misrepresentation, or other misconduct”) (emphasis added).

127. *See id.* at 589 (“[T]he public rights doctrine reflects simply a pragmatic understanding that when Congress selects a quasi-judicial method of resolving matters that ‘could be conclusively determined by the Executive and Legislative Branches,’ the danger of encroaching on the judicial powers is reduced.”).

128. *See id.* at 586 (citing *Crowell v. Benson*, 285 U.S. 22, 53 (1932)).

129. *See id.* at 587 (“If the identity of the parties alone determined the requirements of Article III, under appellees’ theory the constitutionality of many quasi-adjudicative activities carried on by administrative agencies involving claims between individuals would be thrown into doubt.”). The Court explained that its prior decisions treated adversarial proceedings to invoke tariffs against competitors and to adjudicate federal landlord tenant disputes as appropriate for agency adjudication. *See id.* Both of these situations determined liability between the parties; therefore, these prior decisions could not be reconciled with the strict *Northern Pipeline* approach. *See id.* at 588–89 (citing *Atlas Roofing Co. v. Occupational Safety & Health Review Comm’n*, 430 U.S. 442, 454–55 (1977); *Ex parte Bakelite Corp.*, 279 U.S. 438, 447 (1929); *Block v. Hirsh*, 256 U.S. 135 (1921)).

130. *Thomas*, 473 U.S. at 593–94.

131. *Id.* at 592.

132. *Id.* (citing *Crowell*, 285 U.S. at 54).

133. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986).

tion—adjudicating reparation claims against brokers for CFTC violations.¹³⁴ According to the *Schor* Court, the issue of agency adjudication could be determined on a case-by-case basis with reference to the “purposes underlying the requirements of Article III.”¹³⁵ The Court defined these purposes as: (1) protecting the judicial branch’s independence within the constitutional scheme and (2) safeguarding litigants’ rights to have their claims decided by judges who are not dominated by the other branches of government.¹³⁶

The Court stated several factors were critical to its inquiry: (1) the extent to which essential judicial functions are reserved to Article III courts, (2) the corresponding extent to which the agency tribunal exercises traditional Article III powers, (3) the “origins and importance of the right to be adjudicated,” and (4) “the concerns that drove Congress to depart from the requirements of Article III.”¹³⁷ The decision also suggests agency adjudication is more likely to be found constitutional if it involves a segregated area of law¹³⁸ that requires special expertise.¹³⁹ Unfortunately, the Court gave little reason for why the parties’ rights to an independent judge were preserved, stating that by bringing the original CFTC claim, Schor waived his right to have counterclaims against him adjudicated by an Article III court.¹⁴⁰

134. *Id.* at 836–38.

135. *Id.* at 847.

136. *Id.* at 848 (citing *United States v. Will*, 449 U.S. 200, 218 (1980)).

137. *Schor*, 478 U.S. at 851 (citations omitted).

138. *See id.* at 852–53 (“The CFTC, like the agency in *Crowell*, deals only with a ‘particularized area of law,’ whereas the jurisdiction of the bankruptcy courts found unconstitutional in *Northern Pipeline* extended to broadly ‘all civil proceedings arising under title 11 or arising in or related to cases under title 11.’” (citations omitted)).

139. *See id.* at 856 (explaining that failing to allow agencies to adjudicate state common law claims at the election of the parties would “defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task.” (quoting *Crowell v. Benson*, 285 U.S. 22, 46 (1932))).

140. *See id.* at 849. This explanation is obviously inadequate to justify mandatory agency adjudication of “seemingly private rights.” *See* PIERCE, *supra* note 111, § 2.8, at 137–38 (discussing the incomplete nature of the *Schor* analysis (citing Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 316–17 (1988))). Professor Verkuil has developed an alternative explanation—due process—that can be grafted onto the *Schor* explanation to create a coherent argument that explains how agency adjudication can satisfy the purposes of Article III. *See* Verkuil, *supra*, at 316–17; *see also* PIERCE, *supra* note 111, at 138 (summarizing Professor Verkuil’s “well-reasoned” argument). He argues the Administrative Procedure Acts goes a long way to satisfying due-process concerns and that the independence of administrative law judges and bankruptcy judges indicate Congress can assure litigants that they can avail themselves of independent adjudicators. *See* Verkuil, *supra*, at 316.

*Granfinanciera v. Nordberg*¹⁴¹ disturbed the pragmatic, albeit incomplete, approach established just three years earlier in *Schor*, and stated that an acquiescent version of the bright-line *Northern Pipeline* test is the current means of determining whether Article I adjudication is constitutional. It is worth noting that the Court's discussion of this issue can be classified as *dicta*, providing the Court with wiggle room should it elect to take a different approach in the future. The precise issue in *Granfinanciera* was whether "a person who has not submitted a claim against a bankruptcy estate has a right to a jury trial when sued by the trustee in bankruptcy to recover an allegedly fraudulent monetary transfer."¹⁴² A bankruptcy court was adjudicating a private right in the sense that the claim was between two private parties.¹⁴³

According to the Court, the Seventh Amendment applies to claims that enforce statutory rights that an 18th-century English court of law, as opposed to a court of admiralty or equity, would have determined.¹⁴⁴ As such, the proper inquiry is to first "compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity."¹⁴⁵ The second part of the analysis requires a determination of whether the claim is legal or equitable.¹⁴⁶ If these factors indicate a party is entitled to a jury trial, the Court continued, it would then be required to decide whether "Congress may assign and has assigned resolution" to an Article I court.¹⁴⁷ Utilizing these criteria, the Court concluded that the action would have been tried in an 18th-century court of law and was legal in nature due to the nature of the remedy sought—damages.¹⁴⁸

The Court next addressed whether "the *Seventh Amendment* confers on petitioners a right to a jury trial in the face of Congress' decision to allow a non-Article III tribunal to adjudicate the claims against them."¹⁴⁹ This suggests that the initial inquiry is asking whether the Seventh Amendment *applies*, and the second is asking whether the Seventh Amendment has been *violated*. Oddly, whether the Seventh

141. *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989).

142. *Id.* at 36.

143. *See id.*

144. *Id.* at 42 (citing *Curtis v. Loether*, 415 U.S. 189, 193 (1974)).

145. *Id.* at 42 (quoting *Tull v. United States*, 481 U.S. 412, 417–18 (1987)).

146. *Id.* (quoting *Tull*, 481 U.S. at 417–18).

147. *Id.* at 42.

148. *Id.* at 43–48.

149. *Id.* at 50 (emphasis in original).

Amendment protects a party's right to a jury trial and whether Congress has permissibly negated that right to a jury trial appear to be different inquiries. Parts of the opinion suggest that even when the Seventh Amendment applies, Congress can restrict jury trials under the right circumstances.

The Court explained that, while Congress could create a statutory right and assign adjudication of that right to an Article I tribunal that did not provide for a jury trial,¹⁵⁰ Congress may only restrict access to jury trials when the right is a *public right*.¹⁵¹ The Court's discussion indicates the original public and private right bright-line-style classifications still apply. A claim is based on a public right "where the government is involved in its sovereign capacity."¹⁵² A private right is still generally defined as "the liability of one individual to another."¹⁵³

According to the *Granfinanciera* Court, the Seventh Amendment inquiry, and the non-Article III adjudication inquiry are now one and the same. Writing for the majority, Justice Brennan used the following language:

[O]ur decisions point to the conclusion that, if a statutory cause of action is legal in nature, the question whether the Seventh Amendment permits Congress to assign its adjudication to a tribunal that does not employ juries as factfinders requires the same answer as the question whether Article III allows Congress to assign adjudication of that cause of action to a non-Article III tribunal.¹⁵⁴

Based on this language, it appears that, if the resolution of a claim can be assigned to non-Article III tribunal, no jury trial is required.¹⁵⁵

The Court carved out an important exception for certain legal claims not involving the government as a party in its sovereign capacity, which would likely would have been "private rights" under the *Northern Pipeline* calculus.¹⁵⁶ *Granfinanciera* revived the portion of *Thomas* that accepted an expanded definition of public rights. If the government is not a party, a statutory right must be closely inter-

150. *Id.* at 51 (citing *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 455 (1977)).

151. *Id.*

152. *Id.*

153. *See id.* at 51 n.8 (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)).

154. *Id.*

155. *See id.* at 53.

156. *See supra* discussion accompanying notes 118–124 (describing the *Northern Pipeline* decision).

twined with a federal regulatory scheme if it is to be resolved by a non-Article III court.¹⁵⁷

The crucial question, in cases not involving the Federal Government, is whether “Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly ‘private’ right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary.” If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court. If the right is legal in nature, then it carries with it the Seventh Amendment’s guarantee of a jury trial.¹⁵⁸

Thus, the Court appeared to backtrack on its statements that the Seventh Amendment and public rights inquiry are one in the same. The Court also indicated that if Congress creates a right to sue that does not implicate the government as a party, the claim can be adjudicated by an agency if the right is “closely intertwined with a federal regulatory program,” and if this is the case, Congress can foreclose jury trials.¹⁵⁹ But, in the quotation above, the Court declared that if the same right to sue is legal in nature, the Seventh Amendment requires a jury trial. These appear to be conflicting statements, particularly when considered against the result in *Schor*, and can be read to suggest that whether a claim can be assigned to a non-Article III tribunal and whether a jury trial can be restricted may not be the same inquiry.¹⁶⁰

By assigning the adjudication of a case involving a right that is closely integrated with a “public regulatory scheme” to a specialized non-Article III court, Congress can effectively convert would-be private rights to public rights. If stretched to its limits, this might allow

157. See *Granfinanciera*, 492 U.S. at 54–55.

158. *Id.* (footnotes and internal citations omitted) (alteration in original).

159. See *id.* (“If a statutory right is not closely intertwined with a federal regulatory program Congress has power to enact, and if that right neither belongs to nor exists against the Federal Government, then it must be adjudicated by an Article III court.”); *id.* at 55 n.10 (“Those cases in which Congress may decline to provide jury trials are ones involving statutory rights that are integral parts of a public regulatory scheme and whose adjudication Congress has assigned to an administrative agency or specialized court of equity. . . . [W]e now refer to those rights as ‘public’ rather than ‘private.’”).

160. See Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1094–95 (1999) (discussing a variety of explanations *Granfinanciera* and providing a more thorough discussion of this line of cases).

Congress to convert any private right into a public right.¹⁶¹ *Granfinanciera* represents a return to the categorical approach¹⁶² and provides a comprehensive, albeit logically strained, framework. It is similar to *Northern Pipeline* because it employs bright-line categories, but similar to *Thomas* in that it takes an acquiescent and more nuanced approach. Note that *Granfinanciera* utilized *Thomas*, which rejected the categorical approach,¹⁶³ to expand *Northern Pipeline*'s two bright line categories¹⁶⁴ to three: (1) rights between a private party and the government, or "traditional public rights"; (2) rights between private parties intertwined with federal regulation, or "non-traditional public rights"; and (3) rights between private parties *not* intertwined with federal regulation, or "traditional private rights."

While parts of the decision seem to restrict Article I adjudication based solely on whether a statutory claim resembles a common law claim, the Court's efforts to distinguish *Atlas Roofing Co. v. Occupational Safety and Health Review Commission*, another public rights case, appear to leave some wiggle-room:

The decisive point is that in neither the 1978 [Bankruptcy] Act nor the 1984 Amendments did Congress "creat[e] a new cause of action, and remedies therefor, unknown to the common law," because traditional rights and remedies were inadequate to cope with a manifest public problem. Rather, Congress simply reclassified a preexisting, common-law cause of action that was not integrally related to the reformation of debtor-creditor relations that apparently did not suffer from any grave deficiencies.

Nor can Congress' assignment be justified on the ground that jury trials of fraudulent conveyance actions would "go far to dismantle the statutory scheme," or that bankruptcy proceedings have been placed in "an administrative forum with which the jury would be incompatible." To be sure, we owe some deference to Congress'

161. See ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 122 (1st ed. 1993) ("[A]lmost any private, common-law sort of action may be converted by Congress to a matter of public right and thereby moved outside the zone of Article III courts.").

162. See Levy & Shapiro, *supra* note 109, at 513 (explaining that *Granfinanciera* returned the categorical approach and arguing that this threatens "judicial review as a rule of law safeguard for some private rights").

163. See *supra* notes 125–32 and accompanying text (describing the *Thomas* court's rejection of the strict *Northern Pipeline* approach).

164. See *supra* notes 118–24 and accompanying text (describing the *Northern Pipeline* decision).

judgment after it has given careful consideration to the constitutionality of a legislative provision.¹⁶⁵

While the Court was largely attempting to distinguish language contained in *Atlas Roofing*, the Court's discussion suggests that language is valid law. This passage suggests the Court might defer to Congress in three situations: (1) a truly novel type of claim is created because traditional claims are wholly inadequate to address a "manifest public concern," (2) the administrative forum and jury fact finding are incompatible, and (3) Congress has carefully considered the Constitutional implications of Article I juryless adjudication and determined Article III jury trials would dismantle an important public regulatory or dispute resolution system. These appear to be situations in which integration with a regulatory scheme justifies restricting the right to a jury trial even when a claim is "legal in nature."

The *Granfinanciera* Court applied its newly-created framework in a odd fashion because it did not state the bankruptcy court was incapable of adjudicating the claim, even though it held that the parties had a right to a jury trial.¹⁶⁶ The Court indicated the claim asserted in bankruptcy court was a *private* right,¹⁶⁷ and therefore, Congress could not deprive the parties of a jury trial.¹⁶⁸ *Granfinanciera* probably could have been decided on the tribunal assignment issue, but the Court framed the issue far more narrowly, stating that the party's Seventh Amendment rights were the "sole issue before the Court."¹⁶⁹ This narrow framing of the case suggests the Court might be able to distinguish *Granfinanciera* in the future without too much difficulty, perhaps allowing a return to the *Schor* approach, although nothing indicates that the Court is leaning in that direction.

165. *Granfinanciera v. Nordberg*, 492 U.S. 33, 58 (1989) (quoting *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 461, 454 n.11, 450 (1977) (alterations added and in original). *Atlas Roofing* involved federal legislation that allowed federal agencies to impose civil penalties on employers for maintaining unsafe work conditions because Congress found that traditional state-created tort remedies were inadequate to protect employees. *Atlas Roofing*, 430 U.S. at 444–45. The Court concluded that "right to a jury trial turns not solely on the nature of the issue to be resolved but also on the forum in which it is to be resolved." *Id.* at 460–61. Because Congress had recognized that traditional common-law and other remedies were inadequate, the Seventh Amendment was not a bar to adjudicating these new claims without juries. *See id.* at 461.

166. *See Sward*, *supra* note 160, at 1094–95 (1999) (discussing this issue).

167. *See Granfinanciera v. Nordberg*, 492 U.S. 33, 58 (1989) (concluding that the respondent's action did not arise "as part of the process of allowance and disallowance of claims" and that it was to "integral to the restructuring of debtor-creditor relations").

168. *Id.* at 58–59.

169. *Id.* at 50.

B. The Government Liability Approach

Article I tribunals can adjudicate torture claims against the government without providing jury trials. Even under *Northern Pipeline*, which is the most restrictive bright line approach, the victim's right is enforceable against the government in its sovereign capacity and is therefore a traditional public right. In fact, this type of claim is tailor-made for adjudication by an Article I court, even though it resembles a traditional tort cause of action. While the Court has appeared hesitant to allow these types of traditional private claims to be adjudicated by non-Article III tribunals,¹⁷⁰ this type of claim is truly a "novel cause[] of action"—the specific type of claim the *Granfinanciera* Court stated could be assigned to non-Article III courts.¹⁷¹ If a court elected to distinguish *Granfinanciera* and opt for the approach taken in *Thomas*, which departs from *Northern Pipeline*'s bright-line approach to designating rights as public or private, the analysis would not produce a different result because *Thomas* is a *more acquiescent* approach than that taken in *Northern Pipeline*, where all claims between private individuals and the government were private rights.¹⁷²

Even under the pre-*Granfinanciera* decisions, no jury trial would be required because Article I judges can sit as fact finders in suits against the United States. The same result would be reached if the questionable language in *Granfinanciera* stating that the tribunal and jury trial outcomes cannot differ is the current state of the law. Despite the unique nature of the claim, under the public-private rights analysis, adjudicating torture claims against the government in Article I courts is no different from a social security claim or a government contract claim litigated against the government in the Court of Federal Claims. The claims involve traditional public rights. Therefore, an Article I tribunal utilizing a process akin to a bench trial can adjudicate the claim.

170. See *Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 458 (1977) (stating that "wholly private tort, contract, and property cases, as well as a vast range of other cases, are not at all implicated" by the Court's determination that non-Article III courts can adjudicate certain claims).

171. See *Granfinanciera*, 492 U.S. at 51 ("Congress may devise *novel causes of action* involving public rights free from the strictures of the Seventh Amendment if it assigns their adjudication to tribunals without statutory authority to employ juries as factfinders.") (emphasis added).

172. See *supra* notes 125–32 and accompanying text (discussing the *Thomas* decision and explaining that it would expand the group of rights that may be adjudicated by non-Article III courts under *Northern Pipeline* to include some "seemingly private rights").

C. The Individual Liability Approach

Individual liability is a different ball of wax. Under *Granfinanciera*, the plaintiff's right must be closely integrated with a public regulatory scheme. This section first discusses some of the cases applying *Granfinanciera* with respect to this proposition and then explains how the seemingly private torture claim can be assigned to an Article I tribunal.

In *Yellow Freight System, Inc. v. Martin*, the Second Circuit upheld the adjudication of a "seemingly private right," holding that it was sufficiently integrated with federal regulation.¹⁷³ The court affirmed an agency decision requiring a freight line company to reinstate one of its employees and pay compensatory damages and back pay.¹⁷⁴ Originally, the Assistant Secretary of Labor deferred to an arbitrator's determination that the plaintiff's claim was without merit and declined to serve in the role of a prosecuting party.¹⁷⁵ Federal regulations permitted the complainant to step into the role of the Assistant Secretary as the prosecuting party and continue the action.¹⁷⁶ When the Administrative Law Judge ("ALJ") sided with the plaintiff, the freight line company appealed. It argued, among other things, that allowing the plaintiff to continue his claim after the Assistant Secretary had bowed out subjected the freight line to "a private claim for damages in violation of its *Seventh Amendment* right to an Article III court and jury."¹⁷⁷

The court turned to the Supreme Court's *Granfinanciera* analysis, explaining that the crucial inquiry is whether the seemingly private right at issue was "so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary."¹⁷⁸ The court recognized that, in order to protect the public interest in highway safety, Congress "created an extensive public regulatory scheme that includes parts of the [Surface Transportation Assistance Act]," which provided for the seemingly private claim.¹⁷⁹ Apparently, the similarities between back-

173. See *Yellow Freight Sys., Inc. v. Martin*, 983 F.2d 1195, 1200-01 (2d Cir. 1993).

174. *Id.* at 1197.

175. *Id.* at 1198.

176. See *id.* at 1198 n.2 ("In any case in which only the complainant objects to findings that the complaint lacks merit, to the preliminary order, or to both, the complainant shall be the prosecuting party." (citing 29 C.F.R. § 1978.107(b) (1988))).

177. *Id.* at 1200 (emphasis added).

178. *Id.* (citing *Granfinanciera v. Nordberg*, 492 U.S. 33, 54 (1989)).

179. See *id.* at 1200-01.

pay damage claims and traditional damages in tort had little impact on the analysis since the court did not discuss this issue. The reason for this private claim, the court continued, was Congress's recognition that employees are often in the best position to detect safety violations and need protection against retaliation for reporting them.¹⁸⁰

Yellow Freight System provides a factor that can be used to determine whether a seemingly private right is sufficiently integrated with a public regulatory scheme. If the new cause of action is positioned as an enforcement mechanism that is integral to furthering the regulatory scheme's public policy objectives, it is clearly integrated with the regulatory scheme. It is also important to note that the court explicitly held that the plaintiff's right to press the action as a seemingly private claim was sufficiently related to regulation to be appropriate for agency adjudication.¹⁸¹ Therefore, *Granfinanciera* was not being applied as a Seventh Amendment case; rather, it was applied as a *public rights* case, suggesting courts will not distinguish *Granfinanciera*'s discussion of public rights as mere *dicta*.¹⁸²

Unfortunately, there is little case law applying the "closely integrated" test. At least one bankruptcy court has determined that a party's private right to recover damages resulting from the violation of the automatic stay is sufficiently integrated with bankruptcy regulations to negate the Seventh Amendment jury guarantee.¹⁸³ Bankruptcy decisions declining to allow Article I adjudication typically involve state-created private claims,¹⁸⁴ which was a point of emphasis

180. See *Yellow Freight Sys., Inc. v. Martin*, 983 F.2d 1195, 1201 (2d Cir. 1993) (quoting *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987)).

181. See *id.* ("Thus, while Spinner's continued prosecution of his own case without the participation of the Department of Labor may seemingly subject Yellow to the enforcement of merely private rights, we hold that those rights are integrated sufficiently closely into a public regulatory scheme as to be appropriate for agency resolution.").

182. Recall that there is legitimate concern over whether courts ruling on public rights grounds might distinguish *Granfinanciera* by claiming it was a Seventh Amendment case and that the bright line guidelines set forth in the case were mere *dicta*. At least three commentators have concluded the Court's *Thomas* and *Schor* opinions should control. See E. Donald Elliot et al., *Administrative "Health Courts" for Medical Injury Claims: The Federal Constitutional Issues*, 33 J. HEALTH POL'Y & L. 761, 789 (2008) (stating that nothing in *Granfinanciera* overruled *Thomas* or *Schor* and that they therefore contain the appropriate standards with which courts will evaluate Article I tribunals).

183. See *In re Glenn*, 359 B.R. 200, 204 (Bankr. N.D. Ill. 2006) ("I conclude that the rights created by section 362(k)(1) are so fundamental to our bankruptcy system that they are appropriately resolved by a bankruptcy judge sitting without a jury and that they should, therefore, be viewed as 'public rights' as that term is used in *Granfinanciera*.").

184. See, e.g., *In re Commercial Fin. Serv.*, 251 B.R. 414, 421 (Bankr. N.D. Okla. 2000) ("[T]his Court does not have authority to enter binding judgments against the Bartmanns with respect to CFS's state law breach of contract claims."); *Stalford v. Blue Mack Transp., Inc.* (*In re*

in *Granfinanciera*.¹⁸⁵ The Court of Veterans Appeals, on the other hand, found that adjudicating private claims arising out of state claim judgments did not conflict with the current public rights framework.¹⁸⁶ So while there might be some confusion on the margins of the issue of integration, non-Article I adjudication is most constitutionally vulnerable when state-created private claims are being litigated.

How does all of this inform the present inquiry? An Article I torture tribunal must not adjudicate state-created private claims, and the private action should be an integral part of furthering the objective of preventing torture. The first requirement is easily met by forbidding torture courts from hearing state claims. But there is another potential problem: the newly created torture claim would “sound in tort.” Under a broad reading of certain portions of the private rights case law, including the Supreme Court’s language in *Granfinanciera*, claims resembling traditional state claims (i.e., tort and contract) cannot be resolved in Article I courts even when they are created by statute and are sufficiently integrated with a regulatory scheme.

The torture claim, however, would be a unique type of highly regulated, nuanced claim not contemplated by state law or the 18th century common law. And because the state secrets doctrine has its roots in the common law, it is highly unlikely a claim involving this type of subject matter could be heard by a common law court.¹⁸⁷ It is also worth noting that a state could not even create such a claim against a federal official, unless that official was acting outside the scope of his employment, due to the FTCA exclusivity provision explained in Part I.

The *Granfinanciera* Court’s attempt to distinguish *Atlas Roofing* might help offset a torture damages claim’s strong resemblance to traditional legal claims. First, even though the claim is essentially legal in nature, traditional legal claims have been wholly inadequate to

Lands End Leasing), 193 B.R. 426, 434 (Bankr. D.N.J. 1996) (“In the present case, the trustee’s tort claim against Bailey for compensatory and punitive damages for his alleged fraud in directing the diversion of estate assets is a private right.”).

185. See, e.g., *Granfinanciera v. Nordberg*, 492 U.S. 33, 55–56 & n.12 (1989) (noting that in *Northern Pipeline*, the Court explained “that state-law causes of action for breach of contract or warranty are paradigmatic private rights . . .”).

186. See *Smith v. Derwinski*, 1 Vet. App. 267, 274 (Vet. App. 1991) (“We therefore hold that we do not offend the Constitution in reviewing determinations of private rights, including those arising out of a state court judgment, when, as here, such rights are ‘closely integrated into a public regulatory scheme’ over which this Article I court exercises judicial review pursuant to statute.”) (quoting *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 594 (1985)).

187. See *infra* note 207 (discussing the origins of the state secrets privilege).

address what appears to be a “manifest public concern”—torture perpetrated by government officials. Statutory and common law hurdles have effectively barred the court-room doors to torture victims. Second, the need for confidentiality and the nature of the claims might not lend themselves to jury compatibility. If the underlying bases of torture claims are to be considered by a fact finder, and still remain confidential to some extent, a traditional jury trial is not the best approach. Furthermore, the nature of the claims, which necessarily involve conduct that will inflame the passions of traditional jury members, does not seem amendable to traditional jury trials. And while jurors consider horrific acts of violence in regular criminal trials, it is unlikely that key executive officials would support subjecting their employees to regular jury trials. If Congress carefully considers these issues, provides heightened due process protection for plaintiffs and defendants, demonstrates that it has considered the constitutional implications of non-Article III adjudication, and concludes that Article III adjudication would dismantle the torture-deterrence scheme, the Supreme Court might be willing to permit Article I juryless adjudication.

In order to ensure the torture victim’s right to bring a claim is sufficiently integrated with the anti-torture regulatory scheme, it should be treated as one of the principle enforcement mechanisms of the government’s efforts to curb torture. Since the torture victim is the one actually being tortured, he, like the truck driver in *Yellow Freight Line*, may be in the best position to report and pursue actions against torture. Although mechanisms can be created to self-police against torture, the ability of the torture victim to bring these types of suits is one way to ensure the self-policing mechanisms are actually utilized effectively. This can help ensure that government incentives to hide internal human rights abuses do not prevail.

The role of the private litigant as an enforcer dovetails with concerns that government liability will do little to deter government human rights abuses. Literature on the subject suggests there is no correlation between monetary government liability and deterrence.¹⁸⁸ And the NYC Bar, while recognizing that holding individual officers liable might be politically unpalatable, suggests it would likely have a greater deterrent effect than government liability.¹⁸⁹ Therefore, a

188. See *supra* notes 104–05 and accompanying text (discussing the limited deterrent effect of government liability).

189. See *supra* text accompanying notes 100–01.

strong case can be made that private actions are closely integrated because they can be an integral deterrent mechanism.

It is important to note that this entire argument assumes an expanded system of torture regulations and enforcement mechanisms falls under the heading of a “public regulatory scheme.”¹⁹⁰ This might be a bit of a stretch. The bankruptcy regime, which justifies hearing certain private claims central to that regime in an Article I court, regulates conduct (the bankruptcy process) generally available to all members of the general public. While the scheme in *Yellow Freight Line* might have directly affected a smaller portion of the general public (individuals involved in the freight business), it was ultimately premised on highway safety.¹⁹¹ Torture regulations would push the envelope. Prohibitions of torture certainly prohibit conduct by non-government employees, but in practice, they largely apply to government officials. Adding an adjudicatory scheme to the mix certainly broadens the scope of the overall regulatory scheme to include members of the public—both domestic and foreign—but the overall regulatory scheme, the scheme upon which this argument relies, seeks to deter conduct by government officials. On the other hand, torture laws seek to protect the public from government officials. Whether this potential hang-up is a salient issue depends on how much the courts seize on the word “public” in the Supreme Court’s “public regulatory scheme” language.¹⁹²

It is critical that the new private rights are premised on deterrence, rather than compensatory goals, or at least a mix of the two. While reparations can help further the deterrent goal of current torture laws, they are best pursued against the government—not private individuals. With its deep pockets, the government is in the best position to compensate victims fully. It also seems unlikely that most private individuals will be able to satisfy torture judgments unless they are significantly capped. And capping claims would prevent Congress from accomplishing its goal of fully compensating victims of torture. Reparations—as opposed to claims premised on deterrence—are not integral to a statutory scheme that seeks to prevent torture.

190. See *supra* text accompanying note 158 (showing how the Court has used this language).

191. See *supra* text accompanying notes 178–80.

192. For an article arguing administrative “health courts” that would adjudicate medical injury claims would not offend the Seventh Amendment because they could be positioned as integral to regulating health care costs, see Elliot et al., *supra* note 182, at 788–91. That piece, too, recognizes the difficulties posed by individual, rather than government liability. See *id.* at 791.

The viability of Article I adjudication is also dependent on judicial acquiescence. The Supreme Court would need to place heavy emphasis on the language from *Atlas Roofing* it distinguished in *Granfinanciera*. If the Court is not willing to back off the hard-line statements from *Granfinanciera* that suggest traditional juries are always required when a statutory claim closely resembles a traditional legal claims, Article I adjudication is very much in doubt. On the other hand, if the Court considers the degree of integration with a regulatory scheme to be the critical issue, Article I tribunals could be positioned as a constitutional means of deterring torture.

Thus, the ultimate question the Court would have to answer is whether significant integration of an essential component of a regulatory scheme can overcome a claim's resemblance to traditionally state-created, tort-style causes of action.

D. Judicial Review

Allowing the appropriate level of judicial review is an important aspect of ensuring Article I torture courts are constitutional. The important question is whether and to what extent Congress can preclude judicial review of agency decisions. Literature on this topic has focused on procedural due process restrictions and the much-celebrated jurisdiction stripping debate.¹⁹³ Resolving the jurisdiction stripping debate is wholly beyond the scope of this Article (and the author's capability), as is the precise outer limit of Congress's ability to preclude judicial review. This section will roughly identify the vague outer limits of Congress' powers in an effort to determine how far Congress can go without risking a viable challenge.

That Congress can preclude certain aspects of judicial review is beyond question under Supreme Court precedent.¹⁹⁴ Unfortunately, the Court has never provided a firm statement on the limits of review preclusion, but the literature on the subject indicates Congress may not preclude review of constitutional issues.¹⁹⁵ The Court has skirted

193. See, e.g., Levy & Shapiro, *supra* note 109, at 524–33 (discussing preclusion of judicial review in terms of procedural due process and the jurisdiction stripping debate).

194. See, e.g., *Webster v. Doe*, 486 U.S. 592, 601 (1988) (holding that Congress intended to insulate the Director of the Central Intelligence Agency's decision to discharge employees from judicial review); *Heckler v. Chaney*, 470 U.S. 821, 837 (1985) (recognizing the presumption that "agency decisions not to institute proceedings are unreviewable"); *Argabright v. United States*, 35 F.3d 472, 476 (9th Cir. 1994) (holding that an IRS decision was exempted from judicial review).

195. Levy & Shapiro, *supra* note 109, at 527 ("[M]ost commentators conclude that it would violate due process to deny a judicial forum for the resolution of constitutional claims, and the

the question of whether constitutional review can actually be precluded, but its seemingly counterfactual readings of statutory language strongly suggest the Court would find complete preclusion of constitutional review unconstitutional. In *Johnson v. Robinson*, for example, the Court reviewed constitutional challenges to a Veteran's Administration decision despite a statute that precluded review of "any questions of law or fact."¹⁹⁶ The Court reasoned the question of law—whether the law being administered by the Veteran's Administration was unconstitutional—arose under the Constitution, not by statute, and that the statute did not preclude review of constitutional questions.¹⁹⁷

The New York Court of Appeals has explicitly stated what the United States Supreme Court has only been willing to imply. In *Department of Environmental Protection v. Civil Service*, the court explained that "[e]ven where judicial review is proscribed by statute, the courts have the power and the duty to make certain that the administrative official has not acted in excess of the grant of authority given . . . by statute or in disregard of the standard prescribed by the legislature."¹⁹⁸ Indeed, without this rudimentary level of constitutional review, Congress could render the entire discussion of public rights and judicial review moot by precluding review of constitutional issues. During his time on the United States Supreme Court, Justice Brandeis suggested determinations of constitutional rights must be subject to judicial review by *some* court, even if it is not the United

Court has suggested the same in dicta." (citing *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 592–93 (1985)); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and Synthesis*, 124 U. PA. L. REV. 45, 93 (1975) ("[T]here exists a due process right to an independent judicial determination of constitutional rights . . .").

196. *Johnson v. Robinson*, 415 U.S. 361, 367 (1974).

197. *Id.* The Court explained its rationale as follows:

The prohibitions would appear to be aimed at review only of those decisions of law or fact that arise in the *administration* by the Veterans' Administration of a *statute* providing benefits for veterans. A decision of law or fact "under" a statute is made by the Administrator in the interpretation or application of a particular provision of the statute to a particular set of facts. Appellee's constitutional challenge is not to any such decision of the *Administrator*, but rather to a decision of *Congress* to create a statutory class entitled to benefits that does not include I-O conscientious objectors who performed alternative civilian service.

Id. (emphasis added).

198. *Dep't of Env'tl. Prot. v. Civil Serv. Comm'n*, 579 N.E.2d 1385, 1387 (N.Y. 1991) (quoting *Guardian Life Ins. Co. v. Bohlinger*, 124 N.E.2d 110, 114 (N.Y. 1954)).

States Supreme Court.¹⁹⁹ Thus, courts will read preclusion narrowly when it might affect constitutional rights.

On the other hand, Congress can generally preclude judicial review of questions of fact and questions of non-constitutional law. This is particularly the case with traditional public right claims where the government is a party. Indeed, when Justice Brandeis suggested constitutional rights required judicial review, he distinguished constitutional rights from “privilege[s] offered by the government.”²⁰⁰ Still, attempting to preclude all questions of law might not always be successful, even when the government is a party. If a question of law purportedly precluded by statute potentially implicates questions of *constitutional* law, courts will likely to read the proscription narrowly.²⁰¹

The APA specifically addresses the question of judicial review, stating that individuals “suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action” are entitled to judicial review.²⁰² This right of judicial review applies unless either a statute precludes judicial review, or “agency action is committed to agency discretion by law.”²⁰³ In *Heckler v. Chaney*, the Court construed the phrase “committed to agency discretion by law” as proscribing judicial review if the relevant statute fails to provide a meaningful standard against which the courts can evaluate an agency’s exercise of discretion.²⁰⁴ Therefore, with the exception of constitutional issues, Congress can preclude review of an Article I torture court’s decision by statute or by failing to provide precise criteria against which an Article III court can review the torture court’s exercise of discretion. The safest approach would obviously be precluding review by statute, since the issue of “meaningful standards” is a question of degree.

If Congress elects to state that any claims against private individuals are *in lieu* of *Bivens* claims, Congress should not have any problem restricting review of whether this is permissible. *Bivens* claims,

199. *See* *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 77 (1936) (Brandeis, J., concurring) (stating that when dealing with constitutional rights, there must be review “at some time, to some court”).

200. *See id.*

201. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 362 (2001) (construing a statute the precluded review of question of law as allowing review of questions of law because constitutional rights were implicated).

202. 5 U.S.C. § 702 (2006).

203. 5 U.S.C. § 701(a) (2006).

204. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

while based on constitutional remedies, are not *required* by the Constitution under Supreme Court case law because Congress can preempt them.²⁰⁵ Therefore, even though torture tribunal claims against private individuals might be based on constitutional standards, they are statutory in nature and therefore may be precluded like any other statutory claim.

In sum, provided Congress does not attempt to preclude review of constitutional questions, it should be able to preclude judicial review of most questions of law and all questions of fact for public and private claims. Precluding review of questions of law, however, might be troublesome because of the areas of law implicated by torture claims.²⁰⁶ Torture tribunal regulations would likely abrogate the state secrets doctrine to some extent because they would prevent the information from being exposed to the public, but would also prevent the government from asserting the doctrine with the frequency that it does in regular civil litigation. Unfortunately, it is unclear where the constitutional basis for the state secrets doctrine ends and the common law portion of the doctrine begins.²⁰⁷

CONCLUSION

This Article has argued that, with a sufficient level of judicial acquiescence, Article I tribunals can compensate torture victims and deter torture. Part I explained that torture victims are generally without financial recourse under current law. The FTCA has rendered recovery against the federal government all but impossible, and a torture victim's chances against federal officials are not much better. The victim's best bet is to bring a *Bivens* claim, seeking damages for violations of his constitutional rights. And even though one such claim against John Yoo has successfully survived a motion to dismiss, the current deferential-prudential model of *Bivens* jurisprudence is likely to foreclose this type of relief when that decision is appealed. There-

205. See *supra* text accompanying notes 43–45.

206. Recall that the Supreme Court has disregarded statutory language precluding review of questions of law when those questions of law potentially implicated constitutional rights. See *supra* note 195.

207. Professor Chesney explains that the state secrets privilege can be conceived “as having a potentially inalterable constitutional core surrounded by a revisable common-law shell.” See Chesney, *supra* note 74, at 1310. Chesney points out that, while discovering the theoretical line between constitutional and common law bases is a difficult task, there is a line that indicates Congress can abrogate the doctrine to some extent. See *id.* at 1308–14 (expanding the discussion of what Congress might do to abrogate the state secrets doctrine).

fore, torture victims do not have a viable avenue of redress under current law.

Part II discussed the potential solutions, including the basic mechanisms recommended by the NYC Bar. An administrative law solution can avoid the hurdles to torture victim recovery without affecting the substantive law outside the realm of torture-related claims. This, of course, can be accomplished without administrative law, but cordoning off the torture-claim regime can ensure more general areas of law are not unintentionally affected. Furthermore, Article I courts would allow for specialization, as well as a level of secrecy that is not afforded in Article III courts without resort to the state secrets doctrine. Part II also concluded that suits against individual officers, while perhaps not popular, might be the only means of deterring torture through claims seeking money damages.²⁰⁸

Part III concluded that Article I courts can adjudicate claims against the government, and, under an acquiescent reading of *Granfinanciera*, against federal officials. This acquiescent reading is required for two reasons. First, a torture claim regime is not a massive public regulatory scheme like the bankruptcy code. If the freight business regulations in *Yellow Freight Line* are “less public” than bankruptcy, torture regulations are one step further removed—they are “less public” than freight regulations. Torture regulations, however, can prohibit the government (as well members of the public) from torturing any member of the public—foreign or domestic. Thus, one can still make a good argument that this is the type of “public” regulatory scheme was contemplated by the Supreme Court’s separations of power case law.²⁰⁹ Furthermore, it is unclear whether a massive public regulatory scheme is absolutely necessary to satisfy the Supreme Court.

An acquiescent reading of *Granfinanciera* is also required to offset the Supreme Court’s suggestion that a claim cannot be decided by a non-Article III tribunal (without consent) if the claim resembles a traditional legal cause of action. Part III explained that the *Granfinanciera* Court’s use of the language from *Atlas Roofing* suggests sufficient integration and the unique nature of torture claims

208. This is not to say, however, that there are not *better* means of deterrence.

209. One thing is clear: the Supreme Court’s separation of powers case law fails to provide meaningful limitations on the comingling of executive and judicial powers, and is likely a far cry from what the Founders envisioned. *Cf. supra* note 140 and accompanying text.

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might be able to overcome their resemblance of traditional legal claims.

Permitting claims against federal officials may not be the best course of action. It might be political suicide for legislators advocating such a policy. It might also have a detrimental effect on our intelligence community, which could in turn expose us to future terrorist attacks. But determining whether torture courts are good policy is best left for another day. If our policymakers pursue an Article I tribunal and administrative law solution, the Supreme Court's case law will not stand in the way of using juryless Article I tribunals to adjudicate claims against the federal government. If the Supreme Court reads *Granfinanciera* liberally, positioning the torture claim as a principle enforcement mechanism of torture regulations will allow Article I tribunals to adjudicate claims against federal officials. Future research on this subject should focus on (1) whether torture regulations fall within the definition of a "public regulatory scheme" and (2) whether integration can or should overcome a claim's resemblance to traditional tort claims.



The Constitutionality of the Defense of Marriage Act and State Bans on Same-Sex Marriage: Why They Won't Survive

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As of February 2010, a *Washington Post* poll indicated that “[a]mong individuals ages [eighteen] to [twenty-nine], an estimated [sixty-five] percent support marriage equality.”¹ These statistics are significant. A majority of the United States Supreme Court has made clear that, in determining the constitutional rights of individuals, the Court considers today’s societal views, national and global trends, contemporary values, and an emerging recognition of new positions on an issue.²

I. AN OVERVIEW AND SUMMARY OF CONSTITUTIONAL CHALLENGES TO DOMA AND STATE BANS ON SAME-SEX MARRIAGE

This Article addresses, among other things, the issue of whether state bans denying same-sex couples the right to obtain a marriage license—along with its more than one thousand combined federal and state benefits—and various aspects of the federal Defense of Marriage Act (“DOMA” or the “Act”) violate the fairness, liberty, and equality rationales underlying the Due Process and Equal Protection Clauses of the United States Constitution.

The right to marry a person of one’s own choosing, regardless of gender, has become an issue of national significance. In the summer of 2010, three federal district court decisions—two in Massachusetts and one in California—affirmed that the Constitution protects an individual’s choice of a marital partner regardless of gender. On July 8, 2010, in the case of *Gill v. Office of Personnel Management*,³ the

1. John D. Podesta & Robert A. Levy, *Marriage for All: It’s up to the Courts to Defeat Prop. 8*, WASH. POST, June 8, 2010, at A17, available at LEXIS (search for source) (citing to a February 2010 *Washington Post* poll).

2. See, e.g., *Graham v. Florida*, 130 S. Ct. 2011, 2033-34 (2010) (noting that evidence of “contemporary values” and “the laws and practices of other nations” are relevant); *Roper v. Simmons*, 543 U.S. 551, 563 (2005) (highlighting that “inquir[ing] into our society’s evolving standards of decency” is appropriate); *Roper*, 543 U.S. at 566 (taking into consideration trends); *Id.* at 567 (looking to evidence of “today[’s] . . . societ[al] views”); *Roper*, 543 U.S. at 575-76 (noting that the court will consult “the laws of other countries” and especially “nations that share our Anglo-American heritage . . . and . . . leading members of the Western European community”); *Lawrence v. Texas*, 539 U.S. 558, 571-72 (2003) (considering whether society has begun to embrace an “emerging awareness” or an “emerging recognition” of a new position on an issue).

3. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010).

United States District Court for the District of Massachusetts invalidated Section 3 of DOMA.⁴ The court held that DOMA violated the United States Constitution's Fifth Amendment Due Process Clause (and its Equal Protection component).⁵ On the same day, in the companion case of *Commonwealth v. Department of Health and Human Services*, the same court struck down Section 3 of DOMA under the Tenth Amendment⁶ and the Spending Clause of Article 1, Section 8 of the U.S. Constitution.⁷

On August 4, 2010, in the case of *Perry v. Schwarzenegger*, a federal district court in California invalidated the State of California's voter referendum ban on same-sex marriage, known as Proposition 8,⁸ under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution.⁹ Additionally, several state supreme courts have held that their particular state's ban against same-sex marriage violated the due process and equal protection guarantees of their respective state constitutions.¹⁰

While there are some important distinctions between the Massachusetts cases (involving DOMA's non-substantive federal definition of marriage) and the California case (involving a state substantive prohibition against same-sex marriage), each decision held that discriminatory laws that treat same-sex couples differently from hetero-

4. See 1 U.S.C. § 7 (2006) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

5. The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V. In *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), the Supreme Court recognized that an equal protection component existed under the Fifth Amendment's Due Process Clause. The Fifth Amendment's Due Process Clause applies to the federal government. The Due Process and Equal Protection Clauses of the Fourteenth Amendment only apply to the states, not to the federal government.

6. The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people." U.S. CONST. amend. X.

7. *Commonwealth v. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010). The Spending Clause of the United States Constitution provides, in pertinent part: "The Congress shall have Power to Lay and collect Taxes, Duties, Imposts and Excises, to pay Debts and provide for the Common Defense and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8, cl. 1.

8. CAL. CONST. art. I, § 7.5 (outlawing same-sex marriage in California via ballot initiative).

9. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

10. See, e.g., *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Goodridge v. Dep't of Pub. Health* 798 N.E.2d 941 (Mass. 2003).

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sexual couples violate the United States Constitution's guarantee of due process and equal protection under the law. Accordingly, the underlying rationale of the cases is the same.¹¹

Civil marriage is actually a secular, non-religious, government-operated licensing regime.¹² This seems to genuinely surprise many individuals.¹³ Civil marriage empowers the government to issue a license that entitles a couple to over one thousand combined state and federal property rights and benefits.¹⁴ Nevertheless, courts located in jurisdictions permitting same-sex marriages have repeatedly emphasized that religious organizations and disapproving members of the public are free to voice their moral outrage of these marriages and that they are not required to perform or sanction same-sex marriages.¹⁵ The Massachusetts Supreme Judicial Court expressed this sentiment in *Goodridge v. Department of Public Health*.¹⁶ In *Goodridge*, the court held

11. There are some distinctions between the Massachusetts cases and the California case. The Massachusetts cases involve the non-substantive federal definition of marriage contained in Section 3 of DOMA. Section 3 of DOMA does not prevent same-sex couples from getting married in states that permit it. However, it discriminates between lawfully married same-sex couples in a state and heterosexual couples in the same state for purposes of federal property rights and other benefits based on a marriage relationship. The California case, on the other hand, involves a California state substantive ban against same-sex marriage known as Proposition 8. Proposition 8 prohibits same-sex couples in California from getting married after the effective date of the law. The two Massachusetts decisions were decided on July 8, 2010 by the United States District Court for the District of Massachusetts. See *Commonwealth v. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010). The California case was decided on August 4, 2010 by the United States District Court for the Northern District of California. See *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010). The *Perry* case involves a substantive definition of marriage as embodied in a voter referendum known as Proposition 8 which prohibited same-sex couples from being married after the effective date of the Proposition (as interpreted by the California Supreme Court in *Horton v. Strauss*, 207 P.2d 48, 75 (Cal. 2009)). *Id.*

12. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 952, 955 (D. Mass. 2003). As the *Goodridge* court pointed out, "The marriage license grants valuable property rights to those who meet the entry requirements, and who agree to what might otherwise be a burdensome degree of government regulation of their activities." *Id.* at 955.

13. See *id.*

14. For example, in *Goodridge*, the Supreme Judicial Court of Massachusetts listed several of these state property rights and benefits available only to married persons under Massachusetts law. *Id.* at 957. With respect to federal property rights and benefits, the General Accounting Office has identified over 1138 federal statutory provisions in which marital status is a factor in determining eligibility for or entitlement to federal benefits, rights and privileges. *Id.*; see CONGRESSIONAL BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES (June 21, 2004), available at <http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf>; Complaint, *Commonwealth v. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (No. 1:09-11156-JLT); see also discussion *infra* Part III.B.2 (dealing with Massachusetts' challenge to the Defense of Marriage Act under the Tenth Amendment and the Spending Clause of Article I, Section 8 of the United States Constitution).

15. See *Varnum v. Brien*, 763 N.W.2d 862, 905-06 (Iowa 2009); *Goodridge*, 798 N.E.2d at 965.

16. *Goodridge*, 798 N.E.2d at 952, 955.

that same-sex couples in Massachusetts were entitled to a marriage license under the Massachusetts Constitution.¹⁷ The court stated:

Our decision in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or any other reasons. It in no way limits the personal freedom to disapprove of, or to encourage others to disapprove of, same-sex marriage. Our concern, rather, is whether historical, cultural, religious, or other reasons permit the State to impose limits on personal beliefs concerning whom a person should marry.¹⁸

The *Goodridge* decision presents an excellent case to analyze the reasoning underlying state court decisions that have invalidated prohibitions on same-sex marriage. The court in *Goodridge* noted that the Massachusetts marriage restriction impermissibly “identifie[d] persons by a single trait and then denie[d] them protection across the board.”¹⁹ The *Goodridge* court went to great lengths to make clear that civil marriage is a non-religious bestowal of property rights on two people who agree to legalize their relationship.²⁰ The decision allowed persons in same-sex relationships to get married on an equal basis with heterosexual couples as a matter of right under the Massachusetts Constitution.²¹ A similar ruling by the United States Supreme Court that interprets the United States Constitution to permit same-sex marriage would definitively settle the issue as to the property and other rights of persons in same-sex relationships pursuant to the mandates of the Supremacy Clause of the United States Constitution.²²

The Massachusetts Supreme Judicial Court laid out several important points to support its decision. First, the court noted that civil marriage is a wholly secular institution.²³ In particular, the court noted that there are three partners to every civil marriage—two willing spouses and an approving State.²⁴ Second, the Massachusetts Supreme Judicial Court reasoned that Massachusetts’ failure to extend civil marriage to same-sex couples was incompatible with the constitu-

17. *Id.* at 965.

18. *Id.*

19. *Id.* at 963 (citing to *Romer v. Evans*, 517 U.S. 620, 633 (1996)).

20. *See id.* at 955.

21. *See id.*

22. U.S. CONST. art. VI, cl. 2.

23. *Goodridge*, 798 N.E.2d at 954.

24. *Id.*

tional principles of respect for private autonomy²⁵ and equality under law.²⁶

The Massachusetts Supreme Judicial Court sought to insulate its decision from review by the United States Supreme Court by grounding its decision on the Massachusetts State Constitution. As the *Goodridge* court correctly noted, the Massachusetts Constitution can accord greater protections to individual rights than do similar provisions of the United States Constitution.²⁷ The court, thereafter, proceeded to invalidate Massachusetts' same-sex marriage ban. The court held that Massachusetts' same-sex marriage restriction had no rational basis for due process or equal protection purposes under the Massachusetts Constitution and constituted an unwarranted government intrusion into protected spheres of life.²⁸ Specifically, the court held that the Massachusetts ban on same-sex marriage violated individual liberty and equality safeguards under the state Constitution.²⁹

Moreover, the court determined that the purported rational basis for the ban—that the primary purpose of marriage is procreation—is a fallacy since Massachusetts law does not contain a requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus.³⁰ The court noted that “people who have never consummated their marriage, and never plan to, may be and stay married” and that “[p]eople who cannot stir from their deathbed may marry.”³¹ The court then turned its attention to a variety of state property rights only available to married heterosexual couples.³² The court also listed a number of benefits only available to

25. *Id.* at 958 n.17 (reiterating the rationale of *Lawrence v. Texas*, 539 U.S. 558 (2003)).

26. *Id.* at 957 n.15 (comparing the issues involving same-sex marriage to those involved in *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

27. *Id.* at 959 (citing *Arizona v. Evans*, 514 U.S. 1, 8 (1995)).

28. *Id.*

29. *Id.*

30. *Id.* at 961.

31. *Id.*

32. *Id.* at 955-56. A few examples of these property rights include: (a) joint income tax filing, (b) tenancy by the entirety, (c) homestead protection to one's spouse and children, (d) automatic rights to inherit property of a deceased spouse who does not leave a will, (e) rights of elective share and of dower, (f) entitlement to wages owed to a deceased employee, (g) eligibility to continue certain businesses of a deceased spouse, (h) the right to share the medical policy of one's spouse, (i) thirty-nine week continuation of health coverage for the spouse of a person who is laid off or dies, (j) preferential options under Massachusetts' pension system, (k) preferential benefits in Massachusetts' medical program, (l) access to veterans' spousal benefits and preferences, (m) financial protections for spouses of certain Massachusetts employees; (n) the equitable division of marital property on divorce, (o) temporary and permanent alimony rights, (p) the right to separate support on separation of the parties that does not result in a divorce, and (q)

heterosexual married couples that were not directly tied to property rights.³³

Beyond the Massachusetts ruling and the recent federal district court rulings handed down during the summer of 2010, DOMA³⁴ and state bans on same-sex marriage³⁵ are vulnerable to attack under no less than six separate provisions in the United States Constitution. Indeed, the United States Supreme Court laid the groundwork for invalidating bans against same-sex marriage in two significant cases (which the *Goodridge* court cited)—the 1996 case of *Romer v. Evans*³⁶ and the 2003 decision in *Lawrence v. Texas*.³⁷

The Court's decision in *Lawrence*—which invalidated a state statute allowing prosecutions of private homosexual conduct—makes clear that even a profound and deep moral conviction by a majority of a state's citizens cannot serve as a basis for upholding a law that otherwise violates the Due Process Clause of the United States Constitution.³⁸ And, in an often repeated quote, the Court in *Lawrence* emphasized that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”³⁹ Conservative Justice Antonin Scalia, in dissent, noted: “[W]hat [remaining] justifica-

the right to bring claims for wrongful death and loss of consortium and for funeral and burial expenses and punitive damages in resulting from tort actions. *Id.* at 956.

33. *Id.* at 956-57. The court listed the following benefits: (a) the presumptions of legitimacy and parentage of children born to a married couple; (b) evidential rights, such as the prohibition against spouses testifying against one another about their private conversations, applicable in both civil and criminal cases; (c) qualification for bereavement and medical leave to care for individuals related by blood or marriage; (d) application of predictable rules of child custody, visitation, support, and removal out-of-state when married parents divorce; (e) priority rights to administer the estate of a deceased spouse who dies without a will and the requirement that a surviving spouse must consent to the appointment of any other person as administrator; and (f) the right to interment in the lot or tomb by one's deceased spouse. *Id.*

34. Section 3 of DOMA, for example, states that:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

1 U.S.C. § 7 (2006). Additionally, Section 2 of DOMA, 28 U.S.C. § 1738C, appears to permit state courts to deny enforcement of final judgments of other state courts to the extent that the judgment is based on a law recognizing same-sex marriage. See discussion *infra* in Part III.C.

35. For example, the California Voter Referendum known as Proposition 8, which deprived prospective same-sex couples of their right to marry in California simply provides that, “[o]nly marriage between a man and a woman is valid or recognized in California.” CAL. CONST. art. I, § 7.5.

36. See *Romer v. Evans*, 517 U.S. 620 (1996).

37. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

38. See *id.* at 571.

39. *Id.* at 560 (Stevens, J., dissenting) (citing *Bowers v. Hardwick*, 478 U.S. 186, 215 (1986)).

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tion could there possibly be for denying the benefits of marriage to homosexual couples exercising “[t]he liberty protected by the Constitution?”⁴⁰ Justice Scalia was correct in his assessment that, in light of the rationale for the Supreme Court majority’s decision in *Lawrence*⁴¹ the issue of the unconstitutionality of state bans against same-sex marriage and DOMA cannot be seriously doubted. The Court’s earlier decision in *Romer*⁴² only buttresses this view.

In *Romer*, an amendment to the Colorado Constitution “prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect . . . a class . . . [consisting of] homosexual persons or gays and lesbians.”⁴³ The Supreme Court held, among other things, “that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”⁴⁴ The Court noted that “laws singling out a certain class of citizens for disfavored legal status or general hardships” in which it is “more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”⁴⁵

The United States Supreme Court noted in *Bolling v. Sharpe* that the “concepts of equal protection and due process . . . stem[] from [the] American *ideal of fairness*”⁴⁶ Therefore, it is critically important to make clear at the outset that the rights of same-sex couples to more than one thousand property rights and benefits of “civil” marriage are at stake. Even more important is understanding that the right to partake in “civil” marriage is a secular, nonreligious matter. Religious organizations are not required to recognize same-sex civil marriages nor perform them.⁴⁷ This is a crucial point that is not articulated enough nor understood by many.

40. *Id.* at 604-05 (Scalia, J., dissenting) (citation omitted); *see also* Theodore B. Olson, *The Conservative Case for Gay Marriage: Why Same Sex Marriage is an American Value*, NEWSWEEK, Jan. 18, 2010, at 48, available at <http://www.newsweek.com/2010/01/08/the-conservative-case-for-gay-marriage.html> (citing Justice Scalia’s dissenting opinion in *Lawrence v. Texas*).

41. *See generally Lawrence*, 539 U.S. 558 (invalidating under the Due Process Clause of the Fourteenth Amendment, a Texas sodomy statute that, among other things, criminalized consensual sex between homosexuals in the privacy of their home).

42. *Romer v. Evans*, 517 U.S. 620, 633 (1996).

43. *Id.* at 634.

44. *Id.* (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

45. *Id.* at 633.

46. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (emphasis added).

47. *See, e.g., Varnum v. Brien*, 763 N.W.2d 862, 905-06 (Iowa 2009); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003).

This Article contains six parts. Part II discusses the background of DOMA. Part III addresses various constitutional provisions under which state bans on same-sex marriage and various aspects of DOMA are potentially unconstitutional. Those constitutional provisions are as follows: (1) the Fourteenth Amendment's Due Process and Equal Protection Clauses (as to state bans against same-sex marriage); (2) the equal protection component of the Fifth Amendment's Due Process Clause (as to Section 3 of DOMA); (3) the Tenth Amendment to the United States Constitution (as to Section 3 of DOMA); (4) the Spending Clause of Article I, Section 8 (as to Section 3 of DOMA); (5) the Full Faith and Credit Clause of Article IV, Section 1, (as to Section 2 of DOMA insofar as it permits courts to deny enforcement of judgments based on same-sex laws rendered by sister states); and (6) the Establishment Clause of the First Amendment (as to state bans on same-sex marriage Section 3 of DOMA). Part IV explains why tradition is not a justification for denial of same-sex marriage. Part V discusses the Supreme Court's evolving standards in the interpretation of the Constitution and argues that contemporary attitudes of liberty, fairness, justice, and equality will ultimately culminate in a rejection of DOMA and state bans on same-sex marriage on constitutional grounds.

This Article maintains throughout that there is no rational justification for states to deny same-sex couples the property rights afforded by civil marriage. Finally, this Article concludes in Part VI that the constitutionality of DOMA and state bans against same-sex marriage appear to be in grave doubt. The time is rapidly approaching when we shall all know whether this Article's prediction—that the Supreme Court will rule that DOMA and state bans against same-sex marriage are unconstitutional—will become a reality.

II. BACKGROUND OF DOMA

In 1996, Congress enacted DOMA in reaction to the possibility that a state—specifically Hawaii—might authorize same-sex marriage. In *Baehr v. Lewin*, the Supreme Court of Hawaii became the first court in the United States to recognize same-sex marriage.⁴⁸ However, a subsequent amendment to the Hawaii Constitution effectively

48. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (holding that denial of a marriage license to a same-sex couple constituted sex-based discrimination in violation of the equal protection clause of the Hawaii Constitution).

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nullified the decision.⁴⁹ The events in Hawaii sparked a storm of controversy, and in response, a majority of states amended their marriage laws to prohibit same-sex marriage.⁵⁰

With respect to the effect of federal law on interstate recognition of same-sex marriage, Section 2 of the DOMA provides in pertinent part:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.⁵¹

The language of the Act makes clear that there is no mandate under federal law for one state to recognize a same-sex marriage formed in another state. The House Judiciary Committee Report on DOMA acknowledged that federalism constrained Congress' power and that "[t]he determination of who may marry in the United States is uniquely a function of state law."⁵² In this regard, Section 2 of DOMA was entirely unnecessary and instead appears to be primarily an exercise in political posturing. This is because neither state conflict of law rules nor federal law construing the Full Faith and Credit Clause (Article IV, Section 1) of the United States Constitution have ever required a state to give full faith and credit to the laws of another state when the laws of the other state violate the state's strong public policy.⁵³

49. The decision of the Supreme Court of Hawaii in *Baehr v. Lewin* did not last. See National Conference of State Legislatures, *Same-Sex Marriage Overview*, <http://www.ncsl.org/default.aspx?tabid=4240> (last visited Oct. 21, 2010). In 1998, the people of Hawaii approved a constitutional amendment permitting the legislature to define marriage as a relationship between a man and a woman. *Id.*

50. See, e.g., KAN. STAT. ANN. §§ 23-101, 23-115 (1996); S.C. CODE ANN. §§ 20-1-15, 20-1-10 (2009).

51. Defense of Marriage Act § 2, 28 U.S.C. § 1738C (2006).

52. H.R. REP. NO. 104-664 at 2905 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2906-07, 1996 WL 391835 at *3.

53. Section 2 of DOMA seems to have been completely unnecessary since states can deny recognition to state laws (e.g., marriage statutes) that violate the local public policy of the forum state (at least when the public policy of the state does not violate the United States Constitution). See 28 U.S.C. § 1738C (2006); *infra* Part III.C.4. See generally *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233-34 (1998) ("A court may be guided by the forum State's 'public policy' in determining the law applicable to a controversy . . .") (citing *Nevada v. Hall*, 440 U.S. 410, 421-24 (1979)).

DOMA, however, may have a discriminatory and unfair bite to the extent that the statute does not require a state to honor final judgments of other states when the judgment of the rendering court was based on a law recognizing same-sex marriage. Arguably, Section 2 of DOMA is unconstitutional under Article IV, Section 1 of the United States Constitution, as applied to final judgments of sister states.⁵⁴

The House Judiciary Committee Report on DOMA exhibited a substantial amount of anti-gay animus. The House Report candidly stated that Congress' purpose in proposing the Act was to reflect Congress' "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality."⁵⁵ In the floor debate, members of Congress repeatedly voiced their disapproval of homosexuality, calling it "immoral,"⁵⁶ "depraved,"⁵⁷ unnatural,⁵⁸ "based on perversion,"⁵⁹ and an attack upon God's principles.⁶⁰ They argued that the marriage of gays and lesbians would "demean" and "trivialize" heterosexual marriage⁶¹ and might be "the final blow to the American family."⁶²

54. As previously mentioned, the United States Supreme Court has made clear that a court may be guided by the forum State's public policy in determining the law applicable to a controversy. *See Hall*, 440 U.S. at 421-24. The Court's decisions, however, support no roving public policy exception to the full faith and credit due judgments. *See Baker*, 522 U.S. at 233-34 (citing *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908)). Yet, it appears that Congress intended for DOMA to empower state courts to exercise just this sort of roving public policy exception to the full faith and credit due judgments of state courts. *See generally* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 *YALE L.J.* 1965, 2002-03 (1997) (discussing possible interpretations of the Effects Clause). Some commentators have argued that Congress lacks power under the Effects Clause of the Full Faith and Credit Clause to empower states to disrespect the laws of other states. *Id.* Under this line of reasoning, the Framers of the Constitution arguably only gave Congress the power to implement the Full Faith and Credit Clause, not the power to destroy it by amending its basic premise. *See id.*; *see also infra* Part III.C.1.

55. H.R. REP. NO. 104-664 at 2920 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906-07, 1996 WL 391835, at *16.

56. 142 CONG. REC. H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn).

57. *Id.* at H7486 (daily ed. July 11, 1996) (statement of Rep. Buyer).

58. *See id.* at H7441 (daily ed. July 11, 1996) (statement of Rep. Canady) (stating "that the traditional family structure—centered on a lawful union between one man and one woman—comports with nature and with our Judeo-Christian moral tradition").

59. *Id.* at H7444 (daily ed. July 11, 1996) (statement of Rep. Coburn).

60. *See id.*; *see also id.* at H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer); *id.* at H7494 (statement of Rep. Smith).

61. *Id.* at H7494 (daily ed. July 12, 1996) (statement of Rep. Smith). There were many similar statements. *See, e.g., id.* at H7275 (daily ed. July 11, 1996) (statement of Rep. Barr) (stating that marriage is "under direct assault by the homosexual extremists all across this country").

62. *Id.* at H7276 (daily ed. July 11, 1996) (statement of Rep. Largent); *see also id.* at H7495 (daily ed. July 12, 1996) (statement of Rep. Lipinski) ("Allowing for gay marriages would be the final straw, it would devalue the love between man and a woman and weaken us as a Nation.").

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Section 3 of DOMA also created definitions of the terms “marriage” and “spouse” for purposes of federal law. In this regard, the statute states:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.⁶³

Ironically, the Congressional Budget Office has estimated that if marriages between same-sex couples were recognized in all fifty states and the federal government, the federal budget would benefit by \$500 million to \$900 million annually.⁶⁴ Therefore, the often-repeated argument that DOMA protects scarce resources appears to be a myth. Moreover, conservation of scarce resources is never a justification for discrimination against persons who qualify as a suspect or quasi-suspect class.⁶⁵

Additionally, the federal General Accounting Office has identified 1138 federal statutory provisions in which marital status is a factor in determining eligibility for or entitlement to federal benefits, rights, and privileges.⁶⁶ DOMA denies federal benefits to same-sex couples legally married in those states. However, it permits federal benefits to eligible heterosexual couples that reside in states that also recognize same-sex marriages. These facts raise the question as to whether such blatant government-sponsored discrimination against same-sex couples is fair. It certainly does not seem fair, especially in view of scientific findings indicating that gays and lesbians do not choose to be homosexual anymore than others choose to be heterosexual.

63. Defense of Marriage Act § 3, 1 U.S.C. § 7 (2006).

64. See CONGRESSIONAL BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES (June 21, 2004), <http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21.Marriage.pdf>.

65. See *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality) (holding that conservation of time and money can never justify discrimination against persons comprising a suspect or quasi-suspect class). For a discussion of suspect classes and judicial review of discriminatory government laws, see discussion *infra* Part III.A.

66. Complaint at 34, *Commonwealth v. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (No. 1:09-11156-JLT).

III. STATE BANS AGAINST SAME-SEX MARRIAGE AND
CERTAIN ASPECTS OF DOMA VIOLATE THE
UNITED STATES CONSTITUTION

A. Due Process and Equal Protection

The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects persons against arbitrary deprivations of life, liberty, and property on the part of *state and local* governments.⁶⁷ The Due Process Clause of the Fifth Amendment provides similar limitations on the *federal* government.⁶⁸ The United States Supreme Court, in *Loving v. Virginia*, held that the Due Process Clause protects “the freedom to marry” a person of one’s choice.⁶⁹ The Court stated that marriage “has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness” and is a “fundamental right.”⁷⁰ The issue, with respect to same-sex marriage, is whether the Due Process Clause protects an individual’s choice of a marital partner regardless of gender.

With respect to the Equal Protection Clause of the Fourteenth Amendment and the United States Constitution’s equal protection component of the Fifth Amendment, the Supreme Court has made clear that the United States Constitution neither knows nor tolerates discriminatory classifications that treat one group of citizens differently than others.⁷¹ The Supreme Court has repeatedly stated that government classifications based on a “suspect” classification, such as race,⁷² or which impinge on some “fundamental right,”⁷³ must pass the strictest judicial scrutiny to survive analysis under either the Equal Protection Clause of the Fourteenth Amendment,⁷⁴ or the equal protection component of the Due Process Clause of the Fifth Amendment.⁷⁵

Fairness in the government’s distribution of property rights is the real point of debate underlying the various constitutional issues. The

67. See *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“The [Due Process] Clause . . . provides heightened protection against government interference with certain fundamental rights and liberty interests.”).

68. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

69. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

70. *Id.*

71. See *Romer v. Evans*, 517 U.S. 620, 623 (1996).

72. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

73. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (discussing the fundamental right of interstate travel).

74. See *Loving*, 388 U.S. at 9.

75. See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

United States Constitution requires that state and local governments justify any differential treatment of persons pursuant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment.⁷⁶ The United States Constitution similarly demands that the federal government justify any differential treatment of persons pursuant to the equal protection component inherent in the Fifth Amendment's Due Process Clause.⁷⁷

The obligation of fairness, however, does not stop with the United States Constitution's Equal Protection Clause. The United States Constitution prohibits both state and federal governments from denying any person of life, liberty, and property without due process of law. But what exactly is the definition of "property"—this vitally important interest protected by the Due Process Clause of the United States Constitution? The answer is simple. Property is anything of value that the law permits one to acquire.⁷⁸ It is law that determines what is property and who can own it.⁷⁹ Moreover, the concept of property is more expansive than some may realize. Property refers to more than mere objects and things. The Supreme Court has stated that property also confers a bundle of rights on its lawful owners.⁸⁰ Those rights include the right to possess, use, exclude, and dispose of one's property.⁸¹ DOMA discriminates between persons in lawfully recognized same-sex marriages and persons in heterosexual mar-

76. The United States Supreme Court has created three basic standards to analyze whether a state or its local subdivisions have met their burden under the Equal Protection Clause of the United States Constitution to justify the fairness of state laws that require discriminatory treatment of a class of persons. This Article briefly discusses these three standards—the strict scrutiny or compelling government interest standard, the intermediate scrutiny/substantial relationship test, and the rational relationship test. *See infra* Part III.A.

77. *See supra* text accompanying note 76. The United States Supreme Court uses the same standards referred to in the preceding note to analyze whether the federal government has met its burden under the Fifth Amendment's Due Process Clause to justify the fairness of federal laws that require discriminatory treatment of a class of persons. *Id.* Section 3 of DOMA is an example of a federal law that requires discrimination against a group of persons—same-sex couples legally married in a state that recognizes same-sex marriages. *See* 1 U.S.C. § 7 (2006).

78. *See* JEREMY BENTHAM, *THEORY OF LEGISLATION* 111-13 (4th ed. 1882) ("Property and laws are born together, and die together. Before laws were made there was no property; take away laws and property ceases.").

79. For example, the Thirteenth Amendment to the United States Constitution removed the ability of a person to lawfully own another person as property. U.S. CONST. amend. XIII.

80. *See, e.g.,* *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *Superior Bath House Co. v. McCarroll*, 312 U.S. 176, 180-81 (1941).

81. *See generally* *Moore v. Regents of Univ. of California*, 793 P.2d 479, 509 (Cal. 1990) (Mosk, J., dissenting) (explaining that the bundle of property rights surrounding one's bodily tissue could be broken up into component rights rather than using the all-or-nothing analysis of the majority).

riages.⁸² It accomplishes this result by preventing individuals in same-sex marriages from acquiring a host of federal property rights and benefits available to their heterosexual counterparts.⁸³

DOMA is vulnerable under both heightened scrutiny and rational basis review under both the Due Process and equal protection component of the Fifth Amendment to the United States Constitution. Analysis reveals that DOMA (1) cannot be justified as a basis for protecting or encouraging procreation nor does it enhance child-rearing activities, (2) cannot be justified as preserving “traditional” marriage, (3) undermines rather than protects state sovereignty, (4) does not conserve scarce resources, and (5) explicitly expresses moral disapproval of homosexuality which is not a valid interest in view of Supreme Court precedent.⁸⁴ In short, there is no rational justification for the federal government to discriminate against same-sex marriages under Section 3 of DOMA. Similarly, there is no rational basis that can justify state bans against same-sex marriage.

1. The Fourteenth Amendment Analysis: Equal Protection and Due Process in the Context of State Bans Against Same-Sex Marriage

On August 4, 2010, in *Perry v. Schwarzenegger*,⁸⁵ Judge Vaughn R. Walker of the United States District Court for the Northern District of California invalidated the California same-sex marriage ban, known as Proposition 8, as a violation of the Due Process and Equal Protection Clauses of the United States Constitution. Selected background information leading to the *Perry* case provides an excellent vehicle to explain the underlying issues common to the decisions of the federal district courts in Massachusetts and California. In particular, this background information gives the rationale which lies at the core of the aforementioned decisions which have ruled that DOMA as well as state bans against same-sex marriage violate the U.S. Constitution.⁸⁶

82. See generally 1 U.S.C. § 7 (2006).

83. See *supra* notes 14, 32-33 and accompanying text.

84. See, e.g., Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (2010) (citing Lawrence v. Texas, 539 U.S. 558 (2003)).

85. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010).

86. For a discussion of Judge Walker's decision in *Perry*, see *infra* Part III.A.1.ii.

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In the *In Re Marriage Cases*,⁸⁷ the California Supreme Court held that under Article 1, § 7 of the California Constitution⁸⁸ gays and lesbians were a suspect class, discriminatory laws adversely affecting gays and lesbians were subject to strict scrutiny judicial review,⁸⁹ and that same-sex couples had a fundamental right to enter into civil marriages to the same extent as heterosexual couples.⁹⁰ However, Proposition 8, a California ballot initiative,⁹¹ prospectively nullified the decision of the California Supreme Court in these cases. Proposition 8 states that “[o]nly marriage between a man and a woman is valid or recognized in California.”⁹²

The Supreme Court of California subsequently upheld the constitutionality of Proposition 8 in *Strauss v. Horton*⁹³ as a narrow and limited exception to the state constitutional protection that gays and lesbians currently receive under the holding in the *In Re Marriage Cases*.⁹⁴ The court, however, unanimously held that the state would continue to recognize the marriages of the estimated 18,000 same-sex couples married before the November election.⁹⁵ Furthermore, the *Strauss* decision did not alter the holding in the *In Re Marriage Cases* that gay and lesbian couples are a suspect class and that any law that discriminates on the basis of sexual orientation is constitutionally subject to strict scrutiny judicial review.⁹⁶

i. The Plaintiffs’ Claims in *Perry v. Schwarzenegger*

On May 22, 2009, a legal team spearheaded by Theodore B. Olson and David Boies filed a lawsuit known as *Perry v. Schwarzenegger*.⁹⁷ The lawsuit challenged Proposition 8 as a denial of “basic liberties and equal protection under the law that are guaranteed by

87. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

88. CAL. CONST. art. I, § 7 (“Only marriage between a man and a woman is valid or recognized in California.”).

89. See generally discussion *infra* Part III (discussing strict scrutiny of gays and lesbians under the Equal Protection Clause).

90. *In re Marriage Cases*, 183 P.3d at 384.

91. CAL. CONST. art. I, § 7.5.

92. *Id.*

93. *Strauss v. Horton*, 207 P.3d 48, 75, 78 (Cal. 2009).

94. *In re Marriage Cases*, 183 P.3d at 384.

95. *Strauss*, 207 P.3d at 119-22 (holding that Proposition 8 should be interpreted to apply prospectively and not to invalidate retroactively the marriages of same-sex couples performed prior to its effective date); see also *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 928 (N.D. Cal. 2010) (noting that California had issued over 18,000 marriage licenses to same-sex couples prior to the passage of Proposition 8).

96. *Id.* at 75-76, 78.

97. *Perry*, 704 F. Supp. 2d at 921.

the Fourteenth Amendment of the United States Constitution.”⁹⁸ The lawsuit also asserted that, “California relegates same-sex unions to the separate-but-unequal institution of domestic partnership.”⁹⁹

In *Perry*, the plaintiffs contended that Proposition 8 “impinges on fundamental liberties by denying gay and lesbian individuals the opportunity to marry civilly and enter into the same officially sanctioned family relationship with their loved ones as opposite-sex individuals.”¹⁰⁰ They also alleged that the motivation for Proposition 8 was animus against gays and lesbians and a desire to harm them as members of a politically unpopular group in violation of the Equal Protection Clause of the Fourteenth Amendment.¹⁰¹ With respect to the equal protection claim, the plaintiff’s asserted that “Prop. 8 withdrew from gays and lesbians, but no others, specific legal protections afforded by the California Supreme Court” in the *In Re Marriage Cases*¹⁰² and the subsequent legal protections afforded them by the California Constitution. As a result, the plaintiffs in *Perry* argued that “[Proposition 8] violates the Equal Protection Clause of the Fourteenth Amendment because it singles out gays and lesbians for a disfavored legal status, thereby creating a category of ‘second-class citizens.’”¹⁰³

The plaintiffs in *Perry* also based their constitutional challenge on a state law denial, via Proposition 8, of fundamental liberties protected by the Due Process Clause of the Fourteenth Amendment¹⁰⁴ and the right to be free from irrational government discrimination protected by the Equal Protection Clause of the Fourteenth Amendment.¹⁰⁵ Plaintiffs also raised a statutory civil rights cause of action for injunctive relief against the individual state defendants pursuant to the Civil Rights Act of 1871.¹⁰⁶ The court held that Proposition 8 violated the constitutional rights of same-sex couples under the Due Pro-

98. Complaint at 1, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 3:09-CV-02292-VRW).

99. *Id.*

100. *Id.* at 39.

101. *Id.* at 43.

102. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

103. Complaint at 43, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. 3:09-CV-02292-VRW).

104. *See id.* at 38-39.

105. *See id.* at 41-44.

106. *Id.* at 46-49 (citing Civil Rights Act of 1871, 42 U.S.C. § 1983 (2006)).

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cess¹⁰⁷ and Equal Protection Clauses¹⁰⁸ of the United States Constitution.

a. Due Process

The *Perry* court stated that the Fourteenth Amendment's Due Process Clause protects individuals against arbitrary governmental deprivations of life, liberty, and property.¹⁰⁹ Moreover, the court held that the right to marry protects an individual's choice of marital partner regardless of gender,¹¹⁰ that domestic partnerships do not satisfy California's obligation to allow plaintiffs to marry,¹¹¹ and that Proposition 8 is unconstitutional because it denied plaintiffs a fundamental right without a legitimate (which is much less than a compelling) reason.¹¹²

b. Equal Protection

The *Perry* court also noted that equal protection is a "pledge of the protection of equal laws."¹¹³ The court stated that Proposition 8 operated to restrict Ms. Perry's choice of a marital partner because of her sexual orientation and her partner's gender¹¹⁴ and that the Equal Protection Clause rendered Proposition 8 unconstitutional under any standard of review.¹¹⁵

With regard to the standard of review, the court held that the six rationales¹¹⁶ advanced by the Proposition 8 proponents did not indicate a rational basis related to any legitimate state interest.¹¹⁷ The court addressed the six rationales argued by the proponents in support of Proposition 8 individually. The rationales which purportedly set forth a rational basis for Proposition 8 are as follows: (1) the need to reserve marriage as a union between a man and a woman and to exclude any other relationship from marriage in order to preserve the traditional institution of marriage as the union of a man and a wo-

107. *Id.* at 991.

108. *Id.* at 993.

109. *Id.* at 991.

110. *Id.* at 993.

111. *Id.*

112. *Id.* at 998-1003.

113. *Id.* at 995 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

114. *Id.* at 996.

115. *Id.* at 1003.

116. *Id.* at 998-1002.

117. *Id.* at 1002.

man;¹¹⁸ (2) the need to proceed with caution when implementing social change which could radically transform the fundamental nature of a bedrock institution;¹¹⁹ (3) the need to promote opposite-sex parenting over same-sex parenting to increase stability and responsibility in naturally procreative relationships;¹²⁰ (4) the need to protect the freedom of those who oppose marriage for same-sex couples to accommodate the First Amendment rights of persons and entities to oppose same-sex marriage on religious and moral grounds;¹²¹ (5) the need to treat same-sex couples differently from opposite sex couples in order to maintain flexibility in separately addressing the needs of different relationships, in order to ensure that California marriages are recognized in other jurisdictions, and to be able to conform California's definition of marriage to federal law;¹²² and finally, (6) for "any other conceivable interest."¹²³

The *Perry* court held that the first argument of the Proposition 8 proponents—the need to reserve marriage as a union between a man and a woman and to exclude any other relationship from marriage to preserve the traditional institution of marriage as the union of a man and a woman—did not further any state interest. Rather, the court held that the evidence produced at trial indicated "Proposition 8 harms the state's interest in equality because it mandates that men and women be treated differently based only on antiquated and discredited notions of gender."¹²⁴

Next, the court held that the second argument of the Proposition 8 proponents—the need to proceed with caution when implementing social change which could radically transform the fundamental nature of a bedrock institution—did not further any state interest. Specifically, the court held that "[b]ecause the evidence shows same-sex marriage has and will have no adverse effects on society or the institution of marriage, California has no interest in waiting and no practical need to wait to grant marriage licenses to same-sex couples."¹²⁵ Accordingly, the court found that "Proposition 8 is . . . not rationally related to [the] proponents' purported interests in proceeding with

118. *Id.* at 998.

119. *Id.* at 998-99.

120. *Id.* at 999-1000.

121. *Id.* at 1000-01.

122. *Id.* at 1001.

123. *Id.* at 1001-02.

124. *Id.* at 998.

125. *Id.* at 999.

caution when implementing social change.”¹²⁶ The court also noted that California had already issued “18,000 marriage licenses to same-sex couples,” that California “ha[d] not suffered any demonstrated harm as a result,” and that “California officials ha[d] chosen not to defend Proposition 8 in these proceedings.”¹²⁷

The *Perry* court also found that the third argument of the Proposition 8 proponents—the need to promote opposite-sex parenting over same-sex parenting to increase stability and responsibility in naturally procreative relationships—failed to advance any legitimate identified interest. To the contrary, the court found that the evidence of record supported the opposite conclusion. Accordingly, the court determined that the evidence of record not only failed to support the proponents’ contention but, rather, showed that “same-sex parents and opposite-sex parents are of equal quality” and that “Proposition 8 does not make it more likely that opposite-sex couples will marry and raise biologically conceived children related to both parents.”¹²⁸

The court held that the fourth argument of the Proposition 8 proponents—the need to protect the freedom of opponents to same-sex marriage in order to accommodate their First Amendment rights to challenge same-sex marriage on religious and moral grounds—failed “as a matter of [California state] law.”¹²⁹ The court also noted that in *Lawrence v. Texas*,¹³⁰ the Supreme Court clearly held that a majority of citizens in a state could not use the power of the state to enforce “profound and deep convictions accepted as ethical and moral principles” if those moral principles, as applied, violated the liberty interest of individuals protected by the Due Process Clause of the United States Constitution.¹³¹

Furthermore, the *Perry* court held that the fifth argument of the Proposition 8 proponents—the need to treat same-sex couples differently from opposite sex couples in order to maintain flexibility in separately addressing the needs of different relationships, to ensure that California marriages are recognized in other jurisdictions, and to conform California’s definition of marriage to federal law—was also not

126. *Id.*

127. *Id.* at 1003.

128. *Id.* at 999-1000.

129. *Id.* at 1000 (citing *In re Marriage Cases*, 183 P.3d 384, 451-52 (Cal. 2008); *Koebke v. Bernardo Heights Country Club*, 115 P.3d 1212, 1217-18 (Cal. 2005)).

130. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

131. *Perry*, 704 F. Supp. 2d at 1002 (quoting *Lawrence*, 539 U.S. at 571).

rationally related to a legitimate state interest.¹³² The court noted that the evidence produced at trial thoroughly rebutted this premise. Rather than being different, the court noted that “same-sex couples and opposite-sex unions are, for all purposes relevant to California law, exactly the same.”¹³³ The court also held that the “evidence shows conclusively that moral and religious views form the only basis for a belief that same-sex couples are different from opposite-sex couples.”¹³⁴ Accordingly, the court held that the evidence “fatally undermine[d] any purported state interest in treating couples differently.”¹³⁵

The *Perry* court held that the sixth argument of the Proposition 8 proponents—the catch-all interest (i.e., “for any other conceivable interest”)—similarly failed to establish a rational basis to support Proposition 8.¹³⁶ The court found “that, by every available metric, opposite-sex couples are not better than their same-sex counterparts; instead as partners, parents, and citizens, opposite-sex couples and same-sex couples are equal.”¹³⁷ The court also cited to several United States Supreme Court cases for the proposition that a private moral view that same-sex couples are inferior to opposite sex couples is not a proper basis for legislation.¹³⁸

ii. The District Court’s Conclusion and Holding in *Perry v. Schwarzenegger*

The *Perry* court noted that the unsubstantiated evidence produced by the Defendants at trial showed that Proposition 8 played on the fear that exposure to homosexuality would turn children into homosexuals and that parents should dread having children who are

132. *Id.* at 1003.

133. *Id.* at 1001.

134. *Id.*

135. *Id.*

136. *Id.* at 1001-02.

137. *Id.* at 1002.

138. *See id.* at 1002 (citing to *Romer v. Evans*, 517 U.S. 620, 633 (1996)); *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (noting that a profound and deep moral conviction of a majority of a state’s citizens cannot serve as a basis for upholding a law that violates the Due Process of the United States Constitution); *Lawrence*, 539 U.S. at 560 (“[T]he fact that a State’s governing majority has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice”); *Lawrence*, 539 U.S. at 582 (O’Connor, J., concurring) (“Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons.”); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“The Constitution cannot control [private biases], but neither can it tolerate them.”).

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not heterosexual.¹³⁹ Citing to *Romer v. Evans*, the court held that moral disapproval alone is an improper basis on which to deny rights to gay men and lesbians.¹⁴⁰ The court concluded by holding that:

Proposition 8 fails to advance any rational basis in singling out gay men and lesbians for denial of a marriage license. Indeed, the evidence shows Proposition 8 does nothing more than enshrine in the California Constitution the notion that opposite-sex couples are superior to same-sex couples. Because California has no interest in discriminating against gay men and lesbians, and because Proposition 8 prevents California from fulfilling its constitutional obligation to provide marriages on an equal basis, the court concludes that Proposition 8 is unconstitutional.¹⁴¹

2. The Fifth Amendment Analysis as Applied to Section 3 of DOMA

DOMA is “a radical blot on the American constitution.”¹⁴² As one advocate stated, “it singles out a particular group for discrimination”¹⁴³ and denies gays and lesbians their right to liberty protected by the Due Process Clause of the Fifth Amendment to the United States Constitution. Accordingly, it is not surprising that on July 8, 2010, in *Gill v. Office of Personnel Management*,¹⁴⁴ United States District Judge Joseph L. Tauro ruled that DOMA was unconstitutional.

i. The Fifth Amendment Claim in *Gill v. Office of Personnel Management*

The plaintiffs in *Gill* maintained that Section 3 of DOMA unconstitutionally denied them a variety of federal benefits in violation of the Equal Protection guarantee of the Fifth Amendment via the Amendment’s Due Process Clause.¹⁴⁵ They asserted, among other things, that DOMA (1) does not pass constitutional muster under either heightened scrutiny or rational basis review,¹⁴⁶ (2) has nothing to

139. *Perry*, 704 F. Supp. at 988.

140. *Id.* at 1003 (citing *Romer v. Evans*, 517 U.S. 620, 634 (1996)).

141. *Id.*

142. Sandhya Somashekhar, *Courts Weighing in on Same-Sex Marriage; Two Sides Watch for Appeal in Mass. Case, Ruling in California*, WASH. POST, July 10, 2010, at A2, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/09/AR2010070905499.html> (quoting Evan Wolfson, director of the gay advocacy group Freedom to Marry).

143. *Id.*

144. *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d. 374 (D. Mass. 2010).

145. *See id.* at 376-77.

146. *See* Memorandum in Opposition to Defendants’ Motion to Dismiss and in Support of Plaintiffs’ Motion for Summary Judgment at 12-26, *Gill v. Office of Pers. Mgmt.* 669 F. Supp. 2d

do with procreation and child-rearing,¹⁴⁷ (3) cannot be justified as preserving “traditional” marriage,¹⁴⁸ (4) undermines rather than protects state sovereignty,¹⁴⁹ (5) that DOMA does not conserve scarce resources,¹⁵⁰ and (6) the expression of moral disapproval of homosexuality contained in the statute is not a valid state interest.¹⁵¹

ii. The District Court’s Decision in *Gill v. Office of Personnel Management*

The decision in the *Gill* case only affected the rights of seven gay couples and three survivors of same-sex spouses.¹⁵² Judge Tauro’s decision held that the federal government had unfairly denied these individuals valuable marriage-related federal benefits, including a variety of benefits available under Social Security legislation.¹⁵³

In this case, Judge Tauro ruled that because DOMA had denied plaintiffs the right to federal benefits that they would have otherwise been entitled to if they were in heterosexual marriages,¹⁵⁴ DOMA violated the Equal Protection component of the Fifth Amendment under even the highly deferential rational basis test, which typically results in courts sustaining the constitutionality of challenged legislation.¹⁵⁵ The court stated that it was “convinced” that there was no conceivable set of facts that could ground a rational basis between DOMA and any legitimate government objective.¹⁵⁶ Further, the court stated that the government’s purported objectives in enacting DOMA were to: (1) encourage responsible procreation and child-bearing, (2) defend and nurture the institution of traditional heterosexual marriage, (3) defend traditional notions of morality, and (4) preserve scarce resources.¹⁵⁷

377 (D. Mass. 2010) (No. 109 CV 10930), 2009 WL 5803679 (discussing heightened scrutiny); *id.* at 26-39 (discussing a rational basis standard of review).

147. *Id.* at 34.

148. *Id.* at 36.

149. *Id.* at 37.

150. *Id.* at 38.

151. *Id.* at 39.

152. See *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010).

153. See Somashekhar, *supra* note 142.

154. In *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), the Supreme Court recognized that an equal protection component existed under the Fifth Amendment’s Due Process Clause.

155. Memorandum in Opposition to Defendants’ Motion to Dismiss and in Support of Plaintiffs’ Motion for Summary Judgment at 21, *Gill v. Office of Pers. Mgmt.* 669 F. Supp. 2d 377 (D. Mass. 2010) (No. 109 CV 10930).

156. *Gill*, 699 F. Supp. 2d at 388.

157. *Id.* at 389.

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In response to the government's procreation argument, the court specifically noted that Supreme Court Justice Antonin Scalia's dissent in *Lawrence v. Texas*¹⁵⁸ pointed out that the ability to procreate is not now nor has it ever been a precondition to marriage in any state in the country. The *Gill* court also stated that Congress could not accomplish its objective to defend and nurture heterosexual marriage by punishing same-sex couples who exercise their rights under state law.¹⁵⁹ Additionally, the court noted that the Supreme Court has made "abundantly clear" that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law."¹⁶⁰ Furthermore, the district court in *Gill* could discern no principled reason for Congress to prohibit government expenditures to same-sex married couples "apart from Congress' desire to express disapprobation of same-sex marriage."¹⁶¹

The court also addressed the government's argument that Congress intended for DOMA to provide a uniform structure for distributing federal benefits tied to marriage. The court found that DOMA did not provide a structure that was intended to legitimately address state-to-state inconsistencies in the distribution of federal marriage-based benefits. Instead, the court held that Congress' intent in passing DOMA was to deny to same-sex married couples in a particular state the same federal marriage-based benefits that the state made available to heterosexual couples.¹⁶² Accordingly, the court found that Congress had enacted DOMA for one purpose—"to disadvantage a group of which it disapproves."¹⁶³ Therefore, the court held that since "irrational prejudice plainly *never* constitutes a legitimate government interest . . . Section 3 of DOMA as applied to Plaintiffs violate[d] the equal protection principles embodied in the Fifth Amendment to the United States Constitution."¹⁶⁴

158. See *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting).

159. *Gill*, 699 F. Supp. 2d at 389.

160. *Id.* at 389-90.

161. *Id.* at 390.

162. *Id.* at 394.

163. *Id.* at 396.

164. *Id.* at 397.

B. Federalism, State Sovereignty, and Section 3 of DOMA

1. Background Cases

The United States Supreme Court has repeatedly recognized that the subject of family law and determinations of marital status are an attribute of state sovereignty that the Constitution reserves to the states. For instance, in *Haddock v. Haddock*, the court stated that “[n]o one denies that the states, at the time of the adoption of the Constitution, possessed full power over the subject of *marriage* and divorce [and] that the Constitution delegated no authority to the government of the United States on [that] subject”¹⁶⁵ Similarly, in *Boggs v. Boggs*,¹⁶⁶ the Court noted that “[a]s a general matter, [t]he subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”¹⁶⁷ Moreover, the Court has made clear that the whole area of family law—which includes “declarations of status, e.g., *marriage*, annulment, divorce, custody and paternity”¹⁶⁸—is a matter of local concern “subject to the State’s police power.”¹⁶⁹

i. The Tenth Amendment

Under the Tenth Amendment “powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or the people.”¹⁷⁰ The Tenth Amendment has indeed been recognized as the basis of “Our Federalism.” The Supreme Court in *Younger v. Harris*¹⁷¹ expressed the obligations of the Tenth Amendment, requiring that the federal government, “anxious though it may be to vindicate and protect federal rights and federal interests, always endeavor[] to do so in ways that will not unduly interfere with the legitimate activities of the States” and local governments.¹⁷² The Tenth Amendment and “Our Federalism,” according to *Younger*, recognize that “the entire country is made up of a Union of separate state

165. *Haddock v. Haddock*, 201 U.S. 562, 575 (1906) (emphasis added), *overruled on other grounds* by *Williams v. North Carolina*, 317 U.S. 287 (1942).

166. *Boggs v. Boggs*, 520 U.S. 833, 848 (1977) (citing *In re Burrus*, 136 U.S. 586, 593-94 (1890)).

167. *Id.* at 848 (quoting *In re Burrus*, 136 U.S. 586, 593-94).

168. *Ankenbrandt v. Richards*, 504 U.S. 689, 716 (1992) (Blackmun, J., concurring) (emphasis added).

169. *Loving v. Virginia*, 388 U.S. 1, 7 (1967).

170. U.S. CONST. amend. X.

171. *Younger v. Harris*, 401 U.S. 37 (1971).

172. *See id.* at 44.

governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.”¹⁷³ In essence, the Tenth Amendment requires a “proper respect for state functions.”¹⁷⁴ Despite a recognized commitment to the principles underlying federalism, the Court has not hesitated to invalidate discriminatory state laws regulating civil marriage that violate the United States Constitution.¹⁷⁵

ii. Spending Clause of Article I, Section 8

The Spending Clause of Article I, Section 8 authorizes Congress to “lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”¹⁷⁶ Under the Supreme Court’s decision in *South Dakota v. Dole*, congressional legislation violates the Spending Clause of Article I, Section 8, among other things, if the legislation is “barred by other constitutional provisions” or if it imposes “conditions . . . ‘unrelated to the federal interest in particular national projects or programs’ funded under the challenged legislation.”¹⁷⁷ In *South Dakota v. Dole*, the Supreme Court held that Spending Clause legislation must satisfy five requirements: (1) it must be in pursuit of the ‘general welfare’; (2) conditions of funding must be imposed unambiguously so states are cognizant of the consequences of their participation; (3) conditions must not be ‘unrelated to the federal interest in particular

173. *Id.* Some of the legal doctrines that are grounded on Tenth Amendment concerns are (a) state concurrent jurisdiction to hear federal causes of action; (b) the Rules of Decision Act, 28 U.S.C. 1652 (2006); (c) the full faith and credit due to state court judgments by even federal courts (28 U.S.C. § 1738); (d) the various abstention doctrines, (e) the Eleventh Amendment; and (f) the independent and adequate state ground doctrine with respect to a federal court’s ability to review decisions of state courts. Additionally, the Supreme Court, on federalism grounds, will generally refuse to hear cases involving domestic relations, actions *in rem* involving property already in state custody, and probate cases, even though the court otherwise has diversity jurisdiction to hear the claim. *See generally Ankenbrandt*, 504 U.S. 689 (holding that the court lacked jurisdiction because of the domestic relations exception to diversity jurisdiction). In *Ankenbrandt*, the Court reaffirmed this court-created exception to diversity jurisdiction in cases involving divorce, alimony, and child custody decrees although the Court did not find any exception to be applicable on the facts of that case. *See id.* at 690.

174. *Younger*, 401 U.S. at 44.

175. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down a Virginia law prohibiting interracial marriage (i.e., a miscegenation statute) under the Equal Protection and Due Process Clauses of the Fourteenth Amendment). The first state court to recognize that miscegenation statutes violate the Equal Protection Clause was the California Supreme Court in the case of *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948).

176. U.S. CONST. art I, § 8.

177. *South Dakota v. Dole*, 483 U.S. 203, 207 (1987).

national projects or programs' funded under the challenged legislation; (4) the legislation must not be barred by other constitutional provisions; and (5) the financial pressure created by the conditional grant of federal funds must not rise to the level of compulsion.¹⁷⁸

2. *Commonwealth v. Department of Health and Human Services*

In *Commonwealth v. Department of Health and Human Services*, Massachusetts challenged the constitutionality of Section 3 of DOMA.¹⁷⁹ Massachusetts, in its Tenth Amendment challenge to DOMA, argued that Congress' unprecedented decision to enact a federal definition of marriage, which limits marriage to a union between a man and a woman, rejected the long standing practice of deferring to each state's definition of marriage and contravened the constitutional designation of exclusive authority to the states.¹⁸⁰ The suit maintained that (a) Congress lacked authority under the Tenth Amendment to regulate the field of domestic relations, including marriage,¹⁸¹ (b) Section 3 of DOMA ran afoul of the Constitution's principles of federalism by creating an extensive regulatory scheme that interfered with and undermined Massachusetts' sovereign authority to define marriage and to regulate the marital status of its citizens,¹⁸² and (c) Section 3 of DOMA unconstitutionally commandeered Massachusetts and its employees to facilitate implementation of a discriminatory federal policy.¹⁸³

Massachusetts also asserted that, in passing DOMA, Congress violated the Spending Clause by exercising its spending power in a manner that induced Massachusetts to violate the constitutional rights of its own citizens.¹⁸⁴ Massachusetts' lawsuit asserted that DOMA penalized Massachusetts because the federal government would not provide matching funds under a variety of federal-state programs in which same-sex couples qualified under Massachusetts law.¹⁸⁵ "For

178. *Dole*, 483 U.S. at 207.

179. *Commonwealth v. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010).

180. *Dep't of Health & Human Servs.*, 698 F. Supp. 2d at 246.

181. Complaint at 84, *Commonwealth v. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010) (No. 1:09-11156-JLT).

182. *Id.* at 85.

183. *Id.* at 86.

184. *Id.* at 88. Massachusetts Attorney General Martha Coakley alleged that DOMA required the state to discriminate against its own. *Id.* at 43.

185. *Id.* at 46-79 (citing Medicaid and other federal benefits for veterans administered by the Massachusetts State Cemetery Grants Program). Additionally, the suit maintained that DOMA prevents legally married same-sex couples in Massachusetts from having access to hundreds of

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example, the state would have risked losing federal funding if it had granted the request of a gay war veteran who had asked to be buried in a federally subsidized veteran's cemetery with his spouse."¹⁸⁶

The court found the evidentiary record to be replete with allegations of past and ongoing injuries to Massachusetts for standing purposes.¹⁸⁷ The court held that DOMA mandated that Massachusetts violate its own MassHealth Equality Act¹⁸⁸ and the Massachusetts Constitution¹⁸⁹ as a prerequisite for eligibility to receive matching grants for its Medicaid and State Cemetery Grants programs.¹⁹⁰ For example, the Department of Veterans Affairs informed Massachusetts that the Department would be entitled to recapture millions of dollars in federal grants if Massachusetts permitted a same-sex spouse of a military veteran to be buried in one of two cemeteries eligible for federal matching funds under the State Cemetery Grants Program.¹⁹¹ Consequently, Massachusetts incurred \$640,661 in additional costs and as much as \$2,224,018 in lost federal funding.¹⁹² The court also noted that DOMA prevented Massachusetts from receiving federal matching funds for Medicaid benefits paid to same-sex spouses entitled to coverage under the MassHealth Equality Act.¹⁹³

The court also found that DOMA required Massachusetts to pay an additional \$122,607 in Medicare taxes between 2004 and 2009.¹⁹⁴ Under federal Medicare law, Massachusetts must pay a Medicare tax of 1.45% of each employee's taxable income to the federal government.¹⁹⁵ This is significant because the federal government considers Massachusetts' provision of health benefits to same-sex spouses of employees to constitute extra income.¹⁹⁶ Accordingly, the district court held that the federal government had effectively penalized Mas-

rights and protections afforded to heterosexual couples because of DOMA's definition of marriage. *Id.* at 32-45. Moreover, Massachusetts' suit also noted that the federal General Accounting Office has identified 1138 federal statutory provisions in which marital status is a factor in determining eligibility for or entitlement to federal benefits, rights, and privileges. *Id.* at 34.

186. Somashekhar, *supra* note 142; see also discussion *supra* Part III.B.2.

187. *Dep't of Health & Human Servs.*, 698 F. Supp. 2d at 245.

188. *Id.* at 241.

189. *Id.* at 239 (citing *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941, 959-61, 968 (Mass. 2003)).

190. *Id.* at 239-41.

191. *Id.* at 240.

192. *Id.* at 253.

193. *Dep't of Health & Human Servs.*, 698 F. Supp. 2d at 242.

194. *Id.* at 244.

195. *Id.* at 243.

196. *Id.*

sachusetts for adhering to its Constitution and laws banning discrimination against same-sex married couples.¹⁹⁷

With respect to the Spending Clause, the court agreed with Massachusetts' assertion that "DOMA impermissibly conditions the receipt of federal funding . . . by requiring that the state deny certain marriage-based benefits to same-sex married couples."¹⁹⁸ The court held that "DOMA plainly conditions receipt of federal funding on the denial of marriage-based benefits to same-sex married couples, though the same benefits are provided to similarly situated heterosexual couples."¹⁹⁹

The court's July 8, 2010 Memorandum and Order containing its ruling on the merits also canvassed the overwhelming evidence of state control over determinations of marital status. The court observed that state control over marital status predated the United States Constitution.²⁰⁰ In view of these findings, the court held that DOMA exceeded the scope of congressional power under both the Spending Clause, as interpreted by the Supreme Court in *South Dakota v. Dole*²⁰¹ and the Tenth Amendment to the United States Constitution. The court further noted that its holding—that DOMA violated the Tenth Amendment—was "not a close call."²⁰²

The holding in *Commonwealth* strongly indicates that Section 3 of DOMA is an unconstitutional usurpation of the authority of the states to regulate marriage and domestic relations in violation of the United States Constitution. Moreover, the cases evidence the likelihood that DOMA will not withstand a Tenth Amendment or Spending Clause challenge if brought before the United States Supreme Court.

197. *Id.* at 252.

198. *Id.* at 248. The Court also held that DOMA is independently barred by the equal protection component of the Fifth Amendment's Due Process Clause. *Id.*

199. *Id.* at 248. Amie Breton, a spokeswoman for Massachusetts' Attorney General Martha Coakley's office, stated "that as a result of the ruling, gay married couples in Massachusetts were immediately eligible to apply for Social Security and other federal benefits for their spouses." See Somashekhar, *supra* note 142.

200. *Dep't of Health & Human Servs.*, 698 F. Supp. 2d at 236-50.

201. *Id.* at 247 (citing *South Dakota v. Dole*, 483 U.S. 203, 207 (1987)).

202. *Id.* at 252.

C. The Relationship Among the States

This Section lays out the reasons why Congress exceeded its authority under Article IV, Section 1²⁰³ in enacting Section 2 of DOMA as applied to final judgments. The argument is that Congress' power under the Effects Clause of Article IV, Section 1 is not plenary but more akin to its power to legislate under the Commerce Clause and the Fourteenth Amendment.²⁰⁴ Furthermore, DOMA encourages states to disrespect final judgments of sister states, a position counter to the intent of the Full Faith and Credit Clause.

The common thread or rationale underlying the subject of conflict of laws and several important provisions of the United States Constitution is the obligation imposed on state courts to be fair to outsiders. The outsiders, to whom the several states owe an obligation of fairness, include other states, other sovereigns (e.g., the United States federal government and foreign countries), and non-residents of the state. The United States Constitution imposes this fairness obligation under a number of constitutional provisions. The most common of these provisions are the Full Faith and Credit Clause of Article IV, Section 1, the Due Process Clause of the Fourteenth Amendment, the Privileges and Immunities Clause of Article IV, Section 2,²⁰⁵ the Commerce Clause,²⁰⁶ the Equal Protection Clause of the Fourteenth Amendment, and the Supremacy Clause of Article VI, Clause 2.²⁰⁷ The courts have also created other concepts to ensure fairness to outsiders on the part of the states (as well as the U.S. gov-

203. The Full Faith and Credit Clause of Article IV, Section 1 provides that, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

204. See Kramer, *supra* note 54.

205. The Privileges and Immunities Clause provides, in pertinent part, that, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

206. The Commerce Clause provides that, "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, cl. 3.

207. The Supremacy Clause provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2.

ernment) through legal precepts such as the doctrine of international comity.²⁰⁸

1. The Full Faith and Credit Clause

The Supreme Court has recognized that the Full Faith and Credit Clause was intended to unify the nation with regard to the respect the states were to have for each other.²⁰⁹ The Clause requires that a state give appropriate respect and deference to the public acts, records, and judicial proceedings of every other state.

2. The Privileges and Immunities Clause

The Privileges and Immunities Clause of Article IV, Section 2, Clause 1 requires that each state give the citizens of other states “all” of the privileges and immunities that it affords to its own citizens. In other words, it requires that a state be fair and respectful in its treatment of citizens of other states.

The Framers of the United States Constitution intended the Privileges and Immunity Clause to “fuse into one Nation a collection of independent, sovereign States.”²¹⁰ Thus, the Supreme Court has repeatedly found that “one of the privileges which the Clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with citizens of the State.”²¹¹ However, the Clause only protects those rights of citizens, which are “fundamental” to the promotion of interstate harmony. The Supreme Court, for example, has held that rights which merely involve recreation, rather than a “means of livelihood,” are not fundamental to the promotion of interstate harmony.²¹² On the other hand, in *Hicklin v. Orbeck*,²¹³ the Court invalidated a state statute containing a resident hiring pref-

208. See, e.g., *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993) (citing international comity as the basis for determining whether to apply a federal statute to the conduct of an alien who allegedly committed an act in violation of a federal statute while in his or her home country when the act did not violate the laws of the foreign country); *Hilton v. Guyot*, 159 U.S. 113, 164, 193 (1895) (citing comity as the basis for courts in the United States to enforce judgments of courts in foreign countries).

209. See *Hughes v. Fetter*, 341 U.S. 609 (1951); see also *Allstate v. Hague*, 449 U.S. 302 (1981) (Stevens, J., concurring).

210. *Toomer v. Witsell*, 334 U.S. 385, 395 (1948).

211. *Id.* at 396.

212. See *Baldwin v. Montana Fish & Game Comm’n*, 436 U.S. 371, 383 (1978) (approving charging non-residents more than residents for elk-hunting licenses).

213. *Hicklin v. Orbeck*, 437 U.S. 518 (1978).

erence for all employment related to the development of the state's oil and gas resources.

3. The Commerce Clause

The Commerce Clause of Article I, Section 8, Clause 3, was derived, like the Privileges and Immunities Clause, from the Articles of Confederation. The Framers of the Constitution intended the Commerce Clause to create a national economic union free of parochial interference by the individual states. Indeed, the Supreme Court has recognized the “mutually reinforcing relationship” between the Commerce Clause and the Privileges and Immunities Clause.²¹⁴ This is why the Framers of the United States Constitution gave Congress the power to regulate commerce among the several states.

The Court has held that a state is not allowed to project its legislation into other states and directly regulate commerce in other states.²¹⁵ Thus, the Commerce Clause does not allow a state to control prices and other aspects of commerce in other states. When a state law only indirectly affects interstate commerce, the Supreme Court has examined it to determine whether the state's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.²¹⁶ In short, the Commerce Clause requires that a state be fair and respectful in its dealings with other states.

The United States Supreme Court has occasionally invalidated acts of Congress on the grounds that Congress exceeded its authority in enacting legislation under the Commerce Clause.²¹⁷ For instance, in *United States v. Lopez*, the Supreme Court invalidated a congressional statute—the Gun-Free School Zones Act—because possession of guns in school was not, itself, a commercial activity and not part of a larger regulation of economic activity.²¹⁸ Similarly, the Supreme Court in *United States v. Morrison*²¹⁹ held that Congress had exceeded its authority under the Commerce Clause in enacting a cause of action

214. See *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 279-80 n.8 (1985) (citing *Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978)).

215. See *Brown-Foreman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986).

216. See *id.* at 579.

217. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (finding that Congress exceeded its authority under Section 5 of the Fourteenth Amendment and the Commerce Clause in enacting a cause of action under 42 U.S.C. § 1981 (2006) which created a federal remedy for the victims of gender-motivated violence).

218. See *United States v. Lopez*, 514 U.S. 549, 561-65 (1995).

219. *Morrison*, 529 U.S. at 598.

under Title 42 of the United States Code, Section 1398 that created a federal remedy for the victims of gender-motivated violence because the statute did not address commercial activity nor was it part of a larger regulation of economic activity.²²⁰ The Court also determined that Congress had no power to enact the statute pursuant to Section 5 of the Fourteenth Amendment.²²¹

4. Section 2 of DOMA is Unconstitutional Under the Full Faith and Credit Clause, Article IV, Section 1

The Supreme Court's decisions in *United States v. Lopez* and *United States v. Morrison* make clear that only the United States Supreme Court can ultimately decide whether Congress has exceeded its authority to enact legislation under a particular source of constitutional power. In light of these cases, can one safely argue that Congress has unlimited plenary authority to pass legislation under the Effects Clause of the Full Faith and Credit Clause—the power Congress utilized in enacting DOMA? The answer would seem to be no. It is not only conceivable, but likely that the Supreme Court would find it “more credible” to read the Effects Clause as authorizing Congress to enact whatever national legislation is needed to refine and implement the Full Faith and Credit Clause.²²² However, it seems unlikely that the Court would interpret the Clause to allow Congress the power to “undermine or abolish” the underlying purpose for the Clause.²²³ Accordingly, it is likely that the Supreme Court, not Congress, has the power to determine the extent of the Effects Clause.

Section 2 of DOMA seems to have been completely unnecessary because states can deny recognition to state laws (e.g., marriage statutes) that violate the local public policy of the forum state, at least when the public policy of the state does not violate the United States Constitution.²²⁴ An example of a case where the public policy of a state violated the United States Constitution is *Loving v. Virginia*.²²⁵ In *Loving*, the Court held that there was no compelling justification for Virginia's law that made it illegal “for any white person in [the] State to marry any save a white person, or a person with no other

220. *Id.* at 614-19.

221. *See id.* at 619-27.

222. *See id.*

223. *See Kramer, supra* note 54, at 2002-03.

224. *See supra* note 53.

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

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admixture of blood than white and American Indian”²²⁶ since it was obviously “designed to maintain white Supremacy.”²²⁷

However, as a general proposition, the United States Supreme Court in *Baker v. General Motors* made clear that while a “court may be guided by the forum State’s ‘public policy’ in determining the *law* applicable to a controversy²²⁸ . . . our decisions support no roving ‘public policy exception’ to the full faith and credit due *judgments*.”²²⁹ Yet, it appears that Congress intended that DOMA precisely allow state courts to exercise this sort of “roving public policy exception to the full faith and credit due *judgments*” of state courts.²³⁰

A plausible argument can be made that Section 2 of DOMA is unconstitutional under Article IV, Section 1 as applied to final judgments because Congress only has the power to implement the provision, not to undermine it. The express purpose of the Full Faith and Credit Clause was to give Congress the power to foster respect by one state of “the public Acts, Records, and judicial Proceedings of every other State.”²³¹ Instead, DOMA seems to be an act of Congress designed to empower the states to disrespect the laws of other states.

5. Hypothetical Situation in Which Section 2 of DOMA Appears to Violate Article IV, Section 1

Rosie, a Massachusetts citizen, obtained a final judgment for loss of consortium in a Massachusetts state court against George Wallace and George’s employer, Wallace Enterprises, Inc., for injuries caused by George to Rosie’s same-sex spouse, Ellen. Ellen is also a citizen of Massachusetts. The accident resulted from George’s negligent driving, which occurred in Massachusetts. Both George and his employer, Wallace Enterprises, Inc., are citizens of Alabama. It is undisputed that George was operating the vehicle in the scope of his employment for Wallace Enterprises, Inc. at the time of the accident. Rosie now seeks to enforce the Massachusetts judgment in a state court of appropriate venue and jurisdiction in Alabama against George and his employer, Wallace Enterprises, Inc. The Alabama legislature has enacted a statute patterned after DOMA. The Alabama statute states

226. *Id.* at 5 n.4.

227. *Id.* at 11.

228. *Baker*, 522 U.S. at 233.

229. *Id.* at 233 (citing *Fauntleroy v. Lum*, 210 U.S. 230, 237 (1908)).

230. *Id.*

231. U.S. CONST. art. IV, § 1.

that the Alabama courts shall not enforce any judgments rendered by courts of a sister state, to the extent that such judgments are based on rights stemming from a law that recognizes the legality of same-sex marriages.

The question is whether this statute lawfully empowers the Alabama state courts to deny the final judgment rendered by the Massachusetts state court. Arguably, the answer is no, based on the aforementioned discussion. Section 2 of DOMA seems to be an act of Congress designed to empower the states to disrespect the laws of other states with respect to final judgments entered by those states. To argue that Congress has plenary authority to enact laws that encourage disrespect for the final judgments of another state appears to be an unreasonable interpretation of the Effects Clause of Article IV when viewed in light of its purpose.²³² Therefore, it is questionable whether DOMA is constitutional under Article IV, Section 1.²³³ Accordingly, the Court would likely conclude that Congress exceeded its authority under Article IV, Section 1 in enacting Section 2 of DOMA as applied to final judgments because it only has the power to implement the provision, not to undermine it.

D. The Establishment Clause

State bans against same-sex marriage raise constitutional issues under the Establishment Clause of the First Amendment.²³⁴ Similarly, DOMA's definition of marriage in Section 3 also seems to violate the Establishment Clause of the United States Constitution. The United States Constitution guarantees the freedom of individuals to exercise their individual religious convictions. But it equally prohibits others from forcing their religious beliefs on others.²³⁵

232. However, in view of the scant information of the Framers' understanding with respect to the reach of the Effects Clause of Article IV, Section 1, there have been some who have argued in favor of a virtual plenary congressional authority to pass legislation such as DOMA. See, e.g., Patrick J. Borchers, *Baker v. General Motors: Implications for Interjurisdictional Recognition of Non-Traditional Marriages*, 32 CREIGHTON L. REV. 147, 180-81, 183-84 (1998) (arguing that a broad reading of DOMA is consistent with Congress' power under U.S. CONST. art. IV, §1); Ralph U. Whitten, *The Original Understanding of Full Faith and Credit Clause and the Defense of Marriage Act*, 32 CREIGHTON L. REV. 255 (1998) (providing an originalist defense of Congress' power to enact DOMA).

233. See generally Kramer, *supra* note 54, at 2002-03.

234. The Establishment Clause of the First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I.

235. See generally Olson, *supra* note 40.

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Section 3 of DOMA provides that for all federal purposes “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”²³⁶ As discussed, one of the purposes of DOMA was to reflect Congress’ moral disapproval of homosexuality and a moral conviction that heterosexuality better comports with traditional, especially Judeo-Christian, morality. In the floor debate on DOMA, members of Congress repeatedly voiced their disapproval of homosexuality as immoral, depraved, unnatural, based on perversion, and an attack on God’s principles.

The United States Constitution guarantees the freedom to individuals to exercise their individual religious convictions, but it equally prohibits others from forcing their religious beliefs on others.²³⁷ However,

a statute [does not] violate[] the Establishment Clause because it “happens to coincide or harmonize with the tenets of some or all religions.” That the Judaeo-Christian [sic] religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny.²³⁸

Unlike the Hyde Amendment, which denied federal funding for abortions, DOMA is no longer just a “reflection of ‘traditionalist’ values” but has become the “embodiment of the views” of people who adhere to certain religious beliefs.²³⁹ Indeed, DOMA with each passing year seems to be more of an “endorsement” of a religious view of same-sex marriage.²⁴⁰ For these reasons, DOMA seems to violate the Establishment Clause since it lacks any valid secular purpose. Indeed, the legislative history indicates that the statute was enacted with animus towards gay individuals. The same underlying rationale is also applicable in the context of state-bans prohibiting same-sex marriage.

In *Lawrence v. Texas*,²⁴¹ the United States Supreme Court explicitly repudiated the notion that the government may uniquely disadvantage gays and lesbians because of moral disapproval for same-sex intimate conduct. The Court majority in *Lawrence*, citing to Justice

236. 1 U.S.C. § 7 (2006).

237. See generally Olson, *supra* note 40.

238. Harris v. McRae, 448 U.S. 297, 319 (1980) (internal citations omitted).

239. *But see id.*

240. *But see* County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989).

241. Lawrence v. Texas, 539 U.S. 558, 577 (2003).

Stevens' dissent in *Bowers v. Hardwick*, held that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."²⁴² Furthermore, it is constitutionally irrelevant that the governing majority in a state has traditionally viewed same-sex marriage as immoral as a basis for upholding a law prohibiting that practice. As the Supreme Court of Iowa stated in its decision in *Varnum v. Brien*²⁴³:

State government can have no religious views, either directly or indirectly, expressed through its legislation. This proposition is the essence of the separation of church and state. As a result, civil marriage must be judged under our constitutional standards of equal protection and not under religious doctrines or the religious views of individuals.²⁴⁴

The fact of the matter is that civil marriage is a secular, non-religious bestowal of property rights on two people—the denial of which violates the Fifth Amendment and Fourteenth Amendments to the United States Constitution. The property rights of persons in same-sex relationships is a topic of discussion in law school courses such as Property, Conflict of Laws, Family Law, and several other courses in the law school curriculum. The common thread in each of these subjects is the underlying issue of fairness in the government's distribution of property rights. Interestingly, Judeo-Christian scriptures uniformly regard "fairness" as one of the *fundamental overarching* requirements of human conduct.²⁴⁵ However, one rarely hears any mention of these passages of scripture in discussing the "fairness" of denying the secular benefits of marriage to persons solely because of the gender of the person's spouse.

Section 3 of DOMA prevents persons in legally celebrated same-sex marriages in various states of the United States from acquiring over one thousand property rights and benefits available to their het-

242. *Id.* at 599. Although some religions view a particular practice as immoral, Judeo-Christian scriptures are uniform in their emphasis on fairness as one of the three overarching principles that outweigh all others. Unfortunately, the simple and profound statements in religious teachings are often overlooked. The Hebrew scriptures clearly state that there are *only* three basic things that God requires of human beings. See *Micah* 6:8 (Living Bible). The three fundamental requirements, according to the Hebrew Scriptures, mandate that mankind be fair and just, merciful, and humble. *Id.* Christianity also recognizes fairness as one of the fundamental, overarching requirements of Christian teachings. See *Matthew* 23:23 (The Living Bible).

243. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

244. *Id.* at 905.

245. See *supra* note 242 and accompanying text.

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erosexual counterparts.²⁴⁶ This is neither a fair nor a just result under the civil marriage laws of the several states. The fact that no religious organization is required to solemnize or endorse a civil marriage between persons in same-sex relationships further supports the argument that state bans against same-sex marriage and DOMA raise constitutional issues under the Establishment Clause of the First Amendment.

IV. TRADITION IS NOT A JUSTIFICATION FOR DENIAL OF SAME-SEX MARRIAGE

A. Shifting Societal Attitudes and Acceptance of Same-Sex Relationships

Society increasingly views the denial of civil marriage to same-sex couples to be out of step with contemporary notions of fundamental fairness. During the 1960s, attitudes towards sexual relations, marriage, sexual orientation, and the role of women began to change. The 1960s witnessed the appearance of safe and effective birth control devices and medicines, a change in the attitude toward discouraging premarital sex, “no fault” divorce laws, and an increase in the number of unmarried partners living together. As part of this change in societal norms, the acceptance of same-sex relationships and the number of people openly seeking such relationships increased to the point that many states repealed their sodomy laws in the 1970s.²⁴⁷

Today’s youth attend public schools with friends and teachers who are in openly gay relationships. In light of these developments, the current generation has rightly begun to wonder why the government does not afford same-sex couples the same property rights afforded to heterosexual couples. By way of comparison, the *Washington Post* reported that the reason for the growing resistance to Iran’s ruling ayatollahs and government leaders is because “the young people who form the bulk of Iran’s population have no memory of

246. CONGRESSIONAL BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES (2004), available at <http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf>.

247. See JESSE DUKEMINIER ET AL., PROPERTY 369-71, 395-418 (7th ed. 2010); see also George Painter, *The Sensibilities of Our Forefathers: The History of Sodomy Laws in the United States*, GAY & LESBIAN ARCHIVES OF THE PAC. NW. (Aug. 10, 2004), http://www.glapn.org/sodomylaws/sensibilities/new_hampshire.htm.

those revolutionary days, and many opposition supporters favor a more open society”²⁴⁸

Similarly, today’s generation of young Americans are coming of age in a society in which same-sex relationships are considered to be a normal and uncontroversial fact of life. Such relationships are no longer a closet affair that people in the gay community downplay or deny. Indeed, it is no longer politically correct to even be perceived as homophobic or as a gay basher. And the movement is well underway towards toppling laws discriminating against persons in same-sex relationships. Accordingly, it is not at all surprising that, as of February 2010, a *Washington Post* poll found that “[a]mong individuals ages [eighteen] to [twenty-nine], an estimated [sixty-five] percent support marriage equality.”²⁴⁹

B. An Authoritative Conservative Voice in Support of Same-Sex Marriage

Even some of “the unlikeliest champion[s] of gay marriage” agree that bans on same-sex marriage are unfair. For example, Theodore Olson who represented Bush in *Bush v. Gore* is one of those unlikely champions.²⁵⁰ Additionally, Olson, “[a]s head of the Office of Legal Counsel under Ronald Reagan . . . argued for ending racial preferences in schools and hiring,” “advised Republicans in their efforts to impeach President Clinton,” and defended the Bush administration’s “claims of expanded wartime powers” as solicitor general under George W. Bush.²⁵¹

Olson wrote a cogent analysis of the issues involved in the debate on gay marriage in a *Newsweek* article entitled *The Conservative Case for Gay Marriage: Why Same Sex Marriage Is an American Value*.²⁵² The article provides an excellent, non-technical explanation of why

248. See Thomas Erdbrink & William Branigin, *In Iran, Rival Rallies Show Rift Endures: Clashes Erupt As Regime Marks 30th Anniversary of U.S. Embassy Siege*, WASH. POST, Nov. 5, 2009, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/04/AR2009110404835.html>.

249. Podesta & Levy, *supra* note 1.

250. *Bush v. Gore*, 531 U.S. 98 (2000) (resolving the disputed 2000 presidential election in favor of George W. Bush). Mr. Bois represented the “Gore” side in the case.

251. See Eve Conant, *The Conscience of a Conservative*, NEWSWEEK, Jan. 18, 2010, at 46, available at <http://www.newsweek.com/2010/01/08/the-conscience-of-a-conservative.html>.

252. Theodore B. Olson, *The Conservative Case for Gay Marriage: Why Same Sex Marriage Is an American Value*, NEWSWEEK, Jan. 18, 2010, at 48, available at <http://www.newsweek.com/2010/01/08/the-conservative-case-for-gay-marriage.html>.

state laws that deny civil marriage to same-sex couples is fundamentally unfair. Olson noted in that article that:

California recognizes marriage between men and women, including persons on death row, child abusers, and wife beaters. At the same time, California prohibits marriage by loving, caring, stable partners of the same sex, but tries to make up for it by giving them the alternative of “domestic partnerships” with virtually all of the rights of married persons except the official, state-approved status of marriage.²⁵³

He also observed that, in the aftermath of Proposition 8, that:

[T]here are now three classes of Californians: heterosexual couples who can get married, divorced and remarried, if they wish; same-sex couples who cannot get married but can live together in domestic partnerships; and same-sex couples who are now married but who, if they divorce, cannot remarry. This is an irrational system, it is discriminatory, and it cannot stand.²⁵⁴

Olson’s essay focused on the two essential points: (1) the societal importance of marriage and why it should not be denied to persons who are in same-sex relationships and (2) the lack of any persuasive justification for denying persons in same-sex relationships the civil right to be married.²⁵⁵

1. The Societal Importance of Marriage and Why it Should Not Be Denied to Persons in Same-Sex Relationships

In his *Newsweek* article, Olson noted that marriage is a non-sectarian “civil” right in this country²⁵⁶ and “is one of the basic building blocks of our neighborhoods and our nation.”²⁵⁷ The fact that “some” religions recognize marriage as a “religious sacrament”²⁵⁸ under their teachings does not make “civil” marriage any less than what it is—an official, secular, state sanctioned relationship, which provides “special benefits”²⁵⁹ to couples. It is a “*social and economic partnership*” that “transforms two individuals into a union based on shared aspirations” and “establishes a formal investment in the well-being of society.”²⁶⁰ Society “encourage[s] couples to marry because the commitments

253. *Id.*

254. *Id.*

255. *See id.* at 48.

256. *Id.* at 49.

257. *Id.* at 48.

258. *Id.* at 49.

259. *Id.*

260. *Id.*

they make to one another provide benefits not only to themselves but also to their families and communities.”²⁶¹ The courts in the United States, he noted, “have insisted that withholding that status . . . may not be arbitrarily denied.”²⁶²

Elaborating on this point, Mr. Olson noted that the “United States Supreme Court has repeatedly held that marriage is one of the most fundamental rights that we have as Americans under our Constitution”²⁶³ and “is a part of the Constitution’s protections of liberty, privacy, freedom of association, and spiritual identification.”²⁶⁴ He stated that, “the underlying rights and liberties that marriage embodies are not in any way confined to heterosexuals”²⁶⁵ and that “[l]egalizing same-sex marriage would . . . be . . . the culmination of our nation’s commitment to equal rights.”²⁶⁶ He noted in this regard:

No matter what you think of homosexuality, it is a fact that gays and lesbians are members of our families, clubs, and workplaces. They are our doctors, our teachers, our soldiers, (whether we admit it or not), and our friends. They yearn for acceptance, stable relationships, and success in their lives, just like the rest of us.²⁶⁷

He also observed that:

Confining some of our neighbors and friends who share the same values to an outlaw or second-class status undermines their sense of belonging and weakens their ties with the rest of us and what should be our common aspirations. Even those whose religious convictions preclude endorsement of what they may perceive as an unacceptable “lifestyle” should recognize that disapproval should not warrant stigmatization and unequal treatment.²⁶⁸

2. There Is No Rational Basis for the Denial of Marriage to Persons in Same-Sex Relationships in the 21st Century

Mr. Olson listed four justifications advanced by the proponents of California’s decision in Proposition 8 to “withdraw access to the institution of marriage for some of its citizens on the basis of their sexual orientation”²⁶⁹—(1) tradition, (2) the notion that “traditional mar-

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 48.

267. *Id.* at 50.

268. *Id.* at 52.

269. *Id.* at 49-50.

riage furthers the state's interest in procreation," (3) the argument that "gay marriage somehow does harm to heterosexual marriage," and (4) religious convictions.²⁷⁰ He then went on to explain why none of these reasons were "persuasive" or set forth a "good reason why we should deny marriage to same-sex partners."²⁷¹

3. Tradition

With regard to "tradition" as a basis for denying gay persons the right to marry under the civil marriage laws of the several states, Mr. Olson stated that, "simply because something has always been done a certain way does not mean that it must always remain that way. Otherwise we would still have segregated schools and debtors' prisons."²⁷² He also noted that:

It seems inconceivable today that only [forty] years ago there were places in this country where a black woman could not legally marry a white man. And that it was only [fifty] years ago that [seventeen] states mandated segregated public education—until the Supreme Court unanimously struck down that practice in *Brown v. Board of Education*.²⁷³

Mr. Olson observed that most Americans "are proud" that the courts have "discredited" the discriminatory state laws that led to cases such as *Loving v. Virginia* and *Brown v. Board of Education*. He also predicted that, "Americans will be equally proud when we no longer discriminate against gays and lesbians and welcome them into our society."²⁷⁴

4. The Notion that Traditional Marriage Furthers the State's Interest in Procreation

Mr. Olson noted that the "procreation argument cannot be taken seriously."²⁷⁵ No one asks heterosexual couples whether they intend to have children. Moreover, the law permits the elderly, prison inmates, and persons who do not intend to have children to be married. He also noted, "preventing gays and lesbians from marrying does not cause more heterosexuals to marry and conceive more children. Likewise, allowing gays and lesbians to marry someone of the same sex

270. *Id.* at 50-52.

271. *Id.* at 50.

272. *Id.*

273. *Id.* at 52.

274. *Id.*

275. *Id.* at 50.

will not discourage heterosexuals from marrying a person of the opposite sex.”²⁷⁶

5. The Argument that Gay Marriage Somehow Does Harm to Heterosexual Marriage

Mr. Olson stated that he has “yet to meet anyone who can explain . . . the ways in which [gay] marriage would harm heterosexual marriage.”²⁷⁷ Moreover, he observed that when the judge asked the opposition to identify the ways same-sex marriage would harm heterosexual marriage, Olson noted that his opponent “could not think of any.”²⁷⁸

6. Religious Convictions

Mr. Olson noted that he “understands” religious teachings that view homosexuality as morally wrong, unnatural, or illegitimate.²⁷⁹ His view, however, is that “[s]cience has taught us . . . that gays and lesbians do not choose to be homosexual any more that the rest of us choose to be heterosexual.”²⁸⁰ Furthermore, he pointedly noted that:

While our Constitution guarantees the freedom to exercise our individual religious convictions, it equally prohibits us from forcing our beliefs on others. I do not believe that our society can ever live up to the promise of equality, and the fundamental rights to life, liberty and the pursuit of happiness, until we stop invidious discrimination on the basis of sexual orientation.²⁸¹

V. THE SUPREME COURT’S FOCUS ON EVOLVING STANDARDS

The notion of the Constitution as a living document, aside from academic and ideological debate, is well established in actual practice. Moreover, a majority of the Supreme Court adheres to the “living Constitution” approach when interpreting the meaning of the United States Constitution. The living Constitution theory of interpretation was the clear underlying rationale for *Brown v. Board of Education*,²⁸² perhaps the most uniformly celebrated Supreme Court decision of the

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.* at 52.

280. *Id.*

281. *Id.*

282. *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

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20th Century. As former Supreme Court Justice David Souter stated in a May 2010 commencement address at Harvard, the idea that the Constitution must be construed by looking to the original intent of the Framers “has only a tenuous connection to reality.”²⁸³ Justice David Souter noted that the Supreme Court in *Brown*, reversed its decision in *Plessy v. Ferguson*,²⁸⁴ not because the language of the Equal Protection Clause changed between 1896 and 1954 but “because the nation’s understanding of race changed.”²⁸⁵

In the landmark case of *Lawrence v. Texas*,²⁸⁶ Justice Kennedy spent a good deal of his opinion casting doubt on the factual findings of the case it overruled, *Bowers v. Hardwick*.²⁸⁷ The *Bowers* decision noted that homosexual sodomy had been a widely and historically condemned practice throughout the history of Western civilization.²⁸⁸ In *Lawrence*, however, Justice Kennedy cited to a 1981 European Court of Human Rights case, *Dudgeon v. United Kingdom*,²⁸⁹ as part of the reasoning against the finding in *Bowers*. Justice Kennedy noted that the *Dudgeon* case led to the decriminalization of homosexuality in Northern Ireland.²⁹⁰ In addition, England and Wales had earlier decriminalized homosexuality.²⁹¹

Justice Kennedy cited to international law in the 2005 case of *Roper v. Simmons* as support for invalidating the application of the death penalty to juveniles.²⁹² This indicates that the Supreme Court follows international norms and will seek to determine whether the United States is substantially out of step with widely accepted views of peer nations under international customary law.²⁹³ In *Roper*, Justice Kennedy noted that between 1990 and the time of the *Roper* decision in 2005, “only seven countries other than the United States ha[d] executed juvenile offenders . . . : Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China.”²⁹⁴ However,

283. E.J. Dionne, Jr., Op-Ed., *Souter vs. the Scalias*, WASH. POST, June 3, 2010, at A17, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/02/AR2010060203496.html>.

284. *Id.*

285. *Id.*

286. *Lawrence v. Texas*, 539 U.S. 558, 567-74 (2003).

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

288. *See Lawrence*, 539 U.S. at 567, 571-73 (citing to the discredited findings in *Bowers*).

289. *Id.* at 539 U.S. at 573 (citing to 45 Eur. Ct. H.R. (1981)).

290. *Id.*

291. *Id.* at 572-73.

292. *See Roper v. Simmons*, 543 U.S. 551 (2005).

293. *Id.* at 575-78.

294. *Id.* at 577.

by 2005, each of those countries had either abolished the death penalty for juveniles or made a public disavowal of the practice.²⁹⁵ Thus, the United States stood alone in allowing the execution of juvenile offenders.²⁹⁶ Justice Kennedy also noted that only the United States and Somalia had not ratified Article 37 of the United Nations Convention on the Rights of the Child, entered into force on September 2, 1990, which expressly prohibits “capital punishment for crimes committed by juveniles.”²⁹⁷

Similarly, in the May 17, 2010 case of *Graham v. Florida*,²⁹⁸ Justice Kennedy, writing for the Court, looked to national and global trends in determining that juveniles may not be sentenced to life in prison without the possibility of parole for any crime short of homicide. The court ruled five to four that denying juveniles who have not committed homicide a chance to ever rejoin society is counter to “national” and “global” consensus and violates the Constitution’s ban on cruel and unusual punishment.²⁹⁹ The decision reinforced the Court’s view that the Eighth Amendment’s protections against harsh punishment must be interpreted in light of the country’s “evolving standards of decency.”³⁰⁰ Kennedy noted that only a handful of states actually impose the penalty and that the United States is virtually alone in such sentences.³⁰¹ Justice Kennedy noted that “in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adheres to a sentencing practice rejected the world over.”³⁰² The decision, however, did not forbid sentencing someone younger than eighteen years to life in prison; it only required the state to provide him or her with “some meaningful opportunity” to obtain release before the end of that term.³⁰³

Justice Clarence Thomas wrote a stinging dissent, making the now-familiar argument that interpreting the Eighth Amendment according to evolving societal standards is “entirely the Court’s creation.”³⁰⁴ Thomas and Kennedy sparred over what constituted a

295. *Id.*

296. *Id.* at 576.

297. *Id.*

298. *Graham v. Florida*, 130 S. Ct. 2011, 2033-34 (2010).

299. *Id.* at 2034 (stating that the Court looks to evidence of contemporary values in reasoning that “the laws and practices of other nations” are relevant).

300. *See Roper v. Simmons*, 543 U.S. 551, 563 (2005).

301. *Graham*, 130 S. Ct. at 2029.

302. *Id.* at 2033.

303. *Id.* at 2030.

304. *Id.* at 2044 (Thomas, J., dissenting).

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national and international consensus.³⁰⁵ Thomas pointed out that thirty-seven states, the federal government, and a number of foreign countries kept life without parole as an option for juveniles.³⁰⁶ But Justice Kennedy noted that only a handful of states actually impose the penalty, and that the United States is virtually alone in imposing such sentences.³⁰⁷

The principle of equality under the law “transcends the left-right divide and cuts to the core of our nation’s character.”³⁰⁸ On notable occasions, United States courts have stood up to enforce equal protection even when the executive branch, the legislative branch, and the public were unwilling to confront blatant discrimination. Indeed, at the time of the Supreme Court’s decision in *Loving v. Virginia*, seventy-four percent of the American public disapproved of interracial marriage.³⁰⁹ As two commentators observed, “Our history will soon be written by young people who are seizing the reins from the baby boomers. They seem prepared to reject laws that serve no purpose other than to deny two committed and loving individuals the right to join in a mutually reinforcing marital relationship.”³¹⁰ The constitutional rights of millions of people are at stake. The Supreme Court should once again lead the way as it did in such cases as *Loving v. Virginia* and *Brown v. Board of Education*. The concepts of equal protection and due process both stem “from our American *ideal of fairness*, [and] are not mutually exclusive.”³¹¹ The language of the United States Constitution’s guarantee of equal protection did not change between the cases of *Plessy v. Ferguson* and *Brown v. Board of Education*. What did change was the nation’s understanding of race. As was the situation in *Brown*, the nation’s understanding of what is fair in the twenty-first century supports the right of persons in same-sex relationships to marriage equality.³¹² As Justice Thurgood Marshall stated, in perhaps his most famous speech, “*We the People* no longer enslave, but the credit does not belong to the Framers. It be-

305. *Id.* at 2045 (Thomas, J., dissenting).

306. *Id.* at 2043 (Thomas, J., dissenting).

307. *Id.* at 2023.

308. Podesta & Levy, *supra* note 1, at A17.

309. *Id.*

310. *Id.*

311. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (emphasis added); *see also* *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (“Equal Protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”).

312. *See* Dionne, *supra* note 283.

longs to those who refused to acquiesce in outdated notions of ‘liberty,’ ‘justice,’ and ‘equality,’ and who strived to better them.”³¹³

VI. CONCLUSION

The United States Supreme Court noted, in *Bolling v. Sharpe*,³¹⁴ that “the concepts of equal protection and due process . . . stem[] from our American *ideal of fairness*”³¹⁵ The statistics indicating that individuals ages eighteen to twenty-nine and an estimated sixty-five percent of Americans support marriage equality are significant in light of the U.S. Supreme Court’s expressed consideration of today’s societal views, national and global trends, contemporary values, and an emerging recognition of new positions on an issue in determining the constitutional rights of individuals.³¹⁶

Justice Scalia was clearly correct in his assessment that, in light of the rationale for the Supreme Court majority’s decision in *Lawrence v. Texas*, the unconstitutionality of state bans against same-sex marriage are quite certain.³¹⁷ The Court’s earlier decision in *Romer v. Evans*³¹⁸ only buttresses this view. The Defense of Marriage Act is unconstitutional under the U.S. Constitution for the same underlying reasons that the Court set forth in its decisions in *Lawrence v. Texas* and *Romer v. Evans*.

The Defense of Marriage Act denies same-sex couples the basic liberties and equal protection under the law that are guaranteed by the Fifth Amendment to the United States Constitution. The right of persons in same-sex relationships to the more than one thousand property rights and benefits of civil marriage is a secular, nonreligious matter. Religious organizations are not required to recognize same-sex civil marriages, nor are they required to perform them.³¹⁹ The Constitution’s requirement of fairness demands that government af-

313. See Thurgood Marshall, *The Constitution: A Living Document*, 30 How. L.J. 915, 919 (1987). This address is sometimes referred to as the Maui doctrine after the place where Justice Marshall delivered the speech on May 6, 1987, during the Bicentennial of the United States Constitution. *Id.* at 915.

314. *Bolling*, 347 U.S. at 499 (emphasis added).

315. *Id.* See also *Buckley v. Valeo*, 424 U.S. 1, 93 (“Equal Protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”).

316. See *supra* note 2 and accompanying text.

317. In the wake of the Supreme Court’s decision in *Lawrence v. Texas*, 539 U.S. 558, 604-05 (2003), conservative Justice Antonin Scalia, in his dissent, noted, “[W]hat [remaining] justification could there possibly be for denying the benefits of marriage to homosexual couples exercising ‘the liberty protected by the Constitution?’”

318. *Romer v. Evans*, 517 U.S. 620, 633 (1996).

319. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E. 2d 941, 954 (2003).

The Constitutionality of DOMA

ford same-sex couples the same property rights and benefits afforded to heterosexual couples. Similarly, state bans on same-sex marriage violate the fairness requirements under the Fourteenth Amendment's Due Process and Equal Protection Clauses.

Stark evidence of the blatant unfairness of laws that ban same-sex couples from receiving the same tangible and intangible property rights and benefits afforded to heterosexual couples under civil marriage laws is abundant. The state and local governments of the United States as well as the federal government collectively deny over one thousand property rights and benefits to same-sex couples solely because of their sexual orientation. This government sponsored denial of property rights and benefits to same-sex couples is especially egregious since gay and lesbian individuals do not choose to be homosexual.

Fairness in the government's distribution of property rights is the real point of debate underlying the various constitutional issues. The U.S. Constitution requires state and local governments to meet their fairness obligation by requiring that they justify any differential treatment of persons pursuant to the Equal Protection Clause of the Fourteenth Amendment.

The U.S. Constitution similarly demands that the federal government act in a fair and non-discriminatory manner by requiring that the federal government justify any differential treatment of persons pursuant to the equal protection component inherent in the Fifth Amendment's Due Process Clause.

The constitutionality of DOMA and state bans against same-sex marriage appear to be in grave doubt under (1) the Fourteenth Amendment's Due Process and Equal Protection Clauses (as to state bans against same-sex marriage); (2) the equal protection component of the Fifth Amendment's Due Process Clause (as to Section 3 of DOMA); (3) the Tenth Amendment to the United States Constitution (as to Section 3 of DOMA); (4) the Spending Clause of Article I, Section 8 (as to Section 3 of DOMA); (5) the Full Faith and Credit Clause of Article IV, Section 1, (as to Section 2 of DOMA insofar as it permits courts to deny enforcement of judgments based on same-sex laws rendered by sister states); and (6) the Establishment Clause of the First Amendment (as to both state bans and Section 3 of DOMA).

In view of Justice Kennedy's statements in landmark opinions such as *Lawrence v. Texas*, *Romer v. Evans*, *Roper v. Simmons*, and *Graham v. Florida*, it does not appear likely that DOMA will survive

the constitutional litmus test of fairness in light of today's changing societal views, national and global "trends," "contemporary values," and "emerging recognition" of a sixty-five percent majority view in favor of marriage equality among individuals ages eighteen to twenty-nine. To reiterate a quote summarizing the burgeoning ideal of fairness: "Our history will soon be written by young people who are seizing the reins from the baby boomers. They seem prepared to reject laws that serve no purpose other than to deny two committed and loving individuals the right to join in a mutually reinforcing marital relationship."³²⁰ And so it likely shall be.

320. See Podesta & Levy, *supra* note 1, at A17.

COMMENT

Wasted Money and Insufficient Remedies in Adequacy Litigation: The Case for an Extended School Day and Year to Provide Students Access to Constitutionally Mandated Curriculum

ANDREW C. MENDRALA*

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INTRODUCTION

*“My children need books like you wouldn’t believe [H]aving the curriculum and not being able to deliver it effectively doesn’t help a lot.”*¹

Educators like Dr. Paula Harris, Superintendent of the Allendale County School District in South Carolina, have had their goal of effective teaching thwarted by a regrettable lack of public resources for education.² For instance, “[i]n Texas, 53% of newly hired teachers are not certified.”³ In California, some schools in underserved neighbor-

1. Abbeville Cnty. Sch. Dist. v. South Carolina, No. 93-CP-31-0169 at 24 (S.C. Ct. Com. Pl. Dec. 29, 2005), available at <http://www.scschoolcase.com/Abbeville-County-Order.pdf>.

2. See *id.* (noting that the state is not required to offer “the absolute best of every component involved in the child’s education”).

3. Molly A. Hunter, *Requiring States to Offer a Quality Education to All Students*, 32 HUM. RTS. 10, 10 (2005).

hoods “do not offer the curriculum students must take just to apply to the state’s public universities.”⁴ Thirty-one New York high schools do not have a science lab, yet a laboratory science course is required by the state for graduation.⁵ No matter how a state articulates the standards of the education it must provide its students, if the state falls short in providing the necessary educational resources, students will likely fall short of achieving their full potential.⁶

One court responded to educational deficiencies in its state by explaining, “[t]his case has never been about what is best for the children of the state, or what programs, facilities, and resources the court might wish were available to the children of our state.”⁷ Rather, the task of courts has been to find the constitutional floor for their state’s education systems—that is, the lowest level of education the state is legally compelled to offer. In fact, the education clauses of many state constitutions only require the state to offer a minimally adequate education.

Ultimately, school litigation is about enabling plaintiffs to find more resources for underperforming and underfunded schools. Historically, the fight began by focusing on resources that states allocate to their education systems.⁸ With this agenda, plaintiffs argued that failures of state education funding systems were violations of the Equal Protection Clause.⁹ Courts have generally rejected this argument.¹⁰ Therefore, litigants no longer focus simply on funding dispari-

4. *Id.*

5. *Id.*

6. See W. Norton Grubb et al., *The Unending Search for Equity: California Policy, the “Improved School Finance,” and the Williams Case*, 106 TCHRS. C. REC. 2081, 2097-98 (2004).

The claims of equity are too deeply rooted in American history and education, and the consequences of inequity—the miserable conditions in urban schools, the persistence of achievement and other gaps including the black-white test score gap, the Latino-Anglo attainment gap, the differences in college access, the persistent effects of family background on every imaginable educational outcome—are unacceptable.

Id.; see also Jeannie Oakes & Martin Lipton, “Schools that Shock the Conscience”: Williams v. California and the Struggle for Education on Equal Terms Fifty Years After Brown, 11 ASIAN L.J. 234, 237-46 (2004) (describing the plaintiff’s undisputed evidence of deteriorating schools). See generally JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA (2004) (providing an overview of the academic achievement disparity between well- and under-funded schools).

7. Abbeville Cnty. Sch. Dist. v. South Carolina, No. 93-CP-31-0169 at 24 (S.C. Ct. Com. Pl. Dec. 29, 2005), available at <http://www.scschoolcase.com/Abbeville-County-Order.pdf>.

8. See Maurice R. Dyson, *A Covenant Broken: The Crisis of Educational Remedy for New York City’s Failing Schools*, 44 HOW. L.J. 107, 109 (2000) (noting that unsuccessful equal protection claims were “focusing on inputs such as per-pupil expenditure gaps or total educational funding levels”).

9. See *id.*

10. See *infra* Part I.

ties but argue that the education that some students receive does not meet the constitutionally mandated minimum standard.¹¹ When addressing adequacy, courts attempt to define the desired outcomes—usually a set of skills acquired or test scores achieved—that constitute an adequate education and then work backward.¹² Courts then use these defined standards to determine what steps states must take to reach those desired outcomes.¹³

This Comment explores how states have defined the constitutional floor for “educational adequacy” and how judicially mandated remedies to make curricula accessible to all students have fared in attempts to help schools give children the educational tools they need to succeed. This Comment argues that an appropriate definition of “adequate education” requires that all students have access to a minimum constitutional curriculum. Moreover, to the extent that students do not have access to the curriculum, courts must reconsider the remedies available to plaintiffs. More specifically, this Comment argues that courts should mandate middle and high school students who have fallen behind in school to spend more time in the classroom in order to catch up with their peers.

Part I discusses the background of access-to-education claims under the United States Constitution and state constitutions. In particular, Part I explains that within the context of state constitutional claims, successful claims for access to education have been framed in terms of the right to an adequate education. Part II discusses how various state courts have attempted to define “adequate education.” This Part also examines how states have used standards and testing to measure educational outcomes when determining whether a state’s education system provides an adequate education. Part II also argues that access to curriculum, the inputs states must provide students, is central to adequacy litigation and that certain curriculum inputs are required to achieve a constitutionally adequate education. Part III discusses court directives as to how states should achieve an “adequate education” for all students. Specifically, Part III examines the

11. *See id.*

12. *See infra* Part II.

13. *See* James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1223 (2008) (noting also that “[o]ne obvious difficulty is how to define an adequate education. This task is not only conceptually difficult; it could also strain the institutional capacity and perhaps integrity of courts.”); *see also* Michael Heise, *Adequacy Litigation in an Era of Accountability*, in *SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY* 262, 269-74 (Martin R. West & Paul E. Peterson eds., 2007) [hereinafter *SCHOOL MONEY TRIALS*].

success and failure of the New Jersey Supreme Court's sweeping remedial plan and argues that, to be effective, remedies must be specific and must embrace proven best-practices for educating students in low-income schools. Moreover, Part III contends that adequacy cases ignore innovation in education reform and simply dump more money and resources into failing K-12 school systems, with poor results. As the litigation in New Jersey cautions, courts must also exercise judicial restraint in the remedial phase and allow the state executive and legislative branches to make important policy determinations. Part III argues that a remedy of compulsorily expanded learning time for middle and high school students effectively balances educational innovation with judicial restraint. Furthermore, Part III argues that courts should mandate that failing middle and high schools implement an extended school day and year to more effectively bridge the broad achievement gap that plagues public schools.

I. HISTORY OF EQUAL EDUCATION CLAIMS

*"It is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity for an education."*¹⁴

The question of precisely what opportunities the government are required to provide children remains the focus of much debate. In *Brown v. Board of Education*, the Court held that "[s]eparate educational facilities are inherently unequal."¹⁵ Yet, a dual education system still exists today.¹⁶ Currently, the majority of black and Hispanic children in the United States go to schools where the majority of students are poor.¹⁷ Despite the holding in *Brown*, most poor and minority students are not receiving educational opportunities equal to those of their white and more affluent counterparts.¹⁸ The core problem behind this inequality is the system of education finance, delegated to local governments by states, which usually requires that

14. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

15. *Id.* at 495.

16. See generally James E. Ryan, *Sheff, Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529 (1999) (analyzing the relationship between desegregation and school finance litigation).

17. See Jay P. Heubert, *Six Law-Driven School Reforms: Developments, Lessons and Prospects*, in *LAW & SCHOOL REFORM 1-2* (Jay P. Heubert ed., 1999).

18. See *id.*

funding for public schools come from property taxes.¹⁹ Since property values in wealthier neighborhoods are higher—and lower in poorer neighborhoods—this results in fewer resources for schools located in neighborhoods with low property values.²⁰ In the 1960s, San Antonio property values in a poor neighborhood were taxed at a rate 20% more than a neighboring affluent neighborhood but had 41% less to spend per pupil.²¹ This results in fewer educational opportunities for students in poorer neighborhoods. Consequently, the educational segregation that *Brown* attempted to remedy persists.

A. Ineffectiveness of Equal Protection Claims

One of the first attempts to remedy the system of inequitable school funding came in *Serrano v. Priest*.²² In *Serrano*, the California Supreme Court ruled in the plaintiffs' favor by deciding that education was a fundamental constitutional right and that the property tax-based funding system violated the Equal Protection Clause of the Fourteenth Amendment.²³ The Supreme Court, in *Rodriguez v. San Antonio Independent School District*, quickly overruled the victory of *Serrano*.²⁴ Here, the plaintiff challenged the state and local school-funding scheme in federal court under the Equal Protection Clause.²⁵ The Court ruled that education is not a fundamental right under the United States Constitution.²⁶ The Court based its reasoning on the

19. See Michael A. Rebell, *Educational Adequacy, Democracy, and the Courts*, in *ACHIEVING HIGH STANDARDS FOR ALL: CONFERENCE SUMMARY* 218, 221 (Timothy Ready et al. eds., 2002).

20. See John Dayton, *Rural Children, Rural Schools, and Public School Funding Litigation: A Real Problem in Search of a Real Solution*, 82 *NEB. L. REV.* 99, 100-19 (2003) (providing an overview of legal challenges of property tax-based education funding systems).

21. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973); see also Carmen G. Arroyo, *The Funding Gap*, *THE EDUC. TRUST* 1, 4 (2008), <http://www.closingtheachievementgap.org/cs/ctag/view/resources/75> (follow "Download File" hyperlink).

In 2005, districts serving the highest concentration of poor students received, on average, \$938 less per-pupil in state and local money than the lowest poverty districts. . . . As unjust as these amounts seem[,] they understate the real gaps in educational opportunities. Students growing up in poverty do not merely need the same resources as others; they need more from their schools than do students who can fall back on community and family resources to support their achievement.

Id.; see also Kevin Carey, *The Funding Gap 2004: Many States Still Shortchange Low-Income and Minority Students*, *THE EDUC. TRUST* 1, 8 (2004), http://www.edlawcenter.org/ELCPublic/AbbottvBurke/Resources/History_FundingGap2004.pdf (noting that in 2004, the funding gap between wealthy and poor districts increased in twenty-two states).

22. *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971).

23. *Id.*

24. *Rodriguez*, 411 U.S. at 1.

25. See *id.*

26. See *id.* at 35.

The Case for Extended Learning Time

fact that when some education is provided, the deprivation is relative, not absolute.²⁷ Therefore, inequality in the system will not strike down the entire system.²⁸

However, the Court left open the door for further litigation when education is unequal by stating:

The State repeatedly asserted in its briefs . . . that it now assures “every child in every school district an adequate education.” No proof was offered at trial persuasively discrediting or refuting the State’s assertion.

. . . .

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditure in Texas provide an education that falls short. . . . [N]o charge fairly could be made [here] that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.²⁹

Thus, the Court implied that plaintiffs in a similar situation might prevail if they could show that a state was failing to provide an “adequate education” that did not give students “basic minimal skills.”³⁰ Indeed, in a number of other cases, the Court has “explicitly left open the question whether such a deprivation of access would violate a fundamental constitutional right.”³¹ In *Papasan v. Allain*, the Court was careful to underscore that it still has not “definitively settled the questions as to whether a minimally adequate education is a fundamental right.”³²

The Court avoided addressing the question of whether minimally adequate education was a fundamental right in *Serrano*, *Rodriguez*, and *Papasan* because it felt it did not have the necessary facts to adequately determine what educational opportunities states needed to

27. *Id.* at 19; *cf.* *Williams v. Illinois*, 399 U.S. 235 (1970) (discussing poor criminal defendants’ complete inability to access transcripts to appeal their incarceration because they cannot pay a fine); *Griffin v. Illinois*, 351 U.S. 12 (1956).

28. *Rodriguez*, 411 U.S. at 19.

29. *Id.* at 24, 36-37.

30. *Id.*

31. *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 467 n.1 (1988) (Marshall, J., dissenting).

32. *Papasan v. Allain*, 478 U.S. 265, 285 (1986); *see also Kadrmas*, 487 U.S. at 467 n.1 (Marshall, J., dissenting) (“The Court therefore does not address the question whether a State constitutionally could deny a child access to a minimally adequate education.”).

provide to meet that standard.³³ The Court noted that the cases involved extraordinarily difficult and unrelenting questions of educational policy, an area in which the Court had no expertise or experience.³⁴

In response to the apparent lack of judicially manageable standards to determine what level of education is constitutionally mandated, courts have adopted a “fiscal neutrality principle.”³⁵ This principle operates on the assumption that all students are equal and deserve equal treatment in terms of resources.³⁶ The *Serrano* court utilized this approach and explicitly avoided addressing the “nebulous concept of educational needs” of students.³⁷ However, as critics of the fiscal neutrality principle suggest, “equalizing tax capacity does not by itself equalize education.”³⁸ It avoids confronting the actual, substantive issues that affect the lives and education of the students in the classroom. Whether it is an effective tool for judicially managing school funding or not, *Rodriguez* precluded victory for plaintiffs by determining that education is not a fundamental right guaranteed by the Constitution.³⁹

33. See Betsy Levin, *The Court's Congress and Educational Adequacy: The Equal Protection Predicament*, 39 MD. L. REV. 187, 190 (1979) (“The Supreme Court’s reluctance to find that education is a fundamental right entitled to special protection was at least in part due to the Court’s fear that there are no judicially manageable standards for determining what amount of education is constitutionally guaranteed.”).

34. See *Rodriguez*, 411 U.S. at 42-43.

35. See JOHN E. COONS ET AL., PRIVATE WEALTH AND PUBLIC EDUCATION (Harvard Univ. Press 1970); Paul A. Minorini & Stephen D. Sugarman, *School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact and Future*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 34, 36-37 (Helen F. Ladd et al. eds., 1999) [hereinafter EQUITY AND ADEQUACY]. This concept is also called “horizontal equity.” See Robert Berne & Leana Stiefel, *Concepts of School Finance Equity: 1970 to the Present*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES, *supra* at 7, 18-21; see also John E. Coons et al., *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 305 (1969).

36. Berne & Stiefel, *supra* note 35, at 18-21 (explaining the concept of “horizontal equity” and treating students equally).

37. *Serrano v. Priest*, 487 P.2d 1241, 1265 (Cal. 1971).

38. Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 147 (1995) (“The educationally relevant disparities not only reflect the tax base inequalities, but local political and administrative choices as well, not to mention the impact of preexisting differences in the students and their milieus.”).

39. *Rodriguez*, 411 U.S. at 1.

B. The Shift to Litigate in State Courts

Unable to find redress for their equity claims in federal courts, plaintiffs took their cases to state courts.⁴⁰ Courts in California, Wyoming, Arkansas, and Connecticut all held that education was a fundamental right under their respective state constitutions' equal protection clauses.⁴¹ By focusing on equity, the courts found that constitutional violations had occurred where students received vastly unequal education depending on where they happened to live. With these rulings, courts mandated that funding discrepancies be reduced. Unfortunately, this has often resulted in states reducing the overall amount allocated per pupil.⁴² In fact, equity claims raise important questions "about how educational resources should be distributed, particularly in light of the fact that most poor children, with higher levels of educational need, were clustered in . . . poor school districts."⁴³ Equity ultimately proved to be an insufficient legal theory to equalize educational opportunities because of the many difficult practical obstacles that must be overcome.

C. Adequacy Claims Under State Constitutions

By the late 1980s, civil rights advocates were armed with social science data demonstrating that American school children were lagging behind those of other industrialized nations.⁴⁴ Many experts at the time asserted that the nation was in an educational crisis.⁴⁵ Addressing this crisis through the courts could only be effective and successful if judges were armed with judicially manageable standards to

40. See, e.g., *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983); *Serrano*, 557 P.2d at 949-52; *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *Washakie Cnty. Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980).

41. *Alma Sch. Dist. No. 30*, 651 S.W.2d at 90 (Arkansas); *Serrano*, 557 P.2d at 949-52 (California); *Horton*, 376 A.2d at 359 (Connecticut); *Washakie Cnty. Sch. Dist. No. 1*, 606 P.2d at 310 (Wyoming).

42. See Rebell, *Educational Adequacy, Democracy, and the Courts*, *supra* note 19, at 227; see also Douglas S. Reed, *Twenty-Five Years After Rodriguez: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 LAW & SOC'Y REV. 175 (1998).

43. Gregory C. Malhoit & Derek W. Black, *The Power of Small Schools: Achieving Equal Educational Opportunity Through Academic Success and Democratic Citizenship*, 82 NEB. L. REV. 50, 61 (2003).

44. See *A Nation at Risk: The Imperative for Educational Reform April 1983*, DEP'T OF EDUC., <http://www2.ed.gov/pubs/NatAtRisk/index.html> (follow "Nation at Risk" hyperlink); Stewart J. Hudson, *Challenges for Environmental Education: Issues and Ideas for 21st Century*, 51 BIOSCIENCE 283 (2001).

45. See Malhoit & Black, *supra* note 43, at 63 n.57.

remedy educational inequality—something that equity cases had a difficult time providing.⁴⁶

Nearly every state's constitution has a clause that grants children the right to public education.⁴⁷ However, each state uses different language to articulate the nature and quality of that state's obligation to its children.⁴⁸ In successful "adequacy" lawsuits, the constitutional language describes the quality of education in a variety of ways.⁴⁹

46. Courts have also had a difficult time distinguishing between the two theories. In *Lake View Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002), the court described the "considerable overlap between the issue of whether a school funding system is inadequate and whether it is inequitable." *Id.* at 496. Similarly, in *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973), the court concluded that the requirement for a "thorough and efficient" education in the state's constitution requires an "equal educational opportunity" for all students. *Id.* at 283. Some scholars, however, do not believe that adequacy cases provide much of a doctrinal shift from equity. See Richard Briffault, *Adding Equity to Adequacy*, in *SCHOOL MONEY TRIALS*, *supra* note 13, at 25-54. For this reason, most litigants continue to prefer adequacy to equity as the appropriate legal theory through which to pursue redress. See Molly McUsic, *The Uses of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 322-32 (1991); Mildred W. Robinson, *Financing Adequate Educational Opportunity*, 14 J.L. & POL'Y 483, 495-501 (1998).

47. The following state constitution provisions require the state to support public education: ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1, ¶ 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, § 1; IND. CONST. art. VIII, § 1; KAN. CONST. art. VI, § 6(b); KY. CONST. § 183; LA. CONST. art. VIII, § 13(B); ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. V, § 2; MICH. CONST. art. VIII, §§ 1-2; MINN. CONST. art. XIII, § 1; MO. CONST. art. IX, § 1(a); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, §§ 1-2; N.H. CONST. pt. 2, art. LXXXIII; N.J. CONST. art. VIII, § 4, ¶ 1; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2(1); N.D. CONST. art. VIII, §§ 1-4; OHIO CONST. art. VI, § 2; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. Ann. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, §§ 1-2; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. I, § 23 and art. VII, § 1. The following state constitution provisions allow state legislatures to support public education: ALA. CONST. art. XIV, § 256; MISS. CONST. art. VIII, § 201. Iowa's state constitution makes no mention of education. See also Malhoit & Black, *supra* note 43, at 64 n.61.

48. Some scholars suggest that particular attention should be paid to the language that indicates the extent of the quality of education the state should provide. See William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 606-07 (1994) (discussing Erica B. Grubb, *Breaking the Language Barrier: The Right to Bilingual Education*, 9 HARV. C.R.-C.L. L. REV. 52, 66-70 (1974)). William Thro separated state constitutions into three categories. First are the provisions that simply require that a state establish public education. *Id.* Next, are the provisions that describe a specific quality or uniformity of the education to be provided. *Id.* Finally, Thro discusses the provisions that prioritize education above other government duties and impose a higher standard of education. *Id.*; see also Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777, 814-16 nn.143-46 (1985).

49. "Free"—New York, South Carolina. N.Y. CONST. art. XI, § 1; S.C. CONST. art. LXXXIII. "Uniform"—New Mexico, North Dakota. N.M. CONST. art. XII, § 1; N.D. CONST. art. VII, § 2. "General and uniform"—Arizona, Minnesota, North Carolina, Oregon, South Dakota, Washington. ARIZ. CONST. art. XI § 1; MINN. CONST. art. XIII, § 1. N.C. CONST. art. IX, § 2(1); OR. CONST. art. VIII, § 3; S.D. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 2. "Complete and

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While there is no clear pattern among constitutional provisions, courts have generally decided that public education must meet a certain standard of quality and provide that standard to all children.⁵⁰ A South Carolina trial court captured this sentiment: “The State’s obligation is not merely to make education available to some. The State is directed to provide the opportunity for ‘each child to receive a minimally adequate education.’”⁵¹ Plaintiffs and education advocates argue that under state constitution adequacy clauses, the way states have chosen to fund their school systems prevents students in poor districts from receiving the level and quality of education that the state constitution requires as a matter of right.⁵² Cases framed with this type of argument required the judiciary to determine the outcomes that indicate students have received a constitutionally adequate education. Once courts were armed with notions of standards-based reform that had infiltrated the education-policy milieu, an adequate education was something that, at least on some level, could be defined, measured and managed.⁵³

uniform”—Wyoming. WYO. CONST. art. VII, §1. “General, uniform, and thorough”—Idaho. IDAHO CONST. art. IX, § 1. “As nearly uniform as practicable”—Wisconsin. WIS. CONST. art. X, § 3. “Efficient”—Kentucky, Texas. KY. CONST. § 183; TEX. CONST. art. VII, § 1. “General Suitable and efficient”—Arkansas. ARK. CONST. art. XIV, § 1. “Thorough and efficient”—Maryland, New Jersey, Ohio, West Virginia, Wyoming. MD. CONST. art. VIII, § 1; N.J. CONST. art. VIII, § 4, ¶ 1; OHIO CONST. art. VI, § 2; W. VA. CONST. art. XII, § 1; WYO. CONST. art. VII, § 9. “Guarantee equality of education opportunity to all”—Montana. MONT. CONST. art. X, § 1(1). “Make suitable provision for the finance of the educational interests”—Kansas. KAN. CONST. art. VI, § 6(b). “Cherish the interests of literature and the sciences”—Massachusetts, New Hampshire. MASS. CONST. pt. 2, ch. V, § 2; N.H. CONST. pt. 2, art. LXXXIII. To track the status of education funding litigation, see *Litigations Challenging Constitutionality of K-12 Funding in the 50 States*, NAT’L ACCESS NETWORK (2010), http://www.schoolfunding.info/litigation/New_Charts/06_2010_lit_chall_constitutionality.pdf.

50. See *infra* Part II.

51. *Abbeville Cnty. Sch. Dist. v. South Carolina*, No. 93-CP-31-0169 at 24 (S.C. Ct. Com. Pl. Dec. 29, 2005) (emphasis added) (quoting *Abbeville Cnty.* 335 S.C. 58, 68 (1999)), available at <http://www.scschoolcase.com/Abbeville-County-Order.pdf>.

52. Recently, scholars have advanced a number of alternative legal doctrines aimed at remedying educational inequality. Among these new norms are: (1) a standard for vertical equity, which requires distribution of resources based on children’s educational needs; (2) meaningful educational opportunity, which aims to provide educational opportunity to all students; and (3) comparability, which seeks to measure appropriate educational opportunity by raising educational inputs of poor performing schools to those of high performing schools. See Michael A. Rebell, *Poverty, “Meaningful” Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1467 (2007); Ryan, *Standards, Testing, and School Finance Litigation*, *supra* note 13, at 1225; Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U. MICH. J.L. REFORM 493, 516-19 (1995).

53. Rebell, *Educational Adequacy, Democracy, and the Courts*, *supra* note 19, at 230.

II. ADEQUACY LITIGATION: FOCUSING ON OUTCOMES

Adequacy is defined as “the level of resources or inputs that is sufficient to meet defined or absolute rather than relative, output standards, such as a minimum passing score on a state achievement test.”⁵⁴ Adequacy litigation is based on the quality and totality of the education—the outcomes. Adequacy litigation examines the link between the desired outcome and the necessary curricular inputs.⁵⁵ When students fail to meet the minimum outcomes, the curriculum is deemed inadequate and remedial action is required.⁵⁶ This section discusses what constitutes a basic, “adequate” education nationwide.

A. Insufficient Inputs

Many state courts discuss factors that indicate a student is not receiving the education to which the student is entitled. Courts determine a number of inputs relevant to their consideration of whether a state is providing an adequate education: teacher training and the number of trained teachers,⁵⁷ high student-teacher ratios,⁵⁸ staff shortages,⁵⁹ inadequate supplies,⁶⁰ limited equipment,⁶¹ insufficient course offerings,⁶² inadequate curricula,⁶³ overcrowded or inadequate

54. Regina R. Umpstead, *Determining Adequacy: How Courts are Redefining State Responsibility for Educational Finance, Goals and Accountability*, 2007 BYU EDUC. & L.J. 281, 282 (2007).

55. See Larry J. Obhof, *Rethinking Judicial Activism and Restraint in State School Finance Litigation*, 27 HARV. J.L. & PUB. POL'Y 569, 583 (2004).

56. *Id.*

57. See, e.g., *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 489 (Ark. 2002); *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516, 553 (Mass. 1993); *Campaign for Fiscal Equity v. State (Campaign III)*, 801 N.E.2d 326, 333 (N.Y. 2003); *DeRolph v. State (DeRolph I)*, 677 N.E.2d 733, 745 (Ohio 1997).

58. *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 197 (Ky. 1989); *McDuffy*, 615 N.E.2d at 553; *Campaign III*, 801 N.E.2d at 335; *DeRolph I*, 677 N.E.2d at 744; *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1253 (Wyo. 1995).

59. *DeRolph I*, 677 N.E.2d at 761 (Douglas, J., concurring).

60. *Op. of the Justices No. 338*, 624 So. 2d 107, 131-32 (Ala. 1993); *Lake View Sch. Dist. No. 25*, 91 S.W.3d at 489-90; *Campaign for Fiscal Equity v. State (Campaign II)* 719 N.Y.S.2d 475, 513 (N.Y. App. Div. 2001); *DeRolph I*, 677 N.E.2d at 744.

61. See *Op. of the Justices No. 338*, 624 So. 2d at 134; *Lake View Sch. Dist. No. 25*, 91 S.W.3d at 489-90; *Campaign II*, 719 N.Y.S.2d at 514; *DeRolph I*, 677 N.E.2d at 742.

62. See *Op. of the Justices No. 338*, 624 So. 2d at 131-32; *Lake View Sch. Dist. No. 25*, 91 S.W.3d at 490; *Rose*, 790 S.W.2d at 197; *McDuffy*, 615 N.E.2d at 553; *Campaign III*, 801 N.E.2d at 500-01.

63. *Op. of the Justices No. 338*, 624 So. 2d at 121-22; see also *Kasayulie v. State*, No. 3AN-97-3782 CIV (Alaska Super. Ct. 1999); *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 808 (Ariz. 1994); *McDuffy*, 615 N.E.2d at 553 (Mass. 1993).

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school buildings,⁶⁴ and failures to meet accreditation standards.⁶⁵ Additionally, state courts have indicated that students were not receiving access to the types of programs that constitute a quality education—there was a lack of opportunities to study foreign languages, inadequate access to music and art programs, proper science and computer labs, and physical education.⁶⁶ Other state courts, such as the Supreme Court of Ohio, have indicated that students did not receive a constitutionally adequate education because of run-down facilities, lack of textbooks, insufficient supplies, and a high student-teacher ratio that restricted students' access to education.⁶⁷ Thus, in inadequate school districts, students do not receive an “adequate” education because states do not provide the appropriate educational inputs that provide students access to the curriculum necessary for their success.

At the same time, several courts have focused on subpar *outcome* measurements as objective indications that schools are failing to provide an adequate education.⁶⁸ These measures include low standardized test scores,⁶⁹ high dropout rates,⁷⁰ low graduation rates,⁷¹ high college remediation,⁷² and insufficient preparation for the job market.⁷³ The New Jersey Supreme Court concluded that for many of

64. See *Columbia Falls Sch. Dist. No. 6 v. State*, 109 P.3d 257, 263 (Mont. 2005); *Campaign II*, 719 N.Y.S.2d at 500-08 (App. Div. 2001); *DeRolph I*, 677 N.E.2d at 742 (Ohio 1997); *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1255 (Wyo. 1995).

65. *Op. of the Justices No. 338*, 624 So. 2d at 127.

66. *Abbott v. Burke (Abbott II)*, 575 A.2d 359, 395-96 (N.J. 1990).

67. *DeRolph I*, 677 N.E.2d at 744-45.

68. See, e.g., *Lakeview Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 488-89 (Ark. 2002); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 197 (Ky. 1989); *Hoke Cnty. Bd. of Educ. v. State*, 599 S.E.2d 365, 383 (N.C. 2004); *Campaign for Fiscal Equity v. State (Campaign III)*, 801 N.E.2d 326, 339-40 (N.Y. 2003); *Bradford v. Md. State Bd. of Educ.*, Case No. 95258055/CL20251, slip op. ¶¶ 101-105 (Balt. City Cir. Ct. Aug. 20, 2004) (stating that Baltimore City student performance is not up to par with state requirements, or state averages, “at every grade level and on every test”). *But see Columbia Falls v. State*, 109 P.3d 257, 263 (Mont. 2005) (holding that student performance on standardized achievement tests are not the only measurement of a quality education system).

69. See *supra* note 64 and accompanying text.

70. See *Op. of the Justices No. 338*, 624 So. 2d at 136-37; *Bradford*, Case No. 95258055/CL20251, slip op. ¶¶ 113-114; *Hoke Cnty. Bd. of Educ.*, 599 S.E.2d at 384.

71. See *Lakeview Sch. Dist.*, 91 S.W.3d at 488; *Bradford*, Case No. 95258055/CL20251, slip op. ¶ 115; *Hoke Cnty. Bd. of Educ.*, 599 S.E.2d at 384; *Campaign III*, 801 N.E.2d at 336-37.

72. See *Op. of the Justices No. 338*, 624 So. 2d at 137; *Lakeview Sch. Dist. No. 25*, 91 S.W.3d at 488; *Hoke Cnty. Bd. Of Educ.*, 599 S.E.2d at 385.

73. See *Hoke Cnty. Bd. of Educ.*, 599 S.E.2d at 384; see also *id.* at 386.

[A]n inordinate number of Hoke County students ha[d] consistently failed to match the academic performance of their statewide public school counterparts and that such failure, measured by their [academic] performance . . . their dropout rates, their graduation rates, their need for remedial help, their inability to compete in the job markets, and their inability to compete in collegiate ranks [constituted a] clear showing that they ha[d] failed to obtain a *Leandro*-comporting education.

these reasons, the school system was constitutionally inadequate—“a severe failure of education.”⁷⁴ The court cited poor test scores, low college attendance, and high dropout rates to illustrate this point.⁷⁵

1. Adequate Education as Recognition of the Constitutional Right to Access Curriculum

Once the judiciary recognizes that a state’s students have the right to a minimally adequate level of education and that students in poor school districts are failing to receive that constitutionally required education, they identify gaps in the curriculum that the state is providing its students.⁷⁶ There are certain course offerings and content coverage to which a state’s constitution requires students have access. However, a judiciary’s expertise does not lie in determining what courses should be available to students. As the Texas Supreme Court stated, “[w]e recognize that we are not experts in education, and we do not intend to dictate the programs utilized in our public schools. Instead, we have defined, within deliberately broad parameters, the outlines of the constitution’s requirement of minimally adequate education.”⁷⁷ Thus, court directives as to how to remedy a state’s school system often only point in the direction of how to ensure that students’ educations are adequate; they define the parameters that legislatures and departments of education must operate within to determine whether all students are receiving a constitutionally adequate curriculum.

When courts have attempted to give positive articulation as to what educational outcomes states must drive towards, their directives are vague, characterizing an adequate education as “[a] general diffusion of knowledge.”⁷⁸ States generally offer some synonym of the

Id. *Leandro* was a previous North Carolina decision deciding that the previous education system was inadequate. *Id.*

74. *Abbott v. Burke (Abbott II)*, 575 A.2d 359, 411 (N.J. 1990).

75. *Id.*

76. *See, e.g., Moore v. Alaska*, No. 3AN-04-97456, slip op. at 173 (D. Alaska 2007) (“The . . . question, whether the public education system in Alaska is constitutionally adequate, can not be framed solely in terms of funding, but must also address the opportunity for children to obtain an education.”); *Lakeview Sch. Dist. No. 25*, 91 S.W.3d at 500 (“Equality of educational opportunity must include as basic components substantially equal curricula, substantially equal facilities, and substantially equal equipment for obtaining adequate education.”); *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989) (outlining seven “capacities” or “minimum goals” in providing an adequate education).

77. *Abbeville Cnty. Sch. Dist v. State*, 515 S.E.2d 535, 540 (S.C. 1999).

78. *Neeley v. West Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 753 (Tex. 2005) (quoting TEX. CONST. art. VII, § 1).

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term “adequacy” to describe the government’s obligation to educate.⁷⁹ These vague directives from the courts leave wide latitude for legislatures to act, but judges clearly insist that all students have access to a curriculum provided in the type of environment that will allow students to succeed.

2. Access Directives

Under adequacy claims, courts have indicated that a state must educate all of its children and that it is the courts that “must ensure that . . . students have the chance to succeed because of the educational opportunity provided, not in spite of it.”⁸⁰ Many states have stipulated that all students must have an opportunity to be educated.⁸¹ Students will not have the opportunity to be educated if they are not being taught the subjects and given the materials that will enable them to succeed. Absent this type of access, children do not have the opportunity to learn. Therefore, courts have indicated that in order for a state’s education system to be adequate, all students must have access

79. “Adequate Education”—Arkansas, Kansas, Kentucky, Maryland, Massachusetts, New Hampshire, and Ohio. *Lake View Sch. Dist. No. 25*, 91 S.W.3d at 492; *Montoy v. State*, 112 P.3d 923, 937 (Kan. 2005); *Rose*, 790 S.W.2d at 211 (Ky. 1989); *McDuffy v. Sec’y of the Exec. Office of Educ.*, 615 N.E.2d 516, 519 n.8 (Mass. 1993) (using the term “adequate” but deeming it redundant with the term “education”); *Claremont Sch. Dist. v. Governor (Claremont I)*, 635 A.2d 1375, 1376 (N.H. 1993); *DeRolph I v. State (DeRolph I)*, 677 N.E.2d 733, 745 (Ohio 1997); *Bradford v. Md. State Bd. of Educ.*, Case No. 95258055/CL20251, slip op. ¶ 57 (Balt. City Cir. Ct. Aug. 20, 2004). “A minimally adequate education”—Alabama, New York, and South Carolina. *Op. of the Justices No. 338*, 624 So. 2d 107, 154 (Ala. 1993); *Campaign for Fiscal Equity v. State (Campaign II)*, 719 N.Y.S.2d 475, 520 (App. Div. 2001); *Abbeville Cnty. Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999). “A basic education”—Washington. *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 95 (Wash. 1978). “A sound basic education”—New York and North Carolina. *Campaign for Fiscal Equity v. State (Campaign I)*, 655 N.E.2d 661, 665 (N.Y. 1995); *Leandro v. State*, 488 S.E.2d 249, 254 (N.C. 1997). “A quality education”—Alabama, Montana, and Wyoming. *Op. of the Justices No. 338*, 624 So. 2d 107, 154 (Ala. 1993); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 689 (Mont. 1989); *Campbell Cnty. Sch. Dist. v. State*, 907 P.2d 1238, 1258 (Wyo. 1995). “A proper education”—Wyoming. *Campbell Cnty. Sch. Dist.*, 907 P.2d at 1259. “A suitable education”—Kansas. *Montoy v. State (Montoy II)*, 102 P.3d 1160, 1164 (Kan. 2005). “A high quality education”—West Virginia. *Pauley v. Kelly*, 255 S.E.2d 859, 878 (W. Va. 1979). “A thorough and efficient education”—New Jersey. *Abbott II*, 575 A.2d at 359.

80. *DeRolph I*, 677 N.E.2d at 746.

81. Describing the opportunity that states must provide each child: “an opportunity”—New York, North Carolina, and South Carolina. *Campaign I*, 655 N.E.2d at 666; *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997); *Abbeville Cnty. Sch. Dist.*, 515 S.E.2d at 541. “The same opportunity and access”—Kentucky. *Rose*, 790 S.W.2d at 211. “A substantial equal or equitable opportunity”—Alabama. *Pinto v. Ala. Coal. for Equity*, 662 So. 2d 894, 896 (Ala. 1995). “An equal opportunity”—Arkansas, Kentucky, Montana, New Jersey, Wyoming. *Lake View Sch. Dist. No. 25*, 91 S.W.3d at 492; *Rose*, 790 S.W.2d at 212; *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 689-90 (Mont. 1989); *Robinson v. Cahill*, 303 A.2d 273, 295 (N.J. 1973) (holding that the state has an “obligation to afford all pupils that level of instructional opportunity which is comprehended by a thorough and efficient system of education”); *Campbell Cnty. Sch. Dist.*, 907 P.2d at 1266.

to all basic components of education.⁸² These elements include: (1) teachers,⁸³ (2) curricula,⁸⁴ and (3) facilities.⁸⁵ By providing these elements, courts determine that all children, regardless of location or wealth, have access to appropriate curricula:

Each child, every child, in this Commonwealth must be provided with an equal opportunity to have an adequate education. Equality is the key word here. The children of the poor and the children of the rich, the children who live in the poor districts and the children who live in the rich districts must be given the same opportunity and access to an adequate education.⁸⁶

This access should allow students in poorer districts to begin to achieve a level of equality that they were unable to reach under an unconstitutional education system.⁸⁷ Courts have taken different approaches to defining exactly what access students ought to have.⁸⁸

3. Constitutional Curriculum

Many commentators consider the Kentucky case *Rose v. Council for Better Education* to be the first and perhaps the most important adequacy case.⁸⁹ Rather than focusing on curricular inputs as a constitutional requirement, the court demonstrated its preference of focusing on defining outcomes that indicate a state-provided education is adequate. In Kentucky, the court took a step beyond simply indicating what was wrong with the current education system and positively articulated seven learning outcomes that the state must achieve for each publicly educated student in order to meet constitutional requirements.⁹⁰ These outcomes are the specific skills that the court

82. See Umpstead, *supra* note 54, at 305.

83. See *Campaign I*, 655 N.E.2d at 666; *Helena Elementary Sch. Dist. No. 1*, 769 P.2d at 691.

84. See *Lake View Sch. Dist. No. 25*, 91 S.W.3d at 500; *Campaign I*, 655 N.E.2d at 666.

85. See *supra* note 84.

86. See *Rose*, 790 S.W.2d at 211.

87. See *Pinto v. Ala. Coal. for Equity*, 662 So. 2d 894, 896 (Ala. 1995) (“[E]quitable and adequate educational opportunities shall be provided to all schoolchildren regardless of the wealth of the communities in which the schoolchildren reside.”); see also *Abbott v. Burke (Abbott II)*, 575 A.2d 359, 403 (N.J. 1990).

88. For additional information, see *infra* Part II.A.3.

89. See, e.g., Martin R. West & Paul E. Peterson, *The Adequacy Lawsuit: A Critical Appraisal*, in *SCHOOL MONEY TRIALS*, *supra* note 13, at 7.

90. See *Rose*, 790 S.W.2d at 212. The court stated:

The General Assembly must protect and advance [a child’s right to education]. . . . [A]n efficient system of education must . . . provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) suffi-

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thought students should gain in school. Several other courts have used Kentucky's outline as a rubric in their own adequacy decisions.⁹¹

Most courts broadly define the purpose of education to guide states in determining what type of education to offer its students to fulfill constitutional obligations. They charge states with preparing students for life and work in a variety of contexts. One court described the duty as follows:

The State's constitutional duty goes beyond mere reading, writing and arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the market place of ideas. . . . Education plays a critical role in a free society. It must prepare our children to participate intelligently and effectively in our open political system to ensure that system's survival. . . . It must prepare them to exercise their First Amendment freedoms both as sources and receivers of information; and, it must prepare them to be able to inquire, to study, to evaluate and to gain maturity and understanding. The constitutional right to have the State "make ample provision for the education of all (resident) children" would be hollow indeed if the possessor of the right could not compete adequately in our open political system, in the labor market, or in the market place of ideas.⁹²

With this definition as a guide, three broad areas of education and preparation emerge as goals for public education: (1) the student's role as a political citizen,⁹³ (2) the student's role as a market

cient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.

Id.

91. See, e.g., *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993).

92. *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 94-95 (Wash. 1978).

93. With a directive that did little to challenge the state's education system, the court in South Carolina mandated that the state provide students with "a fundamental knowledge of economic, social, and political systems, and of history and governmental processes." *Abbeville Cnty. Sch. Dist. v. State*, 515 S.E.2d 535, 540 (S.C. 1999). A number of states focus on imparting knowledge of economics, politics and government, both of their particular state and the nation, in order to form informed and intelligent citizens. See, e.g., *Rose*, 790 S.W.2d at 211 (noting that the state legislature must "provide every child with . . . sufficient knowledge of economic, social, and political systems to enable the student to make informed choices"). Courts focus on forming students into functioning political citizens because to fail to do so would prevent students from exercising their fundamental political and democratic rights. The court in New Hampshire

competitor,⁹⁴ and (3) the student's role as an individual and thinker.⁹⁵ By defining adequacy in these broad terms, courts provide little incentive for states to implement innovative strategies to ensure that stu-

stated, "even a minimalist view of educational adequacy recognizes the role of education in preparing citizens to participate in the exercise of voting and first amendment rights, the latter being recognized as fundamental." *Claremont Sch. Dist. v. Governor (Claremont II)*, 703 A.2d 1353, 1359 (N.H. 1997); *see also* *Campaign for Fiscal Equity v. State (Campaign II)*, 719 N.Y.S.2d 475, 487 (App. Div. 2001) ("[T]his court finds that a sound basic education consists of the foundational skills that students need to become productive citizens capable of civic engagement."). What these courts do not indicate, however, is how these vague goals actually impact the education and lives of students. *McUsic*, *supra* note 46, at 322-32. The New York Court of Appeals instructed that an education must "instill the skills students need to become productive citizens," and that these skills are not simply those minimum skills needed to be able to simply serve as jurors and voters, but rather that:

Productive citizenship means more than just being qualified to vote or serve as a juror, but to do so capably and knowledgeably. It connotes civic engagement. An engaged, capable voter needs the intellectual tools to evaluate complex issues, such as campaign finance reform, tax policy, and global warming, to name only a few.

Campaign II, 719 N.Y.S.2d at 485. Clearly, to be a productive citizen students must have access to a rich and complex curriculum to meet the expectations outlined here, yet with this vague language, courts do not compel states to concretely change what they are doing in the classroom. *See* *McUsic*, *supra* note 46, at 322-32. Ultimately, creating productive citizens by providing an adequate education is in the state's interest, as well as the child's: "[T]his duty is designed not only to serve the interests of the children, but, more fundamentally, to prepare them to participate as free citizens of a free State to meet the needs and interests of a republican government." *McDuffy*, 615 N.E.2d at 548. This is a lofty goal indeed, but because of the vagueness of that goal, courts have had a hard time determining if the state has violated that duty, and states have little incentive to change how they are delivering curriculum. *See* *McUsic*, *supra* note 46, at 322-32.

94. Above all, a number of courts' opinions make clear that the state's duty is to provide training for students' future careers so that they may be viable participants in the economic market, to the benefit of the state and student. *See, e.g., Abbeville Cnty. Sch. Dist.*, 515 S.E.2d at 540-41; *Claremont II*, 703 A.2d at 1359-60; *Campbell Cnty. Sch. Dist. v. Wyoming*, 907 P.2d 1238, 1259 (1995); *Rose*, 790 S.W.2d at 212; *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 395-96 (Tex. 1989); *Pauley v. Kelly*, 255 S.E.2d 859, 877-78 (W.Va. 1979); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 94 (Wash. 1978); *Robinson v. Cahill*, 303 A.2d 273, 295 (N.J. 1973); *Serrano v. Priest*, 487 P.2d 1241, 1256 (Cal. 1971). That is, the state has a duty to prepare students to gain employment and pursue higher education so that students may contribute to society and the economy. *See* *Pinto v. Ala. Coal. for Equity*, 662 So. 2d 894, 896 (Ala. 1995) (noting that the legislature must provide students with "sufficient training, or preparation for advanced training, in academic or vocational skills, and sufficient guidance, to enable each child to choose and pursue life work intelligently"). This goal was initially included in the seminal Kentucky articulation of educational aims and has been repeated by many others. *See* *Rose*, 790 S.W.2d at 212; *McDuffy*, 615 N.E.2d at 554; *Claremont II*, 703 A.2d at 1359.

95. Like the other categories of vague judicial directives, courts have found it necessary to require states to encourage students to be thinkers. *See* *Pauley*, 255 S.E.2d at 877. Fundamental to education is imparting to students the ability to analyze and critique their world and their culture and to cultivate a sense of self-awareness and social responsibility. *Id.* States are charged to educate holistically; they must cultivate every aspect of the child. The West Virginia court defines education as "the development of mind, body and social morality." *Id.* Courts promote self-knowledge and mental health as a fundamental constitutional education outcome goal. *Pinto*, 662 So. 2d at 896 (holding that the legislature must provide students with "sufficient self-knowledge and knowledge of principles of health and mental hygiene to enable the student to monitor and contribute to his or her own physical and mental well-being"). What is unclear is how this affects what happens in the classroom. *Id.*

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dents in underperforming schools have access to the curriculum that courts describe. Constitutional curricula are the goal, and it is up to the state's legislature and department of education to figure out how to deliver.

Not all directives given by the courts have been vague. Many courts have held that certain core school subjects are central to providing an adequate education. Students must be provided with foundational knowledge in mathematics,⁹⁶ physical sciences,⁹⁷ and courses that teach reading and writing.⁹⁸ Additionally, some courts have expanded this core list to more subjects, including: (1) music and music appreciation,⁹⁹ (2) visual arts,¹⁰⁰ (3) performance art,¹⁰¹ and (4) literature appreciation.¹⁰² While courts have begun to be more specific in their definition of adequacy to direct states' efforts, this definition does not necessarily help in addressing affirmative efforts schools should take to bridge the achievement gap between high- and low-performing schools.¹⁰³ These directives lead only to remedies that provide additional resources for schools with insufficient direction on how to use those resources.

96. *See, e.g.*, *Campaign for Fiscal Equity v. State (Campaign I)*, 655 N.E.2d 661, 666 (N.Y. 1995); *Leandro v. State*, 488 S.E.2d 249, 255 (N.C. 1997); *Abbeville Cnty. Sch. Dist.*, 515 S.E.2d at 540.

97. *Leandro*, 488 S.E.2d at 255; *Abbeville Cnty. Sch. Dist.*, 515 S.E.2d at 540.

98. *See, e.g.*, *Campaign I*, 655 N.E.2d at 666; *Leandro*, 488 S.E.2d at 255.

99. *See, e.g.*, *Abbott v. Burke (Abbott II)*, 575 A.2d 359, 397 (N.J. 1990); *Pauley*, 255 S.E.2d at 877.

100. *See, e.g.*, *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989); *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993); *Abbot II*, 575 A.2d at 364; *Claremont II*, 703 A.2d at 1359; *Campaign II*, 719 N.Y.S.2d at 500; *Pauley*, 255 S.E.2d at 877.

101. *See, e.g.*, *Campaign II*, 719 N.Y.S.2d at 500; *Pauley*, 255 S.E.2d at 877.

102. *See, e.g.*, *Abbot II*, 575 A.2d at 397; *Pauley*, 255 S.E.2d at 877.

103. *See* Frederick M. Hess, *Adequacy Judgments and School Reform, in* SCHOOL MONEY TRIALS, *supra* note 13, at 162 ("Courts frequently offer clear direction as to necessary additional spending but give elected officials ample leeway for determining how funds ought to be spent.").

III. IT'S MORE THAN MONEY THAT MATTERS:
PROVIDING EFFECTIVE REMEDIAL GUIDANCE WHILE
EXERCISING JUDICIAL RESTRAINT IN REQUIRING
EXTENDED LEARNING TIME FOR MIDDLE AND
HIGH SCHOOL STUDENTS

“[I]f adequacy refers to minimum outcomes, children in high-poverty schools represent the most serious breach of the adequacy standard.”¹⁰⁴

By broadly defining the term “adequacy,” courts must still determine whether school systems are meeting the goal of providing access to a constitutional curriculum. To make this determination, courts rely on objective measures of student performance.¹⁰⁵ That is, courts usually look at student performance to see whether schools are meeting the minimum outcome requirements rather than what and how the schools are attempting to teach their students.¹⁰⁶ Thus, courts rely on specific standards to measure a school system’s performance.¹⁰⁷ By looking only at student performance on standardized tests and other such outcome measurements, courts ignore educational best practices that have proven successful in educating students in poor communities—the very students that adequacy litigation is aimed at helping.¹⁰⁸

A. Standards to Determine Liability: An Adequate Measure?

Reliance on academic standards, either judicial or legislative, runs the risk of undermining the goal of providing access to a constitutional curriculum by narrowing the curriculum schools teach. Test scores, used to measure school performance, narrow the focus of educational inputs. They create an incentive for school administrators to

104. William H. Clune, *Accelerated Education as a Remedy for High Poverty Schools*, 28 U. MICH. J.L. REFORM 655, 659 (1995).

105. See *supra* note 64 and accompanying text.

106. See *id.*

107. See *supra* Part II.A.

108. See Jay P. Heubert, *The More We Get Together: Improving Collaboration Between Educators and Their Lawyers*, 67 HARV. EDUC. REV. 531, 536-75 (1997); see also Christopher F. Edley, Jr., *Lawyers and Education Reform*, 28 HARV. J. ON LEGIS. 293, 299 (1991) (“[W]e do well to reject narrow constructions of the role of law [and lawyers] in addressing the urgent problem of education.”); Judy Florian, *Mid-Continent Research for Education and Learning, Teacher Survey of Standards-Based Instruction: Addressing Time*, McREL (1999), http://www.mcrel.org/PDF/Standards/5997RR_AddressTime.pdf (examining the time teachers estimate it actually takes to teach to standards in a variety of tested subjects, finding in three of four grades that the standard school year does not provide enough time to effectively teach the required standards).

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teach only the material that will be measured on the standardized test, such that schools' curriculum reforms will be driven not by educating students but by preparing them for standardized tests.¹⁰⁹ It remains unclear if relying on test scores will result in school improvement or actual student learning.¹¹⁰

One school superintendent instituted a curriculum that had a "single-minded focus on the skills required for the test."¹¹¹ School administrators, judges and politicians have become so enamored with student achievement that curricula no longer focus on learning.¹¹² In order to succeed, students need access to a broad curriculum—not a narrowly focused one.¹¹³ If courts focus their remedy on requiring

109. The standards-based movement proceeds from a misconceived notion of learning. It presumes that students acquire skills and knowledge in much the same way as a computer, in a "process that is linear, incremental, measurable." ALFIE KOHN, *THE SCHOOLS OUR CHILDREN DESERVE: MOVING BEYOND TRADITIONAL CLASSROOMS AND "TOUGHER STANDARDS"* 4 (1999). This understanding of learning has been disproved by many behavioral psychologists, most notably Jean Piaget. Piaget argued that children learn in a fundamentally different way than adults. *Id.* at 5. Children do not acquire knowledge; they construct their reality by developing theories based on their experience and testing those theories. *Id.* Piaget's theory of learning reveals that the standards-based movement is antithetical to genuine teaching and learning. MICHAEL J. KAUFMAN & SHERELYN R. KAUFMAN, *EDUCATION LAW, POLICY AND PRACTICE: CASES AND MATERIALS* 370 (2d ed. 2009). Put differently, "while the standards movement may be politically popular, it is educationally unsound." *Id.*; see also James S. Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 371-73 (1990).

110. See Ryan, *Standards, Testing, and School Finance Litigation*, *supra* note 13, at 1250 (arguing that reliance on standards is likely to reduce entitlement to resources and also reduce the likelihood of success for schools in poor districts).

111. James Traub, *The Test Mess*, N.Y. TIMES, Apr. 7, 2002, at 46.

112. KAUFMAN & KAUFMAN, *supra* note 109, at 370; see also KOHN, *supra* note 109, at 78-83 (noting that tests are designed to measure shallow thinking and not actual learning).

113. As seen in Part II, when outlining an "adequate education," courts have identified curricular standards that districts must teach. Test scores are, and will continue to be relevant in school funding cases because they "offer the best existing proof of whether standards are being met." Ryan, *Standards, Testing, and School Finance Litigation*, *supra* note 13, at 1243. In an effort to show that their schools are getting the job done, administrators and teachers may simply teach to the test and not educate students in a holistic way, rather they treat students as machines who must simply regurgitate information in an artificial test environment. See KAUFMAN & KAUFMAN, *supra* note 109, at 371 ("[T]he emphasis on student achievement as measured by test scores actually undermines student interest in learning makes failure seem overwhelming, leads students to avoid challenging themselves, reduces the quality of learning, and invites students to value their intelligence, not their effort.") (citing KOHN, *supra* note 109, at 28). The simplicity of measurable test scores should not obscure the need for effective and innovative curriculum inputs. See KOHN, *supra* note 109. It is not clear that test scores actually even measure student achievement. *Id.* Rather, many claim that standardized tests primarily measure students' socio-economic class. *Id.* at 77 n.4 ("The richer the family, the higher the [test] score."); see also GARY ORFIELD & MINDY L. KORNBABER, *RAISING STANDARDS OR RAISING BARRIERS?: INEQUALITY AND HIGH STAKES TESTING IN PUBLIC EDUCATION* (2001) (arguing that high-stakes tests, even when appropriately used, are not sufficient to promote strong schools); DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* (2010) (arguing that simply enforce-

students to spend more time in school, students are able to spend more time learning subjects covered by standardized tests as well as non-traditional subjects.¹¹⁴

Cost-out studies employed by the courts encourage more of the same. To minimize the risk of standards narrowing a school system's curriculum, courts utilize cost-out studies to connect outcome goals (constitutional curriculum and test score goals) to educational inputs and increased resources.¹¹⁵ Even though many courts place an emphasis on curriculum delivery, school districts spend more money to deliver the same insufficient curriculum, making little impact on the quality of education students receive.¹¹⁶ In an effort to meet court directives, state legislatures and departments of education have attempted to implement and achieve "adequate education" for all students by simply doing more of the same.¹¹⁷ Ultimately, they are attempting to add resources to their failing curriculum to deliver more of that failing curriculum in the same 9 a.m. to 3 p.m. school day.¹¹⁸

Courts often base the remedy in adequacy litigation on cost studies.¹¹⁹ Experts conduct cost studies to objectively determine the amount of funding that the state must provide its education system so that it will be able to provide all students with a constitutionally minimally adequate education.¹²⁰ Cost studies are particularly attractive in adequacy cases because they expose the fact that states have rarely conducted a rational analysis to determine the necessary resources to provide an adequate education.¹²¹ The use of cost studies emphasizes learning standards and outcome goals through which plaintiffs can empirically show that a state is falling short of its constitutional

ing stricter standards on underperforming schools will not save them and that state created standardized tests are inimical to true education).

114. *See infra* Part III.C.

115. *See* Michael Rebell, *Professional Rigor, Public Engagement and Judicial Review: A Proposal for Enhancing the Validity of Education Adequacy Studies*, 109 TCHRS. C. REC. 1303 (Oct. 2006).

116. *See infra* Part III.B.2.b.

117. *See id.*

118. *See infra* Part III.B.2.

119. *See* Rebell, *Professional Rigor, Public Engagement and Judicial Review*, *supra* note 115.

120. *Id.*

121. *Id.* at 1304.

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duty.¹²² Most cost studies recommend that states substantially increase funding for education.¹²³

There are two basic ways to conduct costing-out studies: (1) the professional judgment study, and (2) the successful school district approach.¹²⁴ Under the professional judgment approach, school administrators, teachers, and other education professionals determine what procedures and resources are needed to allow a state education system to meet certain goals.¹²⁵ Through the successful school district approach, experts use high-performing school districts as the standard for determining the necessary resources for providing an adequate education.¹²⁶

Courts rely on costing-out studies to compel greater resources for education once plaintiffs demonstrate that the state is supplying insufficient resources.¹²⁷ Cost studies are a powerful tool for plaintiffs, but they do not necessarily present the best tool for actually increasing the quality of education for all students. The “basic purpose of costing-out analysis is to determine what level of resources, *using the best mix of current practices*, will meet stated achievement goals.”¹²⁸ These studies do not make it clear that simply adding more money to implement the same curriculum from 9 a.m. to 3 p.m. will actually increase the performance of underperforming schools or empower schools to educate children better. Costing-out studies are premised on the application of current practices and considering innovative curricular models is not part of the stated mission of these studies.¹²⁹ Thus, as the primary mechanism for judges in evaluating funding remedies, cost studies do little to reform curriculum delivery.

122. See Liebman, *supra* note 109, at 380 (arguing that standards create an “enforceable duty” for school officials).

123. See William J. Mathis, *Two Very Different Questions*, EDUC. WEEK, Apr. 21, 2004, <http://www.epicpolicy.org/publication/two-very-different-questions> (follow “Report” hyperlink) (indicating an average of 20-40% recommended increase in funding).

124. James Peyser & Robert Costrell, *Exploring the Costs of Accountability*, EDUC. NEXT, Spring 2004, at 22, 27.

125. Eric A. Hanushek, *The Alchemy of “Costing Out” an Adequate Education*, in SCHOOL MONEY TRIALS, *supra* note 13, at 77, 81.

126. *Id.* at 86.

127. See Rebell, *Professional Rigor, Public Engagement and Judicial Review*, *supra* note 115, at 27.

128. *Id.*

129. *Id.* at 28.

B. How Is the Money Being Spent? Judicial Directives to Remedy Inadequacy

“Only a fool would find that money does not matter in education,” one North Carolina judge boldly stated.¹³⁰ Money obviously matters in establishing a constitutionally adequate education for all students.¹³¹ In order to put school districts in a position to deliver a constitutionally adequate curriculum, courts often award them additional funding.¹³² Courts compel states to provide more money to underfunded school districts with the ultimate goal of delivering adequate constitutional curricula to students. This has been the primary remedy for all school litigation: “to increase spending in the plaintiff districts and all others similarly situated.”¹³³

However, money alone is insufficient; the manner in which school districts spend that money determines how effective the remedy will be. Professor Allan Odden of the University of Wisconsin argues that most underperforming school districts already have sufficient resources to implement effective strategies to provide an adequate education.¹³⁴ He asserts that schools must reallocate the funds that they already receive toward proven, successful strategies.¹³⁵ For most underperforming schools, however, both sides of this coin are in play:

130. Hoke Cnty. Bd. of Educ. v. State, No. 95CVS1158, 2000 WL 1639686, at *57 (N.C. Super. Ct. Oct. 12, 2000).

131. Many commentators do not believe there is a correlation between educational spending and student achievement. See generally ERIC A. HANUSHEK ET AL., MAKING SCHOOLS WORK: IMPROVING PERFORMANCE AND CONTROLLING COSTS (1994) (arguing that improvement of schools today depends more on better use of resources than on provisions of added funds); ALLAN R. ODDEN & LAWRENCE O. PICUS, SCHOOL FINANCE: A POLICY PERSPECTIVE (1992) (discussing how recent research in school finance, resource allocation, and use for higher performance, and site-based management may impact the funding of our nation's schools); Robert F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 HARV. J. ON LEGIS. 465 (1991) (noting that higher teacher salaries and smaller class sizes produce better teachers, which in turn produces better students); Clayton P. Gillette, *Opting Out of Public Provision*, 73 DENV. U. L. REV. 1185 (1996) (examining a different element of “privitization” that does not involve government displacement by private sector); Erik A. Hanushek, *The Impact of Differential Expenditures on School Performance*, EDUCATION RESEARCHER (May 1989); Eric A. Hanushek, *Throwing Money at Schools*, 1 J. POL’Y ANALYSIS & MGMT. 19 (1981); Eric A. Hanushek, *When School Finance “Reform” May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423, 425 (1991) (arguing for a new look at school financing reform).

132. One survey concludes that more than \$34 billion has been spent by states to comply with judicial mandates in school funding litigation. See Chris Atkins, *Background Paper, Appropriation by Litigation: Estimating the Cost of Judicial Mandates for State and Local Education Spending*, 55 TAX FOUND. 1 (2007), <http://www.taxfoundation.org/research/show/22505.html> (follow “Background Paper No. 55” hyperlink).

133. James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 308 (1999).

134. See ALLAN R. ODDEN & LAWRENCE O. PICUS, SCHOOL FINANCE: A POLICY PERSPECTIVE 280-303 (3d ed. 2004).

135. See *id.* at 304-21.

they are not receiving enough funding, and they do not allocate resources toward proven, effective educational strategies to target poor performing students' achievement.¹³⁶ Remedies must address not only inadequate resources and fiscal irresponsibility but also education reform.¹³⁷

Generally, school districts do not direct that judicially mandated resources be put into curriculum development and delivery reform.¹³⁸ Moreover, with respect to school litigation, it is unclear whether plaintiffs' victories have tangibly benefited students in underfunded schools.¹³⁹ Once they reach the remedial phase, "[a]dequacy cases raise fundamental questions about the ability of courts to compel substantive policy change in the face of existing institutional arrangements and political forces."¹⁴⁰ In fact remedies have fallen short of achieving the goal of ensuring students receive an adequate education.

Without more specific guidance on how to use resources that result from plaintiff victories, schools continue along the same path without much reform.¹⁴¹ Many courts are beginning to order districts to conduct costing-out studies and other goal-oriented accountability mechanisms.¹⁴² One North Carolina judge maintained that the state should not just throw more money at a failing school system.¹⁴³ Rather, he argued that "money should be spent with specific goals in mind and with a method of accountability in place to measure whether

136. See Dyson, *supra* note 8, at 136 ("[T]he main culprits for the monetary inefficiency in today's public educational system are poor resource distribution, unimaginative use of funds, school bureaucracy, labor-intensive practices, lack of incentives, inefficient budgeting practices, and overspending on veteran teachers' salaries.")

137. See *id.* at 137.

138. See Hess, *supra* note 103, at 161.

[E]ven if courts prompt legislatures to spend more, such actions may result in little substantive reform. Courts may be able to compel legislators to address budgetary disparities, build new school facilities, provide preschool programs, or adopt new governing arrangements, but the influential, active constituencies, political realities, and organizational inertia that produced the problematic arrangements reflected in existing educational outcomes may not be addressed so readily.

Id.

139. See Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1636 (2004) (observing that in education litigation, "it may be true . . . that, since the time of *Brown*, institutional defendants have won the remedial battle").

140. See Hess, *supra* note 103, at 163.

141. *Id.* at 162 (noting that in adequacy cases, courts often opt for "[a]ccommodative reforms" that "augment current practices but do not significantly disrupt routines or habits of mind" rather than "[d]isruptive reforms" that "alter the status quo by fundamentally changing the way schools or districts operate").

142. See *supra* Part III.A.

143. See Hoke Cnty. Bd. of Educ. v. State, No. 95CVS1158, 2000 WL 1639686, at *57 (N.C. Super. Ct. Oct. 12, 2000).

or not money is being appropriately spent to obtain the results desired.”¹⁴⁴

To allow students in inadequate schools, usually poor minority students in urban schools or poor white students in rural schools,¹⁴⁵ to achieve their academic potential, money must be put toward innovative curriculum delivery. The proper role of the courts in adjudicating the constitutional rights of students to an adequate education should not result in judicial micro-managing of state and local school boards, but they *should* direct cost studies and state education systems to evaluate the possibility of increasing the amount of time students in poorly performing schools are learning.¹⁴⁶ Courts must balance the dual interests of encouraging educational reform in poorly performing schools with judicial restraint. Extending learning time in schools strikes this difficult balance by encouraging schools to deliver curricula in an innovative and remedial way while also preventing the court from making substantive education policy decisions. Plaintiffs should articulate this specific and detailed goal to help guide judges in their formulation of a remedy.¹⁴⁷

1. Bridging the Achievement Gap in Middle and High School:
Differentiated Remedies for Different Age Groups

The protracted litigation in New Jersey illustrates that courts must provide a remedy compelling states to reform education practices; but even when courts act, they should act with humility and caution.¹⁴⁸ In fact, a *New York Times* editorial dubbed one of New Jersey’s series of cases, *Abbott v. Burke*, “the most significant educa-

144. *Id.*

145. For a discussion of the geographic and demographic character of educational disparities, see William H. Clune, *The Shift from Equity to Adequacy in School Finance*, 8 EDUC. POL’Y 376 (1994).

146. Undoubtedly, legislative and executive branches are better suited to answer policy questions, and to the extent practical, courts should avoid overly detailed remedies. See generally Michael Heise, *Schoolhouses, Courthouses, and Statehouses: Educational Finance, Constitutional Structure, and the Separation of Powers Doctrine*, 33 LAND & WATER L. REV. 281, 281-327 (1998).

147. See, e.g., Dyson, *supra* note 8, at 113-14 (arguing that plaintiffs in education litigation cases should request specific remedies).

148. See GORDON MACINNES, IN PLAIN SIGHT: SIMPLE, DIFFICULT LESSONS FROM NEW JERSEY’S EXPENSIVE EFFORT TO CLOSE THE ACHIEVEMENT GAP 23 (2009) (“New Jersey is the national test case for determining if more money produces better education.”); see also William H. Clune, *New Answers to Hard Questions Posed by Rodriguez: Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy*, 24 CONN. L. REV. 721, 752 (1992) (describing the court’s ability to fashion an effective remedy in school finance cases).

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tion case since *Brown v. Board of Education*.¹⁴⁹ The *Abbott* litigation garnered such a reputation because the court took dramatic remedial steps to provide all students with their constitutionally guaranteed education. The New Jersey Supreme Court directed its department of education to increase school funding in underperforming poor schools to the level of the highest funded and wealthiest schools.¹⁵⁰ They placed explicit emphasis on curriculum delivery, noting that curricular opportunities offered to students in wealthier districts were not available to those in poorer districts.¹⁵¹ After discussing the vast disparities in science, computer, music, art, industrial arts, and physical education course offerings, the New Jersey Court stated:

Disparity exists, therefore, between education in these poorer urban districts and that in the affluent suburban districts; it is severe and forms an independent basis for our finding of a lack of a thorough and efficient education in these poorer urban districts—these students simply cannot possibly enter the same market or the same society as their peers educated in wealthier districts.¹⁵²

The court, relying on an analysis of curriculum disparities between the rich and poor districts, broadly defined the term “adequacy,” which drastically increased funding for schools.¹⁵³ As a result, New Jersey’s efforts to improve reading ability in young children led to improvement in those students’ measured education outcomes. In spite of increased spending, however, education output gains were not realized in older students. This indicates that to narrow the achievement gap, schools must take different approaches with students depending on their ages.¹⁵⁴

149. *Truce in New Jersey’s School War*, N.Y. TIMES, Feb. 9, 2002, at A18, available at <http://www.nytimes.com/2002/02/09/opinion/a-truce-in-new-jersey-s-school-war.html>.

150. *Abbott v. Burke (Abbott II)*, 575 A.2d 359, 385-89, 408-09 (N.J. 1990) (dubbing this remedy “parity aid” and estimating that for the 1989-90 school year the cost would be approximately \$440 million).

151. *See id.* at 394-400.

152. *Id.* at 400.

153. In response, the legislature did not comply with the court order to equalize funding. *See* Minorini & Sugarman, *supra* note 35, at 202. Instead, the legislature attempted to elude the court order by articulating its own educational standards and attempting to calculate the cost of meeting those standards. *Id.* The resources that the legislature claimed could meet the new standards were “well below the funding required by the court and barely above existing funding levels.” Ryan, *Standards, Testing, and School Finance Litigation*, *supra* note 13, at 1241. Clearly, the legislature thought it could avoid an expensive remedy by enacting standards instead of honoring the decision to equalize funding. Wisely, the court rejected this maneuver. *Abbott v. Burke (Abbott IV)*, 693 A.2d 417, 433 (N.J. 1997).

154. *See infra* Part III.B.1.

2. New Jersey's Expensive and Expansive Attempts to Close the Achievement Gap

Between 1973 and 2006, the New Jersey Supreme Court decided twenty cases that increased funding for poor districts.¹⁵⁵ Between 1997 (the “parity aid” decision) and 2007, aid to the thirty-one *Abbott* school districts increased by 75.8%, increasing from \$8577 per student to \$14,394.¹⁵⁶ In contrast, the rest of the state only saw a 38% increase in state aid for education spending per pupil—less than the inflation rate.¹⁵⁷ As a result, *Abbott* districts were able to spend approximately 120% of the average spent by the state's wealthiest districts.¹⁵⁸

In ordering increased spending for the *Abbott* districts, the New Jersey Supreme Court was more sweeping and prescriptive than any other previous court about where that money should be spent and what specific educational practices were required in order to bring the state's education system in line with constitutional requirements.¹⁵⁹ As previously indicated, the New Jersey Supreme Court was particularly interested in prescribing curriculum and educational inputs and requiring money to fund curricular programs. The court focused the remedy on four specific areas: (1) early education, (2) curricula, (3) supplemental programs, and (4) facilities.¹⁶⁰ The breadth and specificity of this remedy may well have been its downfall.¹⁶¹

a. The Impressive Results of Increased Funding for Early Education

Without proper and effective early education, low-income students fall behind. “For the majority of poor children, high quality preschool is unaffordable or unavailable, so they arrive in

155. See, e.g., *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); *Abbott v. Burke (Abbott II)*, 575 A.2d 359 (N.J. 1990).

156. MACINNES, *supra* note 148, at 26.

157. *Id.*

158. *Summary of Vital Statistics Comparative Spending Guide*, 2007 N.J. STATE DEP'T OF EDUC. 1, 3-4 (March 2007), <http://www.state.nj.us/education/guide/2007/abbott.pdf>.

159. See MACINNES, *supra* note 148, at 24-25.

160. Hess, *supra* note 103, at 171; see also Alexandra Greif, *Politics, Practicalities, and Priorities: New Jersey's Experience Implementing the Abbott V Mandate*, 22 YALE L. & POL'Y REV. 615, 656 (2004) (noting that *Abbott V* “increased state funding for *Abbott* preschool programs . . . and resulted in facilities legislation more ambitious than any of its kind elsewhere in the country”).

161. See *infra* Part III.B.2.b.

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kindergarten . . . less ready to learn.”¹⁶² Without quality preschool, students are often placed on academic tracks that prevent them from having access to more challenging curriculum.¹⁶³ As such, one innovative approach taken by the New Jersey Supreme Court to bridge the achievement gap in the *Abbott* rulings was to focus funding on pre-school education.¹⁶⁴ The court in *Abbott V* noted:

This Court is convinced that pre-school for three- and four-year olds will have a significant and substantial positive impact on academic achievement in both early and later school years. As the experts described, the long-term benefits amply justify this investment. Also, the evidence strongly supports the conclusion that, in the poor urban school districts, the earlier children start pre-school, the better prepared they are to face the challenges of kindergarten and first grade.¹⁶⁵

Ultimately, the court in *Abbott V* ordered that high-quality pre-school programs be offered to all three and four year-olds in the *Abbott* districts.¹⁶⁶ As a result of this decision, in 2006, New Jersey ranked first in the nation in funding for preschool, highest in pre-school teachers’ salaries, and first for enrollment of three year-olds.¹⁶⁷ As a result of these efforts, New Jersey spends more than \$12,000 per preschooler each year.¹⁶⁸ With this money, the state developed a set of achievement standards and a base curriculum for preschoolers.¹⁶⁹

The state evaluated the students who went through the *Abbott* preschool program as they entered kindergarten and found that they

162. JENNIFER L. HOCHSCHILD & NATHAN SCOVRONICK, *THE AMERICAN DREAMS AND THE PUBLIC SCHOOLS* 80 (2003).

163. *See id.* The authors note:

[When poor children] arrive in kindergarten . . . [t]heir classes are larger and their teachers less qualified than those of wealthier students. They are disproportionately placed in low-ability classes on the general track; they therefore take fewer challenging courses and have less expected of them. In this environment many more poor than well-off students fail, become disaffected, and drop out. If they finish, they are less prepared for college; when they go to college, they frequently need remediation; if they need too much remediation, they never graduate. Poor urban students may have more family and community problems than other children, but their schools have also failed them.

Id.

164. *See Abbott v. Burke (Abbott VI)* 748 A.2d 82 (N.J. 2000); *Abbott v. Burke (Abbott V)*, 710 A.2d 450 (N.J. 1998).

165. *Abbott V*, 710 A.2d at 506-07.

166. *See id.* at 507-08.

167. W. STEVEN BARNETT ET AL., NATIONAL INSTITUTE FOR EARLY EDUCATION RESEARCH, *THE STATE OF PRESCHOOL 2006: STATE PRESCHOOL YEARBOOK 12* (2006).

168. MACINNES, *supra* note 148, at 42.

169. *See Preschool Teaching & Learning Expectations: Standards of Quality*, 2004 N.J. STATE DEP’T OF EDUC. 1, 6 (2004), <http://www.state.nj.us/education/ece/archives/code/expectations/expectations.pdf>.

were significantly more prepared for kindergarten than their peers.¹⁷⁰ Within two years of that study, nearly 78% of *Abbott* district children were enrolled in preschool.¹⁷¹ This effort worked. Students who enrolled in two years of *Abbott* preschool performed statistically better at both the start and end of their kindergarten year than their peers.¹⁷² Moreover, they performed significantly better on third grade standardized tests than their peers across the state who did not attend *Abbott*-implemented preschool programs.¹⁷³

b. The Poor Results of Increased Funding for Middle and High School Students

While flooding the schools with resources to implement a pre-school program worked to improve the education of young students, it does not follow that this remedy will work for older students. As a result of the specific *Abbott V* remedy, K-12 schools in the *Abbott* school districts were flooded with computer and technology equipment,¹⁷⁴ consultants,¹⁷⁵ and pre-packaged instructional programs.¹⁷⁶ This led to a situation where schools were overwhelmed by these programs, people, and equipment; and schools could not focus on how to correctly or effectively use the additional resources to instruct students.¹⁷⁷ Not only was instruction (i.e. curriculum delivery) neglected, but rather, resources were completely mismanaged.¹⁷⁸ Jon Corzine,

170. These children improved their skills by an average of one-third of a standard deviation. MACINNES, *supra* note 148, at 47; see also Ellen Frede et al., *The Abbott Preschool Program Longitudinal Effects Study (APPLES)*, 2007 NAT'L INST. FOR EARLY EDUC. RES. 1, 5-10, available at <http://nieer.org/resources/research/APPLES.pdf> [hereinafter *APPLES*].

171. *APPLES*, *supra* note 170, at 5-6.

172. MACINNES, *supra* note 148, at 48. The book explained that:

The National Institute for Early Education Research in 2006 used widely accepted measures in spoken vocabulary, print awareness, and mathematical skills to assess a sample of 1,071 kindergarten students. Students were drawn from 563 classrooms in the fifteen largest *Abbott* districts, with 72 percent having attended one or both years of the *Abbott* preschool, and the balance having attended no preschool.

Id.

173. *Id.* (noting excellence in both math and language proficiency among *Abbott* students).

174. *Abbott V* required that each school have one computer for every five students. *Abbott v. Burke (Abbott V)*, 710 A.2d 450, 468 (N.J. 1998).

175. Every elementary school in *Abbott* districts were to be provided an "instructional facilitator," a "technology coordinator," and a "media specialist." *Id.* at 459, 496.

176. Each of the *Abbott* elementary schools was to adopt a model of whole-school reform approved by the education commissioner, with a preference for Success for All, a highly scripted reading program developed by Dr. Robert E. Slavin at Johns Hopkins. *Id.* at 457, 487.

177. MACINNES, *supra* note 148, at 28.

178. In an investigation of the Schools Construction Corporation in New Jersey, the agency assigned with administering part of the *Abbott* remedy, the state inspector general found "pervasive waste and mismanagement in the school construction program," as well as possible illegal

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United States Senator for New Jersey in 2005 declared that “[t]he cost overruns and mismanagement of the school construction program [associated with *Abbott* funding have] been a disgrace.”¹⁷⁹ The New Jersey Supreme Court had the best of intentions by mandating specific increases of resources, but they stepped too far and in the wrong direction.

In spite of increased funding, test scores among middle and high school students did not improve.¹⁸⁰ Proponents of the *Abbott* reforms stress that test scores have risen in the targeted districts.¹⁸¹ Improvements, however, only came after the state’s standardized tests were completely revamped, which was done in response to complaints that the tests were too difficult and that not enough students were able to reach the proficiency scores.¹⁸² Based on NAEP test scores, black students in New Jersey were actually falling behind their counterparts nationwide.¹⁸³ On the 2003 NAEP test, New Jersey’s gap in achievement between white and black students ranked fourth from last among all states in math among fourth graders and fifth from last among eighth graders.¹⁸⁴ The gap was just as bad in reading—fourth from the bottom among fourth graders and fifth from last among eighth graders.¹⁸⁵

Pouring money into implementing a new preschool program largely from scratch was manageable for New Jersey. Pouring resources into already poorly performing schools was not. Frederick Hess describes implementing and expanding preschool programs as an “accommodative reform” that does “not require existing educators, local officials, or community members to accept wrenching changes or

activity. Hess, *supra* note 103, at 172 (quoting Dunston McNichol, *Builders’ Lobbyist Quits School Construction Board*, STAR-LEDGER, Sept. 23, 2005).

179. Hess, *supra* note 103, at 172 (quoting John Mooney, *Corzine: School Program ‘A Disgrace,’* STAR-LEDGER, Sept. 9, 2005).

180. See, e.g., *NJ NAEP Reading Scores Flat*, NJ LEFT BEHIND (Aug. 31, 2010, 10:00 PM), <http://njleftbehind.blogspot.com/2010/04/nj-naep-reading-scores-flat.html> (reporting 2009 reading scores for New Jersey students).

181. See Hess, *supra* note 103, at 172 (citing Bill Shralow & Frank Kummer, *Abbott Schools Make Strides on State Tests*, COURIER POST, Jan. 11, 2002).

182. See *id.*; see also RAVITCH, *supra* note 113, at 149-69 (discussing the plummeting NAEP scores in New York, Tennessee and Texas, despite the rising test scores in the states).

183. National Assessment of Educational Progress tests are given periodically to representative samples of students in every state. See *The Nation’s Report Card—National Assessment of Educational Progress—NAEP*, NAT’L CTR. FOR EDUC. STATISTICS (2009), <http://nces.ed.gov/nationsreportcard/pdf/dst2009/2010459.pdf>.

184. *Education Watch: New Jersey, Key Education Facts and Figures, Achievement, Attainment and Opportunity, From Elementary School through College*, EDUC. TRUST 1, 13-17 (2004) <http://www.eric.ed.gov/PDFS/ED479008.pdf>.

185. *Id.* at 4.

threaten jobs or the stability of working conditions.”¹⁸⁶ Thus, it is an easy adjustment for the school to make and absorb into its rhythms.

Simply throwing money at a broken and inefficient middle and high school systems is a maneuver that does not result in lasting change.¹⁸⁷ It does, however, satiate political and public outcries to fix the education system. Public opinion polls suggest that people think that lack of funding is the number one problem with the country’s education system.¹⁸⁸ In response to New Jersey’s inadequate education system, the court succumbed to this conventional wisdom and offered more money to the failing districts. For New Jersey’s K-12 schools, the new money that resulted from litigation was spent on new programs, not on modifying existing programs to improve education.¹⁸⁹ The increased spending had little impact on efforts to improve the structure and function of the school day: student-teacher ratios did not improve, instruction time was not expanded, teacher salaries did not increase, and class sizes were not reduced.¹⁹⁰ Moreover, “the performance of students in the *Abbott* districts . . . suggests that new resources and reforms have not been sufficient to boost school quality significantly, even where they have been applied most assiduously.”¹⁹¹

Ultimately, simply spending more money to improve schools did not improve educational outcomes for the poorest students in New Jersey. Because, as noted above, the New Jersey Supreme Court, in spite of its ambition, was simply doing more of the same—it did not improve students’ access to curriculum, but merely attempted to pump more resources into a system that was failing. New Jersey did not take the easy way out, however. As noted earlier, the money it gave had a large number of strings attached to it. But those strings were not attached to improving the methods or modes of curriculum delivery; they were only attached to specific (and ineffective) ways to spend more money—to purchase more equipment and fund extraneous programs. As one scholar noted, the *Abbott* litigation “highlights the inability of the courts to do more than pump more money through

186. Hess, *supra* note 103, at 162.

187. *Id.* at 188-89.

188. *Highlights of the 2009 Phi Delta Kappa/Gallup Poll*, PHI DELTA KAPPAN (2009), http://www.pdkintl.org/kappan/docs/09pol_highlights.pdf.

189. *See* Hess, *supra* note 103, at 180.

190. *See id.* at 180-85.

191. *See id.* at 185.

the existing institutional framework of educational governance.”¹⁹² This is a recipe for failure.

To increase performance of middle and high school students, the courts must instruct schools to rethink and rebuild their modes of curriculum delivery. New Jersey was successful with its early education efforts because they started early with pre-school aged children—providing them support and resources before they had the opportunity to fail.¹⁹³ To bridge the achievement gap among students who are already behind their peers, courts like the New Jersey Supreme Court need to take the small and logical step of instructing states to require students in failing schools to spend more time in school. In this way, courts would essentially be acting in a manner similar to most effective educators by tailoring the remedy to the needs of the children they are trying to accommodate.¹⁹⁴

The current system of a six-hour school day for six months each year simply is not enough learning time for students in under-performing schools to catch up to their peers in better schools. In fact, extending learning time for students in poor schools has proven an effective practice for remedying an existing achievement gap among older students.¹⁹⁵ This remedy does not require judges to act as education experts. Once a court has identified an education system as constitutionally inadequate, assigning a remedy of extended learning time for older students allows the court to exercise judicial restraint.

C. An Appropriate Remedy: Targeted Efforts to Reform Schools and Provide Underperforming Student Access to Curriculum

New Jersey’s efforts illustrate an important point: bridging the achievement gap must take different forms to effect change at different grade levels.¹⁹⁶ Courts should take notice of a number of curricu-

192. DOUGLAS S. REED, *ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY* 160 (2001).

193. *See supra* Part III.B.2.a.

194. *See* CAROL ANN TOMLINSON & SUSAN DEMIRSKY ALLAN, *LEADERSHIP FOR DIFFERENTIATING SCHOOLS AND CLASSROOMS* 4 (2000) (noting that educators differentiate their instruction by “attending to the learning needs of a particular student or small group of students rather than the more typical pattern of teaching the class as though all individuals in it were basically alike”).

195. *See infra* Part III.C.

196. Courts must acknowledge that students at different stages in their education require different remedial measures to meet the different needs of students. *See* TOMLINSON & ALLAN, *supra* note 194, at 5; PLATO, *THE REPUBLIC*, Book VII 347 (Desmond Lee trans., Penguin Books

lum reforms that have been undertaken in schools across the country. Two efforts in particular have shown to be extremely effective in turning around schools among traditionally poor-performing demographics: an extended school day and an extended school year.¹⁹⁷ Most U.S. students attend school for an average of 6.5 hours a day, for 180 days a year—this is simply insufficient.¹⁹⁸ Since *A Nation at Risk* was published in 1983, education experts have pointed out that children must spend a greater amount of time in school to bridge the domestic and international achievement gap.¹⁹⁹ Moreover, allowing for more time to engage in learning activities has shown to improve learning among low-income and minority students.²⁰⁰ With this remedy, courts will ensure that their state's schools are providing an adequate education to all of their students.

2d ed. 1987) (1955); see also Sally M. Reis et al., *Equal Does Not Mean Identical*, 56 EDUC. LEADERSHIP 74 (1998) (arguing that students with different abilities, interests, and levels of motivation should be offered differentiated instruction that meets their individual needs to raise achievement). In *The Republic*, Plato argues that the class of individuals with the same ability to perform in a profession should receive the same education and that students with capacity for a different profession should receive a different education. See PLATO, *supra*.

197. Advocates for extended school day and year identify five basic benefits of this model:

First, more time allows for more time on task because longer days usually mean longer class periods. Second, teachers can delve more deeply into subject matter. Third, students become more engaged in school because more time allows for project-based learning approaches and classes like art, music and gym don't have to be reduced to accommodate the testing pressures for Math and English. Fourth, more time allows for greater interaction between teacher and student and deeper relationships. Finally, additional learning time enables schools to build in time reserved for teachers to engage in common planning and on-site professional development.

THE NAT'L CTR. ON TIME & LEARNING, <http://www.timeandlearning.org/impact/> (last visited Sept. 7, 2010).

198. See *Expanded Learning Time by the Numbers: The Traditional School Calendar is Failing to Meet Many Students' Need*, CTR. FOR AM. PROGRESS 1 (2010), http://www.americanprogress.org/issues/2010/04/pdf/elt_by_the_numbers.pdf.

199. See *A Nation at Risk*, *supra* note 44. Congress established the National Education Commission on Time and Learning to review the relationship between time and learning. The Commission decided that lack of time was the determinative factor contributing to American students falling behind their international peers. See *Prisoners of Time April*, NAT'L EDUC. COMM'N ON TIME AND LEARNING, <http://www2.ed.gov/pubs/PrisonersOfTime/index.html> (follow "Prisoners of Time" hyperlink); see also NAT'L CTR. ON EDUC. & THE ECONOMY, TOUGH TIMES FOR TOUGH CHOICES THE REPORT OF THE NEW COMMISSION ON THE SKILLS OF THE AMERICAN WORK FORCE (2006). For a history of theories and studies on instructional time, see David C. Berliner, *What's All the Fuss About Instructional Time?*, in THE NATURE OF TIME IN SCHOOLS: THEORETICAL CONCEPTS, PRACTITIONER PERCEPTIONS (1990).

200. Harold Wenglinsky, *The Link Between Instructional Practice and the Racial Gap in Middle Schools*, 28 RESEARCH IN MIDDLE LEVEL EDUC. 1 (2004), http://www.nmsa.org/portals/0/pdf/publications/RMLE/rmle_vol28_no1_article1.pdf.

1. A Judicially Manageable Remedy

These simple reforms exemplify judicial restraint and leave open the door for local and state legislative and executive control of education.²⁰¹ Judges are not experts on education policy and should not attempt to prescribe every aspect of school reform.²⁰² Rather, they should take measured aims to diagnose a constitutional deficiency in schools when they find one and provide the time and space for the legislature and the department of education to solve the problem. In advocating judicial restraint, Chief Justice William Rehnquist warns against the impulse to “feel that the sky is the limit when it comes to imposing . . . solutions to national problems on the popularly elected branches of the government and on the people.”²⁰³ New Jersey shows that when judges become too creative with the remedy, they are asserting power that is not rightly theirs. A remedy that requires an extended day and extended year allows judges to effect dramatic change in schools, avoid overstepping their expertise, and preserve local and state control of schools. Manageability is only one element of the calculus of a remedy. Courts must also consider the effectiveness of their proposed remedies—will it actually make curriculum more accessible to students and improve their education?

2. The Need for and Success of Extended Learning Time

Last year, President Barack Obama advocated for extended learning time in public schools.²⁰⁴ He argued that in order for American students to remain competitive in a world economy, they must be in school longer.²⁰⁵ President Obama has argued that, “[w]e can no

201. Judicial restraint is an important pursuit in fashioning a remedy for school finance litigation. As William Clune pointed out in his analysis of *San Antonio Independent School District v. Rodriguez*, redistribution of tax revenue is an extremely difficult task for judges to handle:

Equalization of tax resources proved to be a devilishly complicated exercise of inter-governmental management, both with respect to spending limits and recapture from the wealthiest districts. If equalization of spending seemed more manageable, what level of spending should occur (given different needs), and how should a court give guidance to a legislature? How could a court possibly play a manageable role in setting the amount of compensatory aid for poor children and the development of more effective spending policies? Thus, the complexities revealed by historical experience have vindicated doubts by the *Rodriguez* Court about the remedy of fiscal neutrality.

Clune, *supra* note 148, at 732.

202. See *supra* notes 32-33 and accompanying text.

203. WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 316 (1987).

204. See Brandi Koskie, *Obama Proposes Longer School Days, Extended School Year*, EDUC. IN REVIEW NEWS BLOG (Mar. 12, 2009), <http://www.eduinreview.com/blog/2009/03/obama-proposes-longer-school-days-extended-school-year/>.

205. See *id.*

longer afford an academic calendar designed when America was a nation of farmers who needed their children at home plowing the land at the end of each day”²⁰⁶ In reference to the current school standard, he went on to say, “[t]hat calendar may have once made sense, but today, it puts us at a competitive disadvantage. Our children spend over a month less in school than children in South Korea. That is no way to prepare them for a twenty-first century economy.”²⁰⁷

President Obama also cited to some important and disturbing statistics: (1) one-third of middle school-aged children in the United States cannot read at an appropriate level for their age, and (2) the eighth grade curriculum in public schools lags two years behind competing nations.²⁰⁸ Moreover, third-, fourth- and fifth-graders in high-poverty schools only receive an average of 1.67 minutes of explicit vocabulary instruction per day.²⁰⁹ President Obama argued that in order to bridge the achievement gap among students who are already significantly behind their peers, they must spend more time in schools:

We expect students to learn more today than ever before, and many experts agree that additional learning time, particularly for struggling students, is important to gaining knowledge and skills for the [twenty-first] century. . . . Longer school days or longer school years can help provide additional learning time for students to close the achievement gap.²¹⁰

The Obama administration has also recommended that schools extend their school day to stem the rising tide of middle school drop-outs.²¹¹ This action supports the general data that “urban middle school students placed at risk are able to accelerate their academic skill development when they are taught a curriculum that challenges and engages them, spend more time on tasks and receive regular extra academic assistance that connects to course content.”²¹² Children

206. *Id.*

207. *Id.* See also *Expanded Learning Time by the Numbers*, *supra* note 198, at 2 (pointing out that middle schools in Finland, Japan, and Korea spend an average of seventeen more days each year on instruction).

208. Koskie, *supra* note 204.

209. *Expanded Learning Time by the Numbers*, *supra* note 198, at 3.

210. EDUCATION WEEK, THE OBAMA EDUCATION PLAN: AN EDUCATION WEEK GUIDE 120 (2009).

211. See *White House Education Agenda*, THE WHITE HOUSE (2009), http://thetr.org/trc/download/White_House_Education_Agenda.pdf.

212. L. Mickey Fenzel & Rosalind H. Monteith, *Successful Alternative Middle Schools for Urban Minority Children: A Study of Nativity Schools*, 13 J. OF EDUC. FOR STUDENTS PLACED AT RISK 381, 382 (2008) (citing Robert Balfanz & Douglas Mac Iver, *Transforming High-Poverty Urban Middle Schools into Strong Learning Institutions: Lessons for the First Five Years of the Talent Development*, MIDDLE SCH. J. OF EDUC. FOR STUDENTS PLACED AT RISK, 137-58 (2000));

need to spend more time engaged with the curriculum to ensure their educational success.

3. Successful Implementation of Extended Learning Time in Minority and Impoverished Neighborhoods

Spending more time engaging students in curriculum is particularly effective and necessary in the difficult and pivotal middle school years when students often choose to fail or succeed.²¹³ Increasing time in school allows for a more in-depth study of core subjects as well as broader curriculum offerings. Massachusetts has begun an initiative to expand learning time, which gives school districts “\$1,300 per pupil to add 30 percent more time to the school year.”²¹⁴ This program increases student performance by using the extra time for both enrichment and academic programs.²¹⁵ During the extra learning time, students at one Massachusetts middle school are required to take a second math class and may elect to take courses in robotics, musical theater, band, or book groups.²¹⁶ Some of these schools also offer apprenticeships with businesses.²¹⁷ This extra time in school is already bearing fruit: 4.9% more students in the Massachusetts extended-learning-time schools achieved proficiency in English language arts from 2008 to 2009, compared to a 2.6% increase across the state; 4.8% more students achieved proficiency in science from 2008 to 2009, compared to other students across the state.²¹⁸ One school saw a 25% increase in English language arts proficiency among students from

Harold Wenglinsky, *The Link Between Instructional Practice and the Racial Gap in Middle Schools*, 28 *RMLE ONLINE* 1 (2004), http://www.nmsa.org/portals/0/pdf/publications/RMLE/rmle_vol28_no1_article1.pdf. See generally BRUCE WILSON & H. DICKSON CORBETT, *LISTENING TO URBAN KIDS: SCHOOL REFORM AND THE TEACHERS THEY WANT* (2001) (arguing that urban middle school students want teachers who will spend extra time teaching them).

213. See Melissa Lazarin, *Making ELT Work in Boston: A Conversation with Boston Academic Superintendent Jeff Riley*, *CTR. FOR AM. PROGRESS* (April 26, 2010), http://www.americanprogress.org/issues/2010/04/elt_podcast.html.

214. Catherine Gewertz, *Consensus on Learning Time Builds Interest in Expanding Hours for Students to Master Academic, Social, and Workplace Skills is Mounting*, 28 *EDUC. WEEK* 1, 2 (2008).

215. *Id.*

216. See James Vaznis, *Kennedy to Promote Extended School Days*, *BOSTON GLOBE*, Jan. 8, 2007, at B1, available at http://www.boston.com/news/local/articles/2007/01/08/kennedy_to_promote_extended_school_days/ (noting that these programs were previously offered as free, optional after-school programs, but were sparsely attended).

217. *Id.*

218. *Expanded Learning Time by the Numbers*, *supra* note 198, at 4.

2006 to 2008.²¹⁹ Massachusetts is a model for how other school systems could extend the school day and year to remedy the achievement gap.²²⁰ One teacher explained the benefits of extending the school day, thus:

Expanding learning time has allowed me to provide more individualized instruction to my students. I have time to teach a lesson, break students out into groups, and really give attention to the children who need extra help. In math, it could be as simple as showing a child who is struggling an alternative problem solving method—now I can really address the needs of all students.²²¹

Other schools are extending the school day and year for middle school students to effect dramatic change in poor urban communities, such as the Knowledge is Power Program (“KIPP”) and the NativityMiguel Network of Schools.²²² These two organizations are fulfilling the constitutional mandate of state education clauses for all students by expanding the time in which curriculum is delivered, thus making it accessible to all children and providing the time and space for them to learn. By increasing the amount of time that students are in class, these schools are able to expand the content of their curriculum in order to provide extra-curricular experiences similar to schools in affluent communities.

KIPP is a national network of eighty-two public schools in nineteen states and the District of Columbia enrolling more than 21,000 students.²²³ KIPP requires students in all of their schools to be

219. THE MASS. EXPANDED LEARNING TIME INITIATIVE, REDESIGNING TODAY’S SCHOOLS TO BUILD A STRONGER TOMORROW 2007-2008 ANNUAL REPORT 12 (2008) [hereinafter THE MASS. EXPANDED LEARNING TIME INITIATIVE].

220. For a profile of extended learning time practices in high-poverty and high-minority public schools in Illinois, Delaware, Ohio, Connecticut, Virginia, Florida, Pennsylvania, California, Missouri, Maryland, and New Mexico, see ELENA ROCHA, EXPANDED LEARNING TIME IN ACTION: INITIATIVES IN HIGH-POVERTY AND HIGH-MINORITY SCHOOLS AND DISTRICTS (2008). Additionally, the late Sen. Edward Kennedy introduced legislation in August 2008 to provide federal funding for those schools desiring to implement this type of program. See Gewertz, *supra* note 214.

221. THE MASS. EXPANDED LEARNING TIME INITIATIVE, *supra* note 219, at 11.

222. See THE NOTRE DAME TASK FORCE ON THE PARTICIPATION OF LATINO CHILDREN AND FAMILIES IN CATHOLIC SCHOOLS, TO NURTURE THE SOUL OF A NATION: LATINO FAMILIES, CATHOLIC SCHOOLS, AND EDUCATIONAL OPPORTUNITY 47 (2009) (noting that NativityMiguel Schools’ extended day and extended year programs “ensur[e] that students have ample opportunities to catch up to their peers to close the achievement gap and . . . parents can rest assured that their children are spending their afternoons in a safe, productive environment”); Joshua D. Angrist et al., *Who Benefits from KIPP?* (Nat’l Bureau of Econ. Research, Working Paper No. 15740, 2010) (demonstrating that students with low baseline test scores benefit from the extended day and year programs at KIPP schools).

223. *About KIPP*, KIPP, <http://www.kipp.org/schools> (last visited July 20, 2010).

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in school for more time than their peers in underperforming schools: “[w]ith an extended school day, week, and year, students have more time in the classroom to acquire the academic knowledge and skills that will prepare them for competitive high schools and colleges, as well as more opportunities to engage in diverse extracurricular experiences.”²²⁴

The NativityMiguel Network of Schools is comprised of sixty-four schools serving more than 4400 students in twenty-seven states.²²⁵ Students in NativityMiguel Schools spend an average of 9.5 hours a day in school,²²⁶ three more hours a day than the average public school student in the United States. Like schools in Massachusetts, these schools increase instruction time; consequently, they are able to offer a broad college-preparatory curriculum.²²⁷ Because their students are in school longer, they are exposed more deeply to core curriculum subjects such as math and reading and also are able to spend time in art, music, and physical education—all areas where courts have indicated that public schools are failing.²²⁸

The data shows that NativityMiguel Network of Schools is succeeding. One independent study of KIPP concluded,

The Knowledge Is Power Program has posted large and significant gains on a nationally norm-referenced standardized test. This performance is true across schools and throughout the nation. The fact that KIPP fifth grade cohorts showed a dramatic increase well above normal growth rates in reading, language, and mathematics is laudable and worthy of continued investigation and practice.²²⁹

In fact, 89% of students at NativityMiguel Network of Schools graduated from high school in 2008, compared to a 68% national average,

224. *Five Pillars*, KIPP, <http://www.kipp.org/about-kipp/five-pillars> (last visited July 20, 2010).

225. *About the NativityMiguel Network*, NATIVITYMIGUEL NETWORK OF SCH., <http://www.nativitymiguelnetwork.org/> (follow “About” hyperlink) (last visited July 20, 2010).

226. NATIVITYMIGUEL NETWORK OF SCHOOLS, 2007-2008 ANNUAL REPORT 4, available at http://www.nativitymiguelnetwork.org/index.php?option=com_content&task=view&id=195&Itemid=56 (follow “NativityMiguel Network of Schools, 2007-2008” hyperlink).

227. Spending part of the extended time on areas other than core academic subjects works to keep students focused and interested and prevents teacher burnout and fatigue. Lazarín, *supra* note 213.

228. *KIPP: FAQ, What is the KIPP Curriculum?*, KIPP, <http://www.kipp.org/about-kipp/kipp-faq> (last visited July 20, 2010).

229. *Focus on Results: An Academic Impact Analysis of the Knowledge Is Power Program (KIPP)*, THE EDUC. POL’Y INST. 3 (2005), <http://www.educationalpolicy.org/pdf/kipp.pdf>.

and a 50% rate of graduation for similar communities.²³⁰ The laudable results that these school models are realizing are in part due to their commitment to extending learning time for their students. Surely these are results that courts such as those in New Jersey would love to see among their students.

4. Opposition to Extended Learning Time

While results in pioneering urban schools such as KIPP and NativityMiguel Schools have been impressive, research regarding extended learning time is inconclusive at best. A variety of factors beyond the mere extension of time may contribute to students' success. Three arguments against extended learning time are worth considering: (1) cost, (2) lack of research, and (3) social concerns.

Cost is a significant, though not an insurmountable obstacle to implementing extended day and year programs. For example, when Minnesota shifted from 175 to two hundred school days, it cost districts approximately \$750 million a year in teacher salaries and other expenses.²³¹ Many opponents of extended learning time point to the additional ancillary costs associated with keeping a school open longer as a barrier to implementing this change. These costs are associated with how teachers, paraprofessionals, specialists, and support staff are deployed.²³² The Center for American Progress released a report on costs associated with extended learning time and concluded that schools would have to increase their budgets by 5-16% annually to extend learning time in high poverty schools, depending on the strategy employed.²³³ However, the Obama administration has taken a small step to alleviate that burden: it provides financial incentive for states to extend learning time in poor performing schools.²³⁴ Addi-

230. *NativityMiguel Network of Schools – Support the Network, 2008 High School Graduation Rates*, NATIVITYMIGUEL NETWORK OF SCH., http://www.nativitymiguelnetwork.org/index.php?option=com_content&task=view&id=33&Itemid=17 (last visited July 20, 2010).

231. See Elena Silva, *On the Clock: Rethinking the way Schools Use Time*, EDUCATION-SECTOR REPORTS 8 (2007), http://www.educationsector.org/usr_doc/OntheClock.pdf.

232. See generally Marguerite Roza & Karen Hawley Miles, *Taking Stock of the Fiscal Costs of Expanded Learning Time*, CTR. FOR AM. PROGRESS 1 (2008), <http://www.americanprogress.org/issues/2008/07/pdf/elt2.pdf>.

233. See *id.* at 11.

234. See *Race to the Top Fund*, 74 Fed. Reg. 37,804, 37,810 (proposed July 29, 2009) (to be codified at 34 C.F.R. Subtitle B, Chapter II), available at <http://www.ed.gov/legislation/FedRegister/proprule/2009-3/072909d.pdf>. Under the Recovery Act, the Obama administration also increased Title I funds to local school districts by \$10 billion. U.S. DEP'T OF EDUC., FISCAL YEAR 2010 BUDGET SUMMARY AND BACKGROUND INFORMATION 6, <http://www2.ed.gov/about/overview/budget/budget10/summary/10summary.pdf>. In this budget allocation, the Secretary of Education suggested that schools expand "extended learning opportunities for Title I-eligible

The Case for Extended Learning Time

tionally, the Center for American Progress identified five strategies school districts could use to mitigate the increased burden on school budgets: (1) redirect targeted Title I funds, (2) shift resources from support and ancillary school service, (3) renegotiate teacher contracts, (4) invest in professional development to help teachers utilize extended time, and (5) employ weighted student funding.²³⁵ Ultimately however, if courts continue to award more money to failing schools as the primary method to bridge the achievement gap, the remedy awarded in litigation will mitigate the additional cost to expand learning time.

Additionally, research that demonstrates gains in student test scores resulting from extended learning time is sparse and inconsistent. One scholar claims that “no truly trustworthy studies have been done on modified school calendars that can serve as the basis for sound policy decisions.”²³⁶ While research is insufficient to support the assertion that implementing extended learning time will help students from all socioeconomic backgrounds, studies have shown that it does help students from low-income backgrounds.²³⁷ Poor and minority students are less likely to have as many educational opportunities outside of school as their more affluent peers.²³⁸ This is primarily due to the lack of summer learning opportunities in low-income and minority communities, which results in what some researchers call “summer learning loss.”²³⁹

Finally, the interplay of social values with policy considerations warn against the notion that extended learning time is a magic bullet in education reform. Opponents of extended learning time also argue that too many other non-educational factors contribute to student and school failure. Many researchers reject the notion that a school, as an institution, can do anything to reduce the achievement gap. They ar-

students” as an investment in a project that will be sustainable after this funding expires. *Id.* The Secretary advocated for both before and after school activities as well as summer programs that extend the school year. *Id.*

235. See Roza & Miles, *supra* note 232, at 11-14.

236. Shaun P. Johnson & Terry E. Spradlin, *Education Policy Brief: Alternatives to the Traditional School-Year Calendar*, CTR. FOR EVALUATION & EDUC. POLICY 5 (citing Harris Cooper et al., *The Effects of Modified School Calendars on Student Achievement and on School and Community Attitudes*, 73 REV. OF EDUC. RES. 1 (2003)).

237. See Larry Cuban, *The Perennial Reform: Fixing School Time*, 90 PHI DELTA KAPPAN 240 (2008), available at http://www.pdkintl.org/kappan/k_v90/k0812cub.htm#12.

238. See Silva, *supra* note 231, at 5.

239. DORIS ENTWISLE ET AL., CHILDREN, SCHOOLS, AND INEQUALITY 33 (1997). See also Harris Cooper, *Summer Learning Loss: The Problem and Some Solutions*, EDUC. RESEARCH INFO. CTR. 1, 2 (2003), <http://www.eric.ed.gov/PDFS/ED475391.pdf>.

gue that minority students' performance is linked to their experiences before they enter school.²⁴⁰ Additionally, some grassroots advocacy groups argue that extending the school year would counteract the social and educational benefits students receive from outside the classroom experiences that the traditional school calendar provides.²⁴¹

Arguing that more time in school will solve all problems, even just educational problems, faced by low-income students is disingenuous. A variety of other variables influence a school's ability to teach its students including: "the local context itself, available resources, teacher quality, administrative leadership, socioeconomic and cultural background of students and their families and what is taught."²⁴² Researchers have concluded that attempting to effect educational change through "expanding learning time makes little sense without purposeful use of this time and effective instruction, [thus] schools and districts will need to design powerful curriculum."²⁴³

Schools that have extended the school day have often implemented extended learning time and have done so in conjunction with a number of other reforms, making it difficult to isolate the specific causal relationship between more time in school and student achievement.²⁴⁴ Proponents of a longer school day and year concede that extending learning time is not a sufficient step to bridge the achievement gap.²⁴⁵ It is, however, a necessary step toward the goal of providing students access to the curricula that will allow them to succeed. Extending the school day and year also provides schools the capacity to reform other aspects of teaching and institutional practices that can improve student performance.

240. See THE BROOKINGS INSTITUTE, *THE BLACK-WHITE TEST SCORE GAP 1* (Christopher Jencks & Meredith Phillips eds., 1998) (arguing that family experiences and preschool are the key to limiting or creating the achievement gap); MICHELE S. MOSES, *EMBRACING RACE: WHY WE NEED RACE-CONSCIOUS EDUCATION POLICY 50* (Teachers College Press 2002) (arguing that test score gaps are rooted in school segregation and that minority students will perform better if they have a significant set of white middle-class peers); see also THE BROOKINGS INSTITUTE, *Family Background, Parenting Practices and the Black-White Test Score Gap*, in *THE BLACK-WHITE TEST SCORE GAP*, *supra* at 103-45; Valerie E. Lee & David T. Burkam, *Inequality at the Starting Gate: Social Background Differences in Achievement as Children Begin School*, 2003 *ECON. POL'Y INST.* 1.

241. See *Save Our Summers in Other States*, SAVE OUR SUMMERS, <http://www.saveoursummers.com/sosother.asp> (last visited July 20, 2010) (providing examples of "Save Our Summers" groups).

242. Cuban, *supra* note 237.

243. Roza & Miles, *supra* note 232, at 13.

244. See Silva, *supra* note 231, at 2.

245. See Lazarín, *supra* note 213.

CONCLUSION

States have a constitutional duty to provide all of their students with a minimally adequate education. However, as a result of property tax-based funding schemes and local control of education, states do not always provide that education to all students. Schools in poor and urban communities do not have the resources to provide their students with the same curriculum as more wealthy schools. Because of these conditions, students in urban communities tend to fall behind. In an effort to remedy this situation, courts in adequacy litigation have mandated that states provide more resources to underperforming schools to raise students' standardized test scores to a minimum standard. These resources must be directed toward the proven, innovative solution of providing students in failing schools with more instructional time.

As discussed, some efforts of judicially mandated remedies have been successful while others have not. When courts prescribe uses for resources in failing school districts, it can be successful if directed at early education. Heaping more money onto failing systems for older students who are already behind their peers and directing that money to be used narrowly is unsuccessful. Simply providing more money so that schools can continue along the same, ineffective path within a traditional school day is not enough to allow these students to catch up to their peers. Judges must recognize that they are not experts in the field of education policy and must exercise judicial restraint in crafting remedies when they determine that a school system is constitutionally inadequate. Courts must mandate simpler changes that bear in mind the advances that Massachusetts and groups like KIPP and NativityMiguel are making in communities where public schools are failing. They must also mandate longer school days and years to allow underperforming students to catch up with their local and international peers. This remedy allows for local control of schools, while also providing the time and space for middle and high school students to have access to both the core constitutional curriculum and a broader curriculum to enrich their education.



NOTE

The Blame Game: Family and Medical Leave Act Violations and Individual Liability in the Public and Private Sectors

ALTA M. RAY*

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INTRODUCTION

As an employee of the State Police Department, John loved working in the community and making a difference. Just last month while driving home from church, John was injured when a large truck struck his car. The accident left John with a major back injury that would likely affect John for the rest of his life. As a result of the accident, John has difficulty moving around and sometimes cannot get out of bed in the morning to go to work. Due to John's temporary inability to work, he did not think twice when he requested leave under the Family and Medical Leave Act hoping to rehabilitate his back injury. John's immediate supervisor denied his request for leave, thereby creating a troubling dilemma. He had the option to take unauthorized leave, which would likely result in the State Police terminating John from the job that he loves. Conversely, he could continue working, which would likely aggravate his back injury further and possibly leave him with a lifetime of physical discomfort.

When a supervisor illegally denies a valid and substantiated leave request under the Family and Medical Leave Act of 1993 ("FMLA" or the "Act"), as did John's supervisor, which interferes with the health and the well-being of an employee, who is to blame: the employer, the supervisor, both, or neither? Should the answer to this question depend on whether the aggrieved employee works for a public employer versus a private employer? These questions remain unanswered by the language of The Family and Medical Leave Act.

Family and Medical Leave Act Violations

The FMLA¹ was signed into law in 1993 by then-President William J. Clinton² and was the first federal law of its kind in the United States to address work-family policy.³ By providing a provision in its federal law for family leave, the United States could now consider itself family-friendly like many of its western industrialized counterparts.⁴ In assessing the FMLA, the Supreme Court has determined that its purpose is “to protect the right to be free from gender-based discrimination in the workplace.”⁵ Other purposes behind the FMLA are accommodating work or family conflicts and providing basic minimum standards of job security.⁶

While the purposes of the FMLA may be clear, it remains unclear who should be liable when individual managers, supervisors, or officials of an employer fail to uphold the purposes behind the FMLA. The language of the FMLA does not explicitly state who an employee may or may not sue in the event of an FMLA violation. As a result, issues of manager and supervisor liability have arisen in federal courts, creating differing opinions over whether the purposes of the FMLA are satisfied by allowing for individual liability.⁷

Much of the debate surrounding individual liability under the FMLA is focused on defining the term “employer” within the meaning of the statute.⁸ Unfortunately, the FMLA has created confusion

1. Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (2006).

2. See Pauline T. Kim, *Introduction to Symposium, The Family and Medical Leave Act of 1993: Ten Years of Experience*, 15 WASH. U. J.L. & POL’Y 1, 1 (2004). Upon signing the FMLA, Clinton stated, “American workers will no longer have to choose between the job they need and the family they love.” President’s Statement on Signing the Family and Medical Leave Act of 1993, 29 WKLY. COMPILATION PRES. DOC. 144 (Feb. 5, 1993) [hereinafter President’s Statement on Signing the FMLA].

3. See Kim, *supra* note 2, at 1. More than thirty states also require that employers provide family or medical leave to their employees. See KURT H. DECKER, *FAMILY AND MEDICAL LEAVE IN A NUTSHELL* 93-102 (West Group 2000). States are not preempted by the FMLA and may provide “more generous leave rights and benefits” to their employees. *Id.*

4. See Kim, *supra* note 2, at 1. Clinton emphasized that prior to the enactment of the FMLA, “the United States [was] virtually the only advanced industrialized country without a national family and medical leave policy.” President’s Statement on Signing the FMLA, *supra* note 2. “All of the United States’ major global competitors provide some form of leave for [family and medical] purposes. Much of this leave is paid . . . many Third World countries [also] provide some form of maternity or parental leave.” DECKER, *supra* note 3, at 9 (citing Report from the Senate Committee on Labor and Human Resources, S. Rep. No. 103-3, at 19-20 (1993)).

5. Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003) (concerning the right of state employees to recover damages in federal court if their employer violated the FMLA).

6. See Kim, *supra* note 2, at 3; see also 29 U.S.C. § 2601(b)(1) (2006).

7. For additional examples explaining how this issue arose, see *infra* notes 8-13 and accompanying text.

8. See Boyd Rogers, *Individual Liability Under the Family and Medical Leave Act of 1993: A Senseless Detour on the Road to a Flexible Workplace*, 63 BROOK. L. REV. 1299, 1301 (1997).

among employers over whether both public and private managers and supervisors can be held liable in their individual capacities for violations of the FMLA. Several reasons have been asserted as to why it is difficult to analyze the definition of “employer.” The confusing language used by the FMLA in its “employer” definition, the “internal inconsistency of the statute itself,” and the fact that many federal district courts have relied on the Fair Labor Standard Act’s (“FLSA”) language, rather than the FMLA’s language, when interpreting the definition of employer have created an inconsistency.⁹

Several federal circuits have held that managers may be held liable in their individual capacity.¹⁰ For example, the Fifth Circuit in *Modica v. Taylor* found that the Act’s definition of “employer” allows managers and supervisors to be held liable in their individual capacities.¹¹ The Eighth Circuit ruled similarly in *Darby v. Bratch*.¹² In particular, the *Darby* court acknowledged that, “other courts have analyzed this issue by comparing the definition of employer under the FMLA to the definition of employer under the Fair Labor Standards Act.”¹³

Some circuits disagree with the approach taken by the Fifth and Eighth Circuits. The Eleventh Circuit in *Wascura v. Carver* held that the plaintiff’s supervisors were not “employers” under the FMLA and therefore could not be subject to liability under the Act.¹⁴ In 2002, the Sixth Circuit in *Mitchell v. Chapman* agreed with the *Wascura* court.¹⁵ That court made an “independent examination of the FMLA’s text

9. *Id.* at 1314.

10. See Frank C. Morris, Jr. & Minh N. Vu, *Developments Under the Family and Medical Leave Act of 1993*, SP024 A.L.I.-A.B.A. 2293, § XIII (2008), available at <http://westlaw.com> (follow “Directory” hyperlink; then follow “Treatises, CLEs, and Other Practice Materials” hyperlink; then follow “ALI-ABA” hyperlink; then search title of article) (noting that individual managers who have “operational control over those aspects of the FMLA alleged to have been violated” may be sued); see generally *Modica v. Taylor*, 465 F.3d 174 (5th Cir. 2006) (holding that an employee in a public agency can be held individually liable under the FMLA); *Darby v. Bratch*, 287 F.3d 673 (8th Cir. 2002) (holding that a public official can qualify as an “employer” under the FMLA and therefore can be held liable in his or her individual capacity).

11. See 465 F.3d at 187.

12. See 287 F.3d at 681 (noting the similarities between the FLSA, the FMLA, and their definitions of the term “employer”).

13. *Id.* at 680.

14. See *Wascura v. Carver*, 169 F.3d 683, 684-85 (11th Cir. 1999) (“If the Court were to exercise jurisdiction where the employer does not meet the statutory prerequisite, it would effectively be expanding the scope of the [FMLA] . . .”).

15. 343 F.3d 811 (6th Cir. 2003) (holding that officials may be held liable in their personal capacity for actions taken in their official capacity).

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and structure” and determined that the FMLA did not inflict individual liability on public supervisors.¹⁶

In its discussion of the FMLA in *Mitchell*, the Sixth Circuit mentioned that the language of the FMLA “mirrors the FLSA’s definition of employer.”¹⁷ One professor argues that it is inappropriate to use the plain meaning approach of statutory interpretation to analyze the issue of individual liability.¹⁸ In support of her belief, she noted that, “the Supreme Court has explicitly directed courts when looking at vague definitions of the terms ‘employer’ and ‘employee’ to look not only at the words of the statute, but at the purposes of the statute itself and the problems it is trying to remedy.”¹⁹

Even with the contrasting views of who constitutes an “employer” under the FMLA, Congress has not adjusted the wording of the statute to provide more guidance as to its intention regarding individual liability. Additionally, the Supreme Court has not resolved the issue of who constitutes an “employer” as defined by the FMLA. By denying certiorari in *Mitchell*, the Court missed an opportunity to address this issue.²⁰ Whether statutory interpretation or another method is used to address this issue, the circuit split must be resolved. There is a need for nationwide consistency in the way the FMLA is interpreted and implemented by the courts. Then, employers, supervisors, managers, and high-level officials will have a clear understanding of the

16. *Id.* at 829 (articulating the three factors that compelled its decisions); see also Ann K. Wooster, *Individual Liability Under Family and Medical Leave Act*, 170 A.L.R. FED. 561, 561 (2001).

There appears to be no rational basis for distinguishing between a state official’s amenability to suit in an “individual capacity” based on the federal statute allegedly violated . . . and if Congress had made the state actor subject to suit under a particular legislative enactment, then that person may be sued in his or her “individual capacity” regardless of the fact that the alleged liability-creating conduct was part of the individual’s “official duties.”

Id.

17. *Mitchell v. Chapman*, 343 F.3d 811, 825-27 (6th Cir. 2003) (discussing statutory interpretation and noting “[t]his is not a coincidence”).

18. See Sandra F. Sperino, *Under Construction: Questioning Whether Statutory Construction Principles Justify Individual Liability Under the Family and Medical Leave Act*, 71 MO. L. REV. 71, 72 (2006). According to Sperino, use of the plain meaning approach “would produce an absurd result” that would allow for “every individual who worked for a company and who was involved in making decisions” regarding employee leave to be liable under the FMLA. *Id.* at 85.

19. *Id.* at 72 (focusing her argument on the Supreme Court’s decision in *Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485, 489-90 (1947)). The holding in that case “strongly suggests that the portion of the FMLA’s definition of ‘employer’ that has been interpreted as creating individual liability should instead be read as creating respondeat superior liability.” *Id.* at 87.

20. See generally *Mitchell*, 343 F.3d at 811, *cert. denied*, 542 U.S. 937 (2003) (refusing to hear the case); Catherine Brainerd, *Hide and Seek: The FMLA Game of Personal Liability for Public Sector Supervisors*, 51 WAYNE L. REV. 1587, 1587 (2005) (noting that the “United States Supreme Court has not stepped in to resolve the split among the various jurisdictions”).

potential consequences that they face in violating the FMLA. As a companion to the issue of individual liability, to date, “no appellate court decisions directly address whether individual liability is appropriate in the private employer context.”²¹ This issue must be addressed along with its relation to the public employer context, where the issue of individual liability has been “percolating in the federal courts for more than a decade.”²²

In 2009, the issue of individual liability under the FMLA arose in *Sadowski v. U.S. Postal Service*.²³ By holding that an aggrieved public employee could not sue his former supervisors for violating the FMLA, the United States District Court for the District of Maryland reversed its previous opinion in *Knussman v. Maryland*²⁴ and decided against retribution for all who were responsible for the violation.²⁵ This Note posits that the court in *Sadowski*, by ruling contrary to the purposes of the FMLA, erred in overruling its previous holding allowing for lawsuits against supervisors. The language of the FMLA supports a petitioner in his or her ability to sue managers or supervisors in their individual capacities for violating the FMLA, regardless of whether the petitioner works for a public or private employer. This liability is separate from the employer’s liability for violating the FMLA. Since one of the main purposes behind the FMLA is to protect employees from discrimination, it follows that anyone who violates the FMLA—employer, manager, or supervisor—should be held liable under the Act. Employers, both public and private, must therefore educate themselves and their employees on what constitutes a violation of the FMLA.

Part I of this Note presents a brief history of the FMLA. Part II discusses the history of holding supervisors and managers liable in their individual capacities for violations of the FMLA. Following this discussion, Part III examines federal case law, scholarly discussions, and public policy to assess the arguments in support of the assertion that public and private managers or supervisors can be held liable in their individual capacities for violating the FMLA. Part IV assesses the opponents’ view that public and private supervisors and managers cannot be held liable. Part V reconciles both sides of the issue by

21. Sperino, *supra* note 18, at 72.

22. *Id.* at 71.

23. *See generally* *Sadowski v. U.S. Postal Serv.*, 643 F. Supp. 2d 749 (D. Md. 2009) (holding that the FMLA did not permit supervisors to be held liable in their individual capacities).

24. *See* *Knussman v. Maryland*, 935 F. Supp. 659, 664 (D. Md. 1996).

25. *See Sadowski*, 643 F. Supp. 2d at 757.

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concluding that the FMLA permits all managers and supervisors to be held liable in their individual capacities if they have violated the Act. Lastly, Part VI proposes ways to minimize the possibility of individual supervisor or manager liability in the future for violating the FMLA by focusing on ways employers can prevent such situations from occurring.

I. HISTORICAL BACKGROUND OF THE FMLA

A. Legislative History

Enacted on February 5, 1993,²⁶ the FMLA aims to “balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity” by allowing employees “reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition.”²⁷

Congress intended the FMLA to “accomplish these purposes in a manner that accommodates the legitimate interests of employers, and in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment in minimizing the potential for employment discrimination on the basis of sex, while promoting equal employment opportunity for men and women.”²⁸

In drafting the legislation, Congress realized that women faced workplace discrimination if they wanted to temporarily stay home after childbirth.²⁹ To some, alleviating this discrimination through the

26. Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (2006).

27. 29 C.F.R. § 825.101(a) (2010). Generally, there are four primary reasons that allow an employee to take leave under the FMLA: (1) when an employee needs to take care of a child following the child’s birth; (2) when an employee must take care of a child following the adoption of the child; (3) when an employee needs to care for a spouse, child, or parent who has a serious health condition; and (4) when an employee has his or her own serious health condition that makes the employee unable to perform his or her job functions. *See* Family and Medical Leave Act, 29 U.S.C. § 2612(a)(1) (2006). The Code of Federal Regulations highlights the necessity of the FMLA because of the fact that “America’s children and elderly are dependent upon family members who must spend long hours at work.” 29 C.F.R. § 825.101(b) (2010). The FMLA prevents the possibility that employees will be “asked to choose between continuing their employment, and meeting their personal and family obligations . . .” *Id.*

28. 29 C.F.R. § 825.101(a) (2010). Employers and their employees were meant, and expected to, benefit from the FMLA, not only employees. 29 C.F.R. § 825.101(c) (2010). “As females, single mothers, and dual income families expanded the United States’ predominately male workforce during the 1960s through the 1990s, legislative attention began to be focused on balancing employment with family and medical needs.” DECKER, *supra* note 3, at 1-2.

29. *See* DECKER, *supra* note 3, at 3 (citing S. Rep. No. 103-3, at 4 (1993)). The failure of the public and private sectors to respond to the economic and social changes in the workforce has

FMLA indicates that Congress may have intended for the FMLA to operate as an antidiscrimination statute.³⁰ In 1985, Congress proposed the Parental and Disability Leave Act of 1985 (“PDLA”).³¹ This proposed legislation differed from the current FMLA because it focused on leave for parents with new or sick children.³² In 1986, the PDLA was reintroduced as H.R. 4300, The Parental and Medical Leave Act of 1986 (“PMLA”).³³ The previous bill was amended to allow employees to care for children as well as a sick spouse or elderly parents.³⁴ Unfortunately, the Congressional session ended before Congress could pass the PMLA.³⁵ Steadfast opposition from business groups kept family leave legislation from passing.³⁶ It was not until the 101st and 102nd sessions of Congress that a congressional attempt to pass meaningful family leave legislation was presented to President George H.W. Bush, who vetoed that attempt.³⁷ Finally, following the election of President Clinton, H.R. 1, The Family and Medical Leave Act, became law during the 103rd Congressional session.³⁸

B. Requirements of the FMLA

The FMLA defines employer as “any person engaged in commerce or in any industry or activity affecting commerce who employs [fifty] or more employees for each working day during each of [twenty] or more calendar workweeks in the current or preceding calendar year.”³⁹ Any person who acts, directly or indirectly, in the interest of an employer falls within the FMLA definition of employee.⁴⁰

resulted in tension between employment and family and placed heavy burdens on employers, employees, families, and society. *Id.* Family and medical leave was necessary to address this conflict. *Id.*

30. *See* Rogers, *supra* note 8, at 1307 (“Congress recognized the disparate impact of traditional family care arrangements on women.”).

31. *See* Parental and Disability Leave Act (“PDLA”) of 1985, H.R. 2020, 99th Cong. (1985).

32. *See* Rogers, *supra* note 8, at 1307 (noting that the PDLA would have given parents as many as eighteen weeks of leave for newborn or newly adopted children and up to twenty-six weeks of leave for disabilities and sick children).

33. *See id.* (allowing employers to provide unpaid leave for parental and temporary disability leave, unlike the PDLA).

34. *See id.* at 1308 (providing also that federal civil service employees are entitled to parental and medical leave).

35. THE FAMILY AND MEDICAL LEAVE ACT 8 (Michael J. Ossip & Robert M. Hale eds., American Bar Association 2006) [hereinafter Ossip & Hale].

36. *Id.* at 8-13.

37. *Id.* at 13.

38. *Id.* at 14-16.

39. Family and Medical Leave Act, 29 U.S.C. § 2611(4) (2006) (including any “public agency” in the definition of “employer”).

40. *Id.*

Family and Medical Leave Act Violations

Employees eligible to benefit from the FMLA are those who have worked at least 1250 hours for the employer during the previous year.⁴¹

To receive leave under the FMLA, an employee must show: (1) that he or she has a serious health condition; (2) that he or she must care for a child due to birth or adoption; or (3) that he or she must care for a child or parent who has a serious health condition.⁴² Regarding “serious health conditions,” the Eighth Circuit has held that the plaintiff must satisfy three elements to prove the existence of a serious health condition: “(1) she had a period of incapacity requiring absence from work; (2) the incapacity exceeded three days; and (3) she received ‘continuing treatment by a healthcare provider’ during that period.”⁴³ The Department of Labor regulations further define the phrase “continuing treatment by a healthcare provider” as “incapacity for more than three consecutive days and any [related] subsequent treatment or period of incapacity” that also involves one of five factors addressed in the regulation.⁴⁴ For instance, when leave is taken under the FMLA for the birth or adoption of a child, the employee is not entitled to leave after twelve months have elapsed.⁴⁵ Employees most likely to benefit from the provisions of the FMLA are those who have a medical condition where they are temporarily unable to work.⁴⁶

An employee is required to request leave and give the employer notice that the leave is being requested for a qualifying reason to invoke the protections of the FMLA.⁴⁷ If it is not feasible to request

41. *Id.* § 2611(2); Kim, *supra* note 2, at 2. Employees must have also worked for the employer for at least one year. *See generally* Morris & Vu, *supra* note 10, at § VI(a) (noting that individual managers who have “operational control over those aspects of the FMLA alleged to have been violated” may be sued).

42. *See* Family and Medical Leave Act, 29 U.S.C. § 2612(a)(1) (2006). The following conditions are excluded under the FMLA unless they become serious: common cold, flu, upset stomachs, non-migraine headaches, and routine dental problems. DECKER, *supra* note 3, at 247.

43. Rankin v. Seagate Techs., Inc., 246 F.3d 1145, 1148 (8th Cir. 2001).

44. Family and Medical Leave Act of 1993, Coverage Under the Family and Medical Leave Act, Continuing Treatment, 29 C.F.R. § 825.115 (2010).

45. *See* Family and Medical Leave, General Requirements for Leave, Leave Requirement, In General, Entitlement to Leave, 29 U.S.C. § 2612(a)(2) (2006).

46. *See* Kim, *supra* note 2, at 3.

47. *See* Brenneman v. MedCentral Health Sys., 366 F.3d 412, 421 (6th Cir. 2004) (stating that employees do not have to specifically cite to the FMLA because the employer should be able to deduce that the employee is eligible under the FMLA if sufficient information has been provided); *see also* Price v. City of Fort Wayne, 117 F.3d 1022, 1025 (7th Cir. 1997); Manuel v. Westlake Polymers Corp., 66 F.3d 758, 761 (5th Cir. 1995). It is the responsibility of the employer to determine whether or not the leave requested by the employee falls under the FMLA. DECKER, *supra* note 3, at 203.

leave prior to an illness, then the employee is not required to do so.⁴⁸ In the past, an employer was required to inform the employee if the leave was going to count as FMLA leave.⁴⁹ Once an employee returns to work, he or she is entitled to work in the same position that he or she held before taking leave or to work in an equivalent position.⁵⁰

The FMLA requires that employers have an affirmative duty “to avoid discriminating against employees with family responsibilities” and to “prohibit the retaliating or discriminating against any employee who oppose[s] any practice made unlawful by th[e] [statute].”⁵¹ Where a violation of the FMLA occurs, an aggrieved employee is entitled to damages equal to the amount of any “wages, salary, employment benefits, or other compensation denied or lost to such employee by reason of the violation” and to “appropriate equitable relief, such as employment, reinstatement, and promotion.”⁵² Courts have allowed plaintiffs to recover damages for consequential or emotional distress.⁵³ The statute of limitations on private lawsuits pursuant to the FMLA is two years,⁵⁴ unless the alleged violation was willful.⁵⁵

48. See Family and Medical Leave Act of 1993, Employee and Employer Rights and Obligations Under the Act, Employee Notice Requirements for Unforeseeable FMLA Leave, Timing of Notice, 29 C.F.R. § 825.303(a) (2010).

49. See Family and Medical Leave Act of 1993, Employee Leave Entitlements Under the Family and Medical Leave Act, 29 C.F.R. § 825.208 (2010) (reserved); see also *Fogleman v. Greater Hazleton Health Alliance*, 122 F. App'x 581, 587 (3d Cir. 2004).

50. See Family and Medical Leave Act of 1993, Employee Leave Entitlements Under the Family and Medical Leave Act, Employee Right to Reinstatement, 29 C.F.R. § 825.214 (2010).

51. *Rogers*, *supra* note 8, at 1303; see also Family and Medical Leave Act, 29 U.S.C. § 2614(a)-(b) (2006). Employers are prohibited from (1) interfering with or denying an employee's exercise of a right granted under the FMLA; (2) terminating or discriminating against an employee for opposing an unlawful practice that violates the FMLA; or (3) terminating or discriminating against an employee who is or has been involved in an FMLA proceeding. *DECKER*, *supra* note 3, at 60 (citing Family and Medical Leave Act, 29 U.S.C. § 2615 (2006)).

52. 29 C.F.R. § 825.400 (2010). An employer may also be liable for interest, liquidated damages, attorney's fees, expert witness fees, and other costs associated with litigation. Family and Medical Leave Act, 29 U.S.C. § 2617(a) (2006).

53. See *Farrell v. Tri-Cnty. Metro. Transp. Dist.*, 530 F.3d 1023, 1025 (9th Cir. 2008) (holding the award was included in the FMLA's provision that employees could seek damages for wages lost by reason of the violation). For further explanation on how damages are calculated, see *DECKER*, *supra* note 3, at 194-98.

54. See Family and Medical Leave Act of 1993, Enforcement Mechanisms, Enforcement, General Rules, 29 C.F.R. § 825.400 (2010).

55. See Family and Medical Leave Act, 29 U.S.C. § 2617(c)(2) (2006) (stating that the statute of limitations for willful FMLA violations is three years, instead of two); see also *Hillstrom v. Best W. TLC Hotel*, 354 F.3d 27, 33 (1st Cir. 2003) (“[T]o establish a willful violation of the FMLA, a plaintiff must show that ‘the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute.’”) (citing *McLaughlin v. Richard Shoe Co.*, 486 U.S. 128, 133 (1988)).

C. Criticisms of the FMLA

Since the FMLA was enacted, several key regulations have been promulgated. In fact, the Department of Labor has issued over one hundred pages of rules, regulations, questions, and answers concerning the FMLA.⁵⁶ The FMLA has faced criticism because of its limitations, specifically “its failure to address the ordinary day-to-day challenges of balancing work and family” since the responsibility of raising a child extends “beyond the first twelve weeks of life.”⁵⁷ Thus, some have argued that the impact of the FMLA has been quite modest,⁵⁸ while others have questioned whether the FMLA has gone too far.⁵⁹ Although employees have welcomed the positive effects of the FMLA, the statute has also negatively affected an employer’s ability to operate. The FMLA arguably may have slowed, or even stalled, states in their ability to create stronger, better protections for employees.⁶⁰ In some cases, employers have failed to create more generous leave packages or lacked the incentives to create such packages.⁶¹ As disagreements regarding the FMLA continue to arise, it will be up to Congress to amend and to resolve the Act accordingly so that it operates to its fullest potential.

56. See Rogers, *supra* note 8, at 1310-11 (“These regulations have been codified in the Code of Federal Regulations, the contents of which are required to be judicially noticed.”); see also Family and Medical Leave Act of 1993, Coverage Under the Family and Medical Leave Act, Purpose of the Act, 29 C.F.R. § 825 (2010).

57. Kim, *supra* note 2, at 13.

58. See *id.* at 15 (“[The FMLA] has not caused significant change in patterns of leave-taking for family care reasons, and its overall effects on gender inequality in the workplace are quite uncertain.”). A 1996 Report to Congress on Family and Medical Leave Policies concluded that since January 1994, only four percent of the eligible employees in the private sector actually took leave under the FMLA. DECKER, *supra* note 3, at 17 (citing COMMISSION ON LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES (Apr. 30, 1996) available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1002&context=key_workplace).

59. See, e.g., Sandra F. Sperino, *Chaos Theory: The Unintended Consequences of Expanding Individual Liability Under the Family and Medical Leave Act*, 9 EMP. RTS. & EMP. POL’Y J. 175 (2005).

60. See Kim, *supra* note 2, at 6-7.

61. See Michael Selmi, *Is Something Better Than Nothing? Critical Reflections on Ten Years of the FMLA*, 15 WASH. U. J.L. & POL’Y 65, 83 (2004). Professor Selmi also believes that the two main rationales of FMLA supporters are that (1) “something was better than nothing,” and (2) the FMLA would eventually lead to the Federal Government creating even stronger leave protections. *Id.* at 68.

II. THE HISTORY OF HOLDING SUPERVISORS AND MANAGERS LIABLE IN THEIR INDIVIDUAL CAPACITIES

A. State Employee Individual Liability and the Eleventh Amendment

Lawsuits against employees in managerial or supervisory positions existed long before the enactment of the FMLA.⁶² At times, the issue was one of whether the employee was acting in his official capacity or individual capacity at the time of the incident at issue.⁶³ Other times, the issue has been whether individuals may sue state officials after violating a federal employment law or a constitutional right based on the language of the Eleventh Amendment.⁶⁴ The federal courts have been responsible for interpreting the Eleventh Amendment in such lawsuits.

The Eleventh Amendment of the United States Constitution states, “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”⁶⁵ Under this Amendment, unless a state gives its consent, it is immune from lawsuits in federal court for monetary damages or equitable relief.⁶⁶

On several occasions, the federal courts have been asked to interpret the Eleventh Amendment when deciding whether it protects public employees from suit in their individual capacities. For instance, the Fifth Circuit has asserted that the Eleventh Amendment generally will not bar a lawsuit against an officer in his or her individual capacity.⁶⁷ Instead, the Eleventh Amendment may only bar such a lawsuit where

62. See *Schweiker v. Chilicky*, 487 U.S. 412, 418 (1988); see also *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 345 (1988).

63. This issue no longer makes standing in a suit against a state official dependent on whether the state official's actions were official or individual. *Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.15 (1996) (“The Constitution specifically recognizes the States as sovereign entities, while government officials enjoy no such constitutional recognition.”).

64. See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232, 238 (1974) (“[D]amages against individual defendants are a permissible remedy in some circumstances notwithstanding the fact that they hold public office.”) (citing *Myers v. Anderson*, 238 U.S. 368 (1915)).

65. U.S. CONST. amend. XI.

66. See generally *Ex parte Young*, 209 U.S. 123 (1908) (holding that lawsuits that seek injunctions against a state official do not violate its sovereign immunity if the state official was not acting on behalf of the state when he sought to enforce an unconstitutional law).

67. See *Hudson v. City of New Orleans*, 174 F.3d 677, 687 n.7 (5th Cir. 1999); *Martin v. Thomas*, 973 F.2d 449, 458 (5th Cir. 1992).

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the state is the real and substantial party in interest.⁶⁸ The Seventh Circuit added that where a state official is being sued in his individual capacity, the application of the Eleventh Amendment to that suit is dependent on the factual circumstances of that particular suit.⁶⁹ Generally, the Eleventh Amendment will not bar lawsuits where a plaintiff seeks damages for the violation of an employment law from an individual state employee, rather than from the state itself.⁷⁰ Although it is possible for Eleventh Amendment sovereign immunity to apply to certain FMLA claims against state entities, “Congress has validly abrogated sovereign immunity at least with respect to claims concerning leave to care for a family member.”⁷¹

B. The Federal Courts’ Interpretation of Individual Liability Within Title VII and Other Antidiscrimination Statutes

Under several of the federal antidiscrimination statutes, the federal courts have been reluctant to hold individuals liable for discriminating against employees.⁷² These statutes include Title VII of the Civil Rights Act (“Title VII”), which makes it unlawful for an employer to “discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”⁷³ Other antidiscrimination statutes where individuals were held not liable include the Americans with Disabilities Act of 1990 (“ADA”), which states that “no employer shall discriminate against a qualified individual with a disability,”⁷⁴ and the Age Discrimination in Employment

68. *See* *Ysleta Del Sur Pueblo v. Raney*, 199 F.3d 281, 286 (5th Cir. 2000); *see also* *Alden v. Maine*, 527 U.S. 706, 709 (1999) (noting that some actions for injunctive or declaratory relief against state officers are not barred by the Eleventh Amendment).

69. *See* *Luder v. Endicott*, 253 F.3d 1020, 1022 (7th Cir. 2001) (holding that the Eleventh Amendment prevented plaintiffs from suing the state; as a result the plaintiffs alternatively sued defendants in their individual capacities under the FLSA).

70. *See id.* at 1022-23. “Sovereign immunity . . . only applies to claims for damages against those public agencies that are state entities. If sovereign immunity does not apply to a claim against the employing entity, it cannot apply to a claim against the employees of the entity.” *Ossip & Hale, supra* note 35, at 389.

71. *Ossip & Hale, supra* note 35, at 389.

72. *See generally* *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2d Cir. 1995) (holding that individual defendants with supervisory control over a plaintiff may not be held personally liable under Title VII); *Miller v. Maxwell’s Int’l, Inc.*, 991 F.2d 583 (9th Cir. 1993) (agreeing with defendant’s arguments that they have no personal liability under Title VII and the ADEA).

73. Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1) (2006).

74. Equal Opportunity for Individuals with Disabilities Act, 42 U.S.C. § 12112(a) (West, Westlaw through Sept. 2008 amendments). It is important to note that the FMLA does not preempt or change the ADA. *DECKER, supra* note 3, at 189. Employers are therefore required to “provide leave under whichever FMLA or ADA statutory provision provides the employee

Act of 1967 (“ADEA”), which prohibits employers from discriminating “against any individual . . . because of such individual’s age.”⁷⁵

Without guidance from the Supreme Court, most of the federal courts that have held against individual liability look primarily to the statutory language or meaning of the term “employer” under the ADA and the ADEA.⁷⁶ These courts argue that because the three statutes state the phrase “and any agent” within the definition of “employer,” “courts [should] impose *respondeat superior* liability upon the employers for the acts of their agents.”⁷⁷ Under this *respondeat superior* interpretation, “the agent provision simply defines the scope of an employing entity’s vicarious liability for the acts of its agents; it does not provide a justification for extending liability to individuals.”⁷⁸ The majority of federal courts have prohibited individual liability because of the antidiscrimination statutes’ limitations on employer liability for employers with at least fifteen or more⁷⁹ or twenty or more employees.⁸⁰ This limitation indicates Congress’ desire to protect small em-

greater rights.” *Id.* However, “when the FMLA’s and the ADA’s remedies coincide, the employee may only utilize one statute’s relief.” *Id.* (citing *Laffey v. Nw. Airlines, Inc.*, 567 F.2d 429, 445 (D.C. Cir. 1976)).

75. Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1) (West, Westlaw through Dec. 2008 amendments).

76. *See, e.g.*, *Gastineau v. Fleet Mortg. Corp.*, 137 F.3d 490, 494 (7th Cir. 1998); *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1281 (7th Cir. 1995) *Miller v. Maxwell’s Int’l, Inc.*, 991 F.2d 583 (9th Cir. 1993). Title VII defines the term “employer” as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day . . . and any agent of such a person.” Civil Rights Act, 42 U.S.C. § 2000e (West, Westlaw through Sept. 2008 amendments). The ADA defines the term “employer” in almost exactly the same way as Title VII. Age Discrimination in Employment Act, 42 U.S.C. § 12111(5) (West, Westlaw through Sept. 2008 amendments). The ADEA defines the term “employer” as “a person engaged in an industry affecting commerce who has twenty or more employees” and notes that the term “employer” also means “any agent of such a person.” Age Discrimination in Employment Act, 29 U.S.C. § 630(b) (2006). The ADEA further defines the term agency: “The term ‘employment agency’ means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person.” Age Discrimination in Employment Act, 29 U.S.C. § 630(c) (2006).

77. Tammi J. Lees, *The Individual vs. The Employer: Who Should Be Held Liable Under Employment Discrimination Law?*, 54 CASE W. RES. L. REV. 861, 864 (2004) (citing *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 180 (4th Cir. 1998); *Gastineau v. Fleet Mortg. Corp.*, 137 F.3d 490, 494 (7th Cir. 1998)).

78. Tracy L. Gonos, *A Policy Analysis of Individual Liability—The Case for Amending Title VII to Hold Individuals Personally Liable For Their Illegal Discriminatory Actions*, N.Y.U. J. LEGIS. & PUB. POL’Y 265, 272 (1999).

79. *See* Civil Rights Act, 42 U.S.C. § 2000e(b) (2006); Equal Opportunity for Individuals with Disabilities Act, 42 U.S.C. § 12111 (West, Westlaw through Sept. 2008 amendments).

80. *See* Age Discrimination in Employment Act, 42 U.S.C. § 2000e(b) (2006); 42 U.S.C. § 12111 (2010); 29 U.S.C. § 630(b) (2006); *see also* Jan W. Henkel, *Discrimination By Supervisors: Personal Liability Under Federal Employment Discrimination Statutes*, 49 FLA. L. REV. 767, 774 (1997) (“Because the relief initially available under Title VII was interpreted to include only remedies that were outside of an individual agent’s capacity to provide, most courts have been

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ployers from the hardship of litigating discrimination claims.⁸¹ Accordingly, the Ninth Circuit in *Miller v. Maxwell's International* stated it is “inconceivable that Congress intended to allow civil liability to run against individual employees.”⁸²

Despite the majority view that the antidiscrimination statutes do not allow for individual liability, a minority of federal courts and several state courts have held the opposite, rejecting the *respondeat superior* interpretation used by other federal courts.⁸³ Several federal courts have held that the use of an agent provision within the definition of employer indicates that the provision has “an independent function.”⁸⁴ Many of these courts also assert that not allowing individual liability will result in encouraging employees to “believe that they may violate Title VII with impunity.”⁸⁵

Certain readings of other statutes, such as Title VII, have led some to believe that the definitions of “employer” that include the phrase “any agent of such a person” support agents being susceptible to suit by employees. Such a definition characterizes agents as employers, thus permitting employees to sue both agents and companies.⁸⁶ By including a separate section that defined agents as employers within Title VII and other statutes, Congress arguably intended to “impose individual liability on agents as statutorily defined employers.”⁸⁷

Several federal district courts, rather than addressing the statutory language, have used further justifications to support holding individuals liable under their state antidiscrimination statutes. For

fairly comfortable concluding that Congress did not intend for agents to be held personally liable under Title VII.”)

81. See *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1281 (7th Cir. 1995).

82. *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) (holding that a former employee could not bring sex and age discrimination claims against individual employees).

83. See *Lorillard v. Pons*, 434 U.S. 575, 582 (1978); see also *Miller*, 991 F.2d at 589 (Fletcher, J., dissenting) (“Because the Supreme Court has noted that the specific and selective incorporation of the FLSA’s remedy and procedural provisions into the ADEA evidenced a congressional intent to adopt existing interpretations of those provisions into the ADEA, some courts have extended the FLSA’s imposition of personal liability on supervisors as ‘employers’ to the ADEA despite the very different definitions of ‘employer’ used in each statute.”); *Henkel*, *supra* note 80, at 780 (asserting that these courts believed that “the ADEA’s incorporation of the FLSA’s enforcement scheme is more important in unraveling the issue of supervisor liability under the ADEA than its definition of ‘employer’”).

84. *Gonos*, *supra* note 78, at 274; see also *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989).

85. *Hamilton v. Rodgers*, 791 F.2d 439, 442 (5th Cir. 1986).

86. See *Henkel*, *supra* note 80, at 777-78 (“[The] agent language would be redundant if read merely as making an employer liable for the conduct of its agent.”).

87. *Id.* at 778.

example, in *Jendus v. Cancer Treatment Centers of America, Inc.*, the court held that individual liability is necessary to satisfy the deterrent function of employment discrimination laws.⁸⁸ In addition, some federal district courts believe that “personal liability vindicates victims of discrimination more effectively than vicarious liability.”⁸⁹ Moreover, in the interest of justice, the person who acts unlawfully toward an employee should be held responsible and be punished for the wrongdoing.⁹⁰

C. The Relationship Between the FMLA and the FLSA

The debate concerning the FMLA usually centers on the definition of “employer.” Should the FMLA’s definition of employer be interpreted according to the definition in FLSA cases or according to the definition derived from courts’ interpretations of antidiscrimination statutes? For example, in looking to Title VII, the courts have found “little guidance as to the intent of the legislature regarding the scope of the definition” of employer.⁹¹ Nonetheless, most courts have held against individual liability.⁹² Most courts, in following Title VII precedent, have also held that under the ADA individual liability is inappropriate because the ADA uses “virtually identical” definitions of employer, as does Title VII.⁹³ In cases involving individual liability under the FLSA, courts have used a more “expansive definition as to who may be held liable for relief owed to an employee arising from a FLSA violation.”⁹⁴ Managers, supervisors, and high-level officials subject to individual liability include those who have the power to hire and fire, those who have supervision and control over work schedules and employment conditions, those who are involved in determining pay, and those who maintain employment records.⁹⁵

88. See *Jendus v. Cancer Treatment Ctrs. of Am., Inc.*, 868 F. Supp. 1006, 1011 (N.D. Ill. 1994).

89. Lees, *supra* note 77, at 880.

90. See *Bishop v. Okidata, Inc.*, 864 F. Supp. 416, 424 (D.N.J. 1994); see also *Strzelecki v. Schwarz Paper Co.*, 824 F. Supp. 821, 829 n.3 (N.D. Ill. 1993).

91. Brainerd, *supra* note 20, at 1591 (asserting that Title VII does not state whether supervisors should be held individually liable).

92. See, e.g., *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1281 (7th Cir. 1995); *Grant v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir. 1994); *Miller v. Maxwell’s Int’l*, 991 F.2d at 587 (9th Cir. 1993); *Sauers v. Salt Lake Cnty.*, 1 F.3d 1122, 1125 (10th Cir. 1993).

93. See, e.g., *Evans v. Work Opportunities Unlimited, Inc.*, 927 F. Supp. 554, 555-56 (D.N.H. 1996); *Miller v. Giglio Distrib. Co.*, 899 F. Supp. 318, 319 (E.D. Tex. 1995).

94. See Raymond J. Farrow, *Qualifying Immunity: Protecting State Employees’ Right to Protect Their Employment Rights After Alden v. Maine*, 76 WASH. L. REV. 149, 153 (2001).

95. See *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).

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The court in *Knussman v. Maryland* noted that because “[u]nder the FMLA, the definition of ‘employer’ includes ‘any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer, . . . liability of individual defendants in their individual capacities is not foreclosed.”⁹⁶ Since this definition arguably can include a manager or supervisor whose primary duty is to act in the interest of an employer, widening the interpretation of liability under the FMLA, the issue of this definition continues to divide the federal courts.

According to the FLSA, the definition of “employer” includes “any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency”⁹⁷ Similarly, the FMLA’s definition of “employer” includes “any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer” in its definition of “employer.”⁹⁸ The similarities of these two definitions have led several courts to believe that disputes over individual liability under the FMLA should be resolved in the same manner as such disputes that have been resolved under the FLSA.⁹⁹ An example of an instance where a federal court examined the issue of whether an employee could be held liable under the FLSA can be found in *Lee v. Coahoma County, Miss.*¹⁰⁰ In *Lee*, the Fifth Circuit held that a sheriff’s managerial duties meant that he was considered an “employer” under the FLSA.¹⁰¹ Therefore, “[i]f an individual with managerial responsibilities is deemed an employer under the FLSA, the individual may be jointly and severally liable for damages resulting from the failure to comply with the FLSA.”¹⁰²

96. *Knussman v. Maryland*, 935 F. Supp. 659, 664 (D. Md. 1996).

97. Fair Labor Standards Act, 29 U.S.C. § 203(d) (2006).

98. Family and Medical Leave Act, 29 U.S.C. § 2611(4)(A)(ii)(I) (2006). “Employer” also includes any “public agency.” 29 U.S.C. § 2611(4)(A)(iii) (2006). Additionally, the FLSA and FMLA include similar provisions relating to damages that an employer must pay an aggrieved employee. Both statutes state that an employer who violates the statute must pay the employee lost or unpaid wages or compensation and an additional amount in liquidated damages. *See* 29 U.S.C. § 2617(a)(1); 29 U.S.C. § 216(a)-(c).

99. *See Wascara v. Carver*, 169 F.3d 683, 685-86 (11th Cir. 1999) (“The fact that Congress, in drafting the FMLA, chose to make the definition of ‘employer’ materially identical to that in the FLSA means that decisions interpreting the FLSA offer the best guidance for construing the term ‘employer’ as it is used in the FMLA.”).

100. *See Lee v. Coahoma Cnty., Miss.*, 937 F.2d 220, 222 (5th Cir. 1991).

101. *Id.* at 226.

102. *Id.* The FMLA also uses the same standard applied by the FLSA in determining whether a violation is willful: “whether the employer knew or showed reckless disregard for whether its conduct was prohibited by the FLSA [or FMLA]” DECKER, *supra* note 3, at 229.

Despite the statutory language similarities to the FLSA, some believe that the FMLA “was grounded in the same soil as other federal antidiscrimination statutes.”¹⁰³ Others believe that although the purpose of the FMLA is similar to the purpose of Title VII, “the legislative history also indicates that the FMLA is designed to serve as a minimum labor standard, analogous to child labor laws, the minimum wage laws . . . and other labor laws that establish minimum standards for employment.”¹⁰⁴ The FLSA is an example of such a law since it addresses labor standards.

According to the cases listed above, the issue of employee individual liability is not a new one; it has been litigated under several other labor and employment statutes throughout the twentieth century. Whether or not the FMLA allows for individual liability will primarily depend on whether courts hold that its purpose and language more closely mirrors that of the FLSA or that of antidiscrimination statutes such as Title VII and the ADA.

III. MANAGERS AND SUPERVISORS IN THE PUBLIC AND PRIVATE SECTORS CAN BE HELD INDIVIDUALLY LIABLE

Federal court decisions, legal scholarship, and public policy reasons each support the assertion that the language of the FMLA supports the possibility of supervisors and managers being held liable in their individual capacities.

A. Arguments from the Federal Courts

In the private employer context, almost every federal court addressing this issue has held that “individual liability may be imposed under the FMLA.”¹⁰⁵ For a supervisor or manager to be held liable in his or her individual capacity, he or she must have somehow controlled “the plaintiff’s ability to take an FMLA leave of absence and restoration to the plaintiff’s former position.”¹⁰⁶ The majority of the debate surrounding individual liability under the FMLA focuses on whether managers and supervisors in the public sector may also be held individually liable.

103. Rogers, *supra* note 8, at 1306.

104. Sperino, *supra* note 18, at 103 (“This analogy to minimum wage laws has led courts to reason that incorporating the FLSA’s definition of employer is appropriate.”).

105. Ossip & Hale, *supra* note 35, at 387 n.64.

106. *Id.* at 387-88.

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In 2006, the Fifth Circuit in *Modica* heard a case involving a public employee who alleged that she was terminated as a result of her failure to return to work after her leave under the FMLA expired.¹⁰⁷ In holding that public supervisors could be subject to personal liability under the FMLA, the court noted that most district courts have followed this interpretation of the FMLA.¹⁰⁸ The court also pointed to the analysis used by the court in *Wascura*, emphasizing that “the fact that Congress, in drafting FMLA, chose to make the definition of employer materially identical to that in FLSA means that decisions interpreting the FLSA offer the best guidance for construing the term employer as it is used in the FMLA.”¹⁰⁹ The court seemed to believe that Congress’ word choice in drafting the FMLA was more determinative of its intent regarding individual liability than the underlying purposes of the FMLA to decrease gender discrimination in the workplace.

In *Knussman*, a 1996 decision that was binding until 2009, the United States District Court for the District of Maryland held that under the FMLA, “liability of individual defendants in their individual capacities is not foreclosed.”¹¹⁰ In *Knussman*, individual agents of the state police, Knussman’s employer, denied his request to take a parental leave of absence under the FMLA after the birth of his child.¹¹¹ The court denied the individual defendant’s motion to dismiss, holding that “individual liability is permissible under the FMLA ‘provided the defendant had supervisory authority over the complaining employee and was responsible in whole or part for the alleged violation.’”¹¹² By using a test similar to the “operational control test” of

107. *Modica v. Taylor*, 465 F.3d 174, 177 (5th Cir. 2006).

108. *Id.* at 184.

109. *Id.* at 186-87 (quoting *Wascura v. Carver*, 169 F.3d 683, 686 (11th Cir. 1999)).

110. *Knussman v. Maryland*, 935 F. Supp. 659, 664 (D. Md. 1996).

111. *See id.* at 662.

112. *Id.* (quoting *Freeman v. Foley*, 911 F. Supp 326, 330-31 (N.D. Ill. 1995)). Furthermore, the Code of Federal Regulations’ expanded explanation of the definitions used in the FMLA states that employers covered by FMLA also include “any person acting, directly or indirectly, in the interest of a covered employer to any of the employees of the employer” 29 C.F.R. § 825.104(a) (2010). This definition of employer plainly indicates that the language of the FMLA allows for public employees to be held individually liable. 29 C.F.R. § 825.104(a) (2010). *See Modica*, 465 F.3d at 184, 187; *see also* John A. Bourdeau, *Establishing Employer’s Discriminatory Motive in Action to Recover for Employer’s Retaliation for Employee’s Exercise of Rights Under Family and Medical Leave Act, in Violation of § 105(a) of Act*, 190 A.L.R. FED. 491, § 2(b) (2003) (“[C]ounsel should also be aware that the majority view, among the courts that have addressed the issue, is that individual liability for supervisors and managers does exist under the FMLA.”).

Freemon v. Foley,¹¹³ the *Knussman* court, with clear justification, looked to the specific facts surrounding the FMLA violation when assessing who could be held responsible for such a violation.¹¹⁴

The Eighth Circuit in *Darby* supported a plain meaning approach to interpreting the meaning of “employer” under the FMLA, stating:

The plain language of the statute decides this question. Employer is defined as “any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer.” This language includes persons other than the employer itself. . . . If an individual meets the definition of employer as defined by the FMLA, then that person should be subject to liability in his individual capacity.¹¹⁵

In *Darby*, a plaintiff employee of the police department alleged that she was disciplined for using her FMLA leave and brought suit against her supervisors and the police department for violating the FMLA.¹¹⁶ The court held that the plaintiff was permitted to sue the supervisors because “if an individual meets the definition of employer as defined by the FMLA, then that person should be subject to liability in his individual capacity.”¹¹⁷ For the *Darby* court, there was no need to go further than the statute itself to determine whether individual liability was appropriate. Since the language of “employer” in the FMLA included those who act directly or indirectly in the employer’s interest, the court clearly understood this language to permit individual liability.

In *Freemon*, a case that focused on supervisor liability under the FMLA, the court looked to the FLSA for guidance and noted that the definition of employer differed from the definition of employer that is included in Title VII, the ADA, and the ADEA.¹¹⁸ As a result, “the court declined to extend the reasoning of the cases interpreting these

113. 911 F. Supp. at 331. The “operational control test” states “an individual may be liable in an FLSA action “provided the defendant had supervisory authority over the complaining employee and was responsible in whole or part for the alleged violation.” *Id.* (citing *Riordan v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987)).

114. *See Knussman*, 935 F. Supp. at 664.

115. *Darby v. Bratch*, 287 F.3d 673, 681 (8th Cir. 2002).

116. *See id.* at 676.

117. *Id.* at 681. Further support can be found in *Meara v. Bennett*, where “although the court [had] been unable to locate any Court of Appeals decisions addressing the issue of individual liability under the recently-enacted FMLA, the decisional law developing at the district court level favored individual liability.” 27 F. Supp. 2d 288, 291 (D. Mass. 1998); *see also* *Wooster*, *supra* note 16, at 561.

118. *Freemon v. Foley*, 911 F. Supp. 326, 330 (N.D. Ill. 1995) (“Given the parallel between these two statutes, we look to the FLSA—rather than the aforementioned discrimination statutes—to enlighten our interpretation of the term ‘employer’ under the FMLA.”).

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anti-discrimination statutes to the FMLA claims.”¹¹⁹ Instead, the court focused on the language of the FMLA. Because the language mirrored the FLSA, rather than the antidiscrimination statutes, the court looked to previous FLSA cases that held that an employee’s immediate supervisor, that supervisor’s supervisor, and corporate officers of a company could each be held individually liable. Such liability was contingent on the supervisor or officer of the employer maintaining “supervisory authority over the complaining authority and [being] responsible in whole or in part for the alleged violation.”¹²⁰ Using the same rationale of the FLSA cases, the court in *Freemon* held that the plaintiff’s immediate supervisors had sufficient control over the plaintiff’s ability to take leave and were therefore subject to individual liability.¹²¹ The plaintiff’s temporary supervisor was not subject to such liability because of his lack of control over the situation.¹²² By looking to the entity in control, the court included supervisors in the definition of “employer” in both the FLSA and the FMLA.

The decisions of these federal courts have often acted as support in legal scholarship defending the allowance of individual liability under the FMLA. Scholars, too, have looked to the language of the FMLA, congressional intent, and the interpretation of other employment statutes by the federal courts.

B. Scholarly Arguments

Proponents of public and private supervisor and manager liability have argued that, “courts should refrain from distinguishing between the public and private sector for liability purposes, as it does not conform with either the intent of the framers or the remedial and preventative purposes of the statute itself.”¹²³ As of 2006, no federal circuit court had decided a case that directly addressed whether individual liability was appropriate in the context of a private employer although such an issue has been addressed several times in the public

119. Rogers, *supra* note 8, at 1320-21 (referring to *Freemon*, 911 F. Supp. at 330).

120. *Freemon*, 911 F. Supp. at 331 (citing *Riordan v. Kempiners*, 831 F.2d 690, 694 (7th Cir. 1987)) (“[E]ven if a defendant does not exercise exclusive control over all the day-to-day affairs of the employer, so long as he or she possesses control over the aspect of employment alleged to have been violated, the FLSA will apply to that individual.”).

121. See *supra* note 113 and accompanying text.

122. *Freemon*, 911 F. Supp. at 332.

123. Brainerd, *supra* note 20, at 1588.

employer context.¹²⁴ Further, “opponents of public sector liability, and the jurisdictions that have supported their position, have failed to explain why public officials should be exempt from liability while supervisors in a private setting are not.”¹²⁵

In support of individual liability, several scholars have referenced the *Freemon* case.¹²⁶ The court used an “operational control test” in determining that “because of the expansive interpretation given to the term ‘employer’ by the FLSA, liability under the FMLA would extend to all those who controlled in whole or in part Freemon’s ability to take a leave of absence and return to her position.”¹²⁷ This test clearly supports individual liability because it is the supervisors and others in control of granting leave—not solely the employer as a whole—that have “operational control.” Further, its simplicity in defining precisely who constitutes the “employer” further underscores the ambiguity of the definition of “employer” as used in both the FLSA and the FMLA.¹²⁸

Furthering their argument, proponents also point out that while both Title VII and the ADA are located in Title 42 of the United States Code, the FMLA and the FLSA are located in Title 29.¹²⁹ The difference in federal code titles offers support to the notion of comparing issues of FMLA individual liability to past issues of individual liability under the FLSA, rather than past issues of individual liability under Title VII or the ADA. In doing so, it is likely that the FMLA allows for supervisors and managers to be held liable in their individual capacities since the majority of FLSA cases involving similar issues

124. See Sperino, *supra* note 18, at 72. “Courts interpreting the term ‘employer’ under the FMLA have almost universally read the term as allowing individuals to be liable under the Act if they are acting on behalf of a private employer.” *Id.* at 76.

125. Brainerd, *supra* note 20, at 1603; see also *Morrow v. Putnam*, 142 F. Supp. 2d 1271, 1274 (D. Nev. 2001).

126. See Brainerd, *supra* note 20, at 1595; Rogers, *supra* note 8, at 1319.

127. See *supra* note 113; Rogers, *supra* note 8, at 1323-24; see generally *Cantley v. Simmons*, 179 F. Supp. 2d 654 (S.D. W. Va. 2002) (denying defendants’ motion to dismiss because the FMLA was found to provide individual liability for employees in public agencies); *Carter v. U.S. Postal Serv.*, 157 F. Supp. 2d 726 (W.D. Ky. 2001) (finding that the FMLA as providing individual liability); *Morrow*, 142 F. Supp. 2d at 1271 (finding no implicit public agency exception to individual liability under the FMLA); *Rupnow v. TRC, Inc.*, 999 F. Supp. 1047 (N.D. Ohio 1998) (holding supervisors individually liable); *Stubl v. T.A. Sys., Inc.*, 984 F. Supp. 1075 (E.D. Mich. 1997) (finding an employer’s president and vice president individually liable).

128. See Brainerd, *supra* note 20, at 1595-96.

129. *Id.* at 1593. Title 29 of the United States Code covers Labor, while Title 42 of the Code covers Public Health and Welfare. Compare 29 U.S.C. §§ 1-30 (2006), with 42 U.S.C. §§ 1-155 (2006).

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have reached this conclusion.¹³⁰ As previously mentioned, the Ninth Circuit has created a four-part test to determine whether an individual or an organization may be considered an employer within the terms of FLSA.¹³¹ If such a test is to be utilized for FMLA individual liability issues, it follows that a supervisor or manager may be considered an employer under the FMLA and thus may be individually liable for violating it.

C. Public Policy Justifications in Support of Individual Liability

Not only do many federal courts and several scholarly articles support the notion of employees being held liable in their individual capacities, but public policy does as well. Holding a manager or supervisor liable does not only help to compensate an aggrieved employee for a wrong, but it also encourages a more responsible workplace. The FMLA defines the term “employer” more expansively to include any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer.¹³² The possibility of being held liable could have a potential deterrent effect.¹³³ This deterrent effect may work to foster more respectful relationships between managers and staff.

Regarding public employers, a proponent of individual liability argued that:

[f]inding public sector supervisors individually liable in the same manner as private sector supervisors, as most jurisdictions have done, does not frustrate the purposes of the FMLA. In fact, holding public sector supervisors to the same standard as private sector supervisors can only serve the public good by offering an additional incentive to such supervisors to abide by federal law, just as those in the private sector must.¹³⁴

130. For cases interpreting “employer” under the FLSA, see *Falk v. Brennan*, 414 U.S. 190 (1973); *Reich v. Circle C Inv., Inc.*, 998 F.2d 324, 326 (5th Cir. 1993); *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 963 (6th Cir. 1991); *Riordan v. Kempiners*, 831 F.2d 690, 690 (7th Cir. 1987).

131. See *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983). “The factors in favor of concluding the individual has reached employer status include: (1) the power to hire and fire, (2) supervision and control of work schedules or conditions of employment, (3) involvement in determining payment rate and method, and (4) involvement in maintaining employment records.” See also *Brainerd*, *supra* note 20, at 1594.

132. Family and Medical Leave Act, 29 U.S.C. § 2611(4)(A)(ii)(I) (2006); see also *Wascura v. Carver*, 169 F.3d 683, 685 (11th Cir. 1999).

133. See *Sperino*, *supra* note 18, at 109-10 (“Individuals will take more precautions to avoid violating the FMLA when they know that they personally can be held liable.”).

134. *Brainerd*, *supra* note 20, at 1604.

Additionally, allowing for both individual perpetrators of FMLA violations and the employers to be held liable deters discrimination by creating fear within individuals who may be subject to direct liability and by making it clear that employers are not immune from suit, due to possible exposure to vicarious liability.¹³⁵

Another public policy reason for allowing individuals to be liable in their individual capacity is an opportunity for the victims to be made whole following an employment discrimination incident. Based on the “innocent plaintiff” rationale, the FMLA should “allow for multiple defendants to be potentially liable for conduct, so that in the event that one of the defendants is financially unable to meet a potential verdict, the plaintiff has a remedy.”¹³⁶ Using a joint and several liability system, a victim can receive a judgment against all liable defendants, including both the individual employee and the employer, and then enforce that judgment against one or all of the liable defendants.¹³⁷ Monetary relief alone is not enough to make victims feel whole.¹³⁸ Allowing victims to sue the individual responsible for violating the FMLA satisfies the victims’ desire for retribution against the wrongdoer. By not allowing individual liability under the FMLA, there is no way that this feeling of retribution will ever be satisfied and victims of employment discrimination will never be made whole. The victim will therefore be “denied some measure of vindication when a court refuses to hold the perpetrators of discrimination responsible of their own acts.”¹³⁹

IV. MANAGERS AND SUPERVISORS IN THE PUBLIC AND PRIVATE SECTOR CANNOT BE HELD INDIVIDUALLY LIABLE

The same sources that have shown clear support for individual liability—federal courts, legal scholarship, and public policy—have also provided support for the opposing side against such liability under the FMLA.

135. See Lees, *supra* note 77, at 883 (noting that individual liability and employer liability together are the most effective means to deterring and eliminating employment discrimination).

136. Sperino, *supra* note 18, at 111.

137. See RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIABILITY § A18 (2000).

138. See Gonos, *supra* note 78, at 291.

139. *Id.* at 269.

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A. Arguments from the Federal Courts

Recently, in August 2009, the United States District Court for the District of Maryland heard a case involving a United States Postal Service employee who sought damages for alleged violations of the FMLA in *Sadowski*.¹⁴⁰ The employee sued both the Postal Service and three of her former supervisors in their individual capacities. In overturning its previous holding in *Knussman* that allowed for individual liability under the FMLA, the court found “convincing the reasoning given in *Mitchell* and *Keene* and therefore conclude[d] that the language of the FMLA prohibits public employees from being found individually liable.”¹⁴¹ The court, which had previously focused on the control aspect of supervisors in allowing individual liability, reversed its reasoning and asserted that the purposes behind the FMLA could not support individual liability.

The Sixth Circuit in *Mitchell* believed it was not coincidental that an employer as defined in the FMLA mirrors the definition of employer in the FLSA.¹⁴² The court emphasized that in the past it has “interpreted the FLSA’s ‘any person who acts, directly or indirectly, in the interest of the employer’ language to impose individual liability on private-sector employers,” not public sector employers.¹⁴³ Due to the purposeful similarity in the language of FMLA, the Sixth Circuit applied its past holding relating to the FLSA to reach its holding in *Mitchell* that the “FMLA’s text and structure does not impose individual liability on public agency employees.”¹⁴⁴ Further, “the FMLA’s definition of ‘employer’ segregates the specific provision regarding liability from the specific provision addressing ‘public agency’ employers,” thus supporting the conclusion that individual liability amongst public employees was not intended by the drafters of the FMLA.¹⁴⁵ By focusing solely on past FLSA decisions within its own circuit, the

140. *See Sadowski v. U.S. Postal Serv.*, 643 F. Supp. 2d 749 (D. Md. 2009).

141. *Id.* at 754. Another district court held that it did not have subject matter jurisdiction over an individual capacity claim brought against public employees because they did not fit into the FMLA’s definition of “employer.” *Sprinkle v. City of Douglas, Ga.*, 621 F. Supp. 2d 1327, 1343 (S.D. Ga. 2008).

142. *See Mitchell v. Chapman*, 343 F.3d 811, 827 (6th Cir. 2003). The Eleventh Circuit, in *Wascura*, also held that public officials cannot be held liable in their individual capacities because a public official is not an “employer” under the FMLA. *Wascura v. Carver*, 169 F.3d 683 (11th Cir. 1999). However, the *Wascura* court’s reasoning received criticism because it held that public employees could not be individually liable under the FMLA simply because the Eleventh Circuit did not have any binding FLSA precedent. *Ossip & Hale, supra* note 35, at 388-89 n.69.

143. *Mitchell*, 343 F.3d at 827.

144. *See id.* at 829.

145. *Id.* at 828.

Mitchell court refused to permit individual liability under the FMLA in the public arena despite acknowledging the similarity in language between the FMLA and the FLSA.

In a case involving a postal worker who alleged that the defendant managers violated the FMLA by denying his request to take time off for a serious health condition, the United States District Court for the Middle District of North Carolina in *Keene v. Rinaldi* held that the postal worker could not sue the defendants in their individual capacities under the FMLA.¹⁴⁶ The court noted that “had Congress so intended, it surely would have made this intent [for individuals to be held liable] crystal clear by placing subsection 4(A)(ii) last in the statute.”¹⁴⁷ Certain employees are included in the definition of “employer” under the FMLA, but it does not mention public employees. Instead, the FMLA simply states that a “public agency” is included in the “employer” definition, not public employees.¹⁴⁸ The fact that there is no mention of public employees within subsection 4(A)(ii) or 4(A)(iii) very strongly suggests that Congress did not intend for persons acting on behalf of public employers to be held individually liable.¹⁴⁹ Furthermore, the court stressed that the Code of Federal Regulations fails to discuss liability for supervisors who work for public agencies, providing more support for its holding that prohibited such individual liability.¹⁵⁰ By pointing out the absence of any statement permitting individual liability of public managers under the FMLA, this court concluded that the absence was indicative of forbidding such liability.¹⁵¹

B. Scholarly Arguments

Those who oppose individual liability in both the public and private sectors sometimes ask the question: how does extending liability to managers and supervisors encourage the FMLA’s underlying policy of fighting discrimination against women in the workplace?¹⁵² Instead of categorizing the FMLA as a minimum labor standard that is similar

146. See *Keene v. Rinaldi*, 127 F. Supp. 2d 770, 778-789 (D.N.C. 2000).

147. *Id.* at 776.

148. Family and Medical Leave Act, 29 U.S.C. § 2611(4)(A)(iii) (2006).

149. See *Keene*, 127 F. Supp. 2d at 776. Congress’ use of language suggests that it only intended “to create individual liability for persons acting on behalf of private employers.” See *id.*

150. *Id.*

151. *Id.*

152. See *Rogers*, *supra* note 8, at 1301 (“To those who opposed to the FMLA because of the enormity of its potential costs, . . . the notion of individual liability for FMLA violations is alarming.”).

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to the FLSA, these scholars argue that courts should consider “its more appropriate characterization as an antidiscrimination statute.”¹⁵³ One scholar finds an example of incorrect categorization in the *Knussman* case, where “like *Freemon* and *McKiernan* before, the *Knussman* court failed to read the FMLA as a whole, glanced too quickly at the Department of Labor’s regulations, and did not consider the significant analytical problems inherent in importing FLSA case law into FMLA interpretation.”¹⁵⁴

Scholars argue that use of the plain meaning rule to interpret whether the language of the FMLA supports individual liability is also problematic.¹⁵⁵ Three reasons support the assertion that it is disingenuous to use plain meaning. First, courts that use plain meaning have not distinguished FMLA claims from a “Supreme Court case¹⁵⁶ which held, that under the National Labor Relations Act, a similar definition of ‘employer’ creates respondeat superior liability, and not individual liability.”¹⁵⁷ Second, even upon conceding that the plain meaning of the words of the FMLA does in fact impose individual liability, such a meaning would create liability that is broader than courts would want.¹⁵⁸ Lastly, even in using the plain meaning approach to interpret the FMLA, courts reach varied conclusions as to the meaning of the language.¹⁵⁹

C. Public Policy Justifications Opposed to Individual Liability

In some ways, according to this argument’s proponents, public policy favors the position that the FMLA does not support individual liability. By allowing supervisors or managers to be held liable, another victim is created. This holds especially true when those supervisors or managers were unaware of the FMLA requirements at the time of the alleged violation or when the industry has a high turnover

153. *Id.* at 1318 (asserting that courts improperly classified the FMLA as a minimum labor standard, thus ignoring the FMLA’s history and purpose).

154. *Id.* at 1328.

155. See Sperino, *supra* note 18, at 82.

156. “The *Packard* case strongly suggests that the portion of the FMLA’s definition of ‘employer’ that has been interpreted as creating individual liability should be instead be read as creating respondeat superior liability.” Sperino, *supra* note 18, at 87 (referencing *Packard Motor Car Co. v. N.L.R.B.*, 330 U.S. 485 (1947)).

157. Sperino, *supra* note 18, at 82. Adding to support the argument against of individual liability is the Restatement (Second) of Agency, which states “principal and agent can be joined in one action for a wrong resulting from the tortious conduct of an agent.” RESTATEMENT (SECOND) OF AGENCY § 359C(1) (1958).

158. See Sperino, *supra* note 18, at 82.

159. *Id.*

in its managerial positions. One scholar made an interesting and viable assertion regarding the idea of holding employees liable: “To those who opposed the FMLA because of the enormity of its potential costs . . . the notion of individual liability for FMLA violations is alarming.”¹⁶⁰

“Similarly, even for the Act’s supporters, who initially conceived of the Act as a way to fight discrimination against women in the workplace, the notion likely seems strange.”¹⁶¹ The sometimes “confusing, vague, contradictory, and difficult” language of the FMLA makes it difficult for supervisors and managers to know what the FMLA requires regarding the granting of leave, let alone how to implement such leave policies.¹⁶² Restricting liability to only the corporate entity, rather than also to managers and supervisors, will create more social and economic efficiency in the implantation and the administration of the FMLA.¹⁶³ The purpose of the FMLA, to promote a gender-neutral workplace, will occur without causing hardship to employees in managerial positions who also deserve to benefit from the protections under the FMLA.¹⁶⁴

V. RECONCILIATION: WHICH SIDE IS CORRECT?

Three public policy reasons are at the heart of the argument in favor of individual liability. First, holding employees personally liable for violating the FMLA will vindicate victims “more effectively than vicarious liability.”¹⁶⁵ Second, a person “who acts unlawfully should

160. Rogers, *supra* note 8, at 1301.

161. *Id.*

162. See Sperino, *supra* note 18, at 109 (“[It] imposes large, unexpected risks on individuals for violations of a statute that even a congressional committee has described as confusing, vague, contradictory, and difficult for employers to administer.”).

163. See Rogers, *supra* note 8, at 1301 (“Restricting liability to the corporate entity will protect managers and supervisors from considerable exposure for their mere compliance with corporate policies, while encouraging corporate policymakers to faithfully implement and comply with the family-friendly policies of the FMLA.”).

164. The competing interests of the employer may present another argument against individual liability. An example of such an interest may occur when the lead employee on an important project is injured. Important questions to consider when looking to this argument include the following: Is the employer obligated to act in the best interest of the employee, even though allowing the lead employee to take leave will work as a detriment to the employer? Should the potential suffrage of the employer be taken into consideration when deciding whether to grant or deny an FMLA leave request? Can the employer modify (or lessen) the amount of leave requested by the employee without facing consequences for violating the FMLA?

165. See Lees, *supra* note 77, at 880 (asserting that a monetary judgment against the employer is not enough; victims will only feel vindicated once the actual wrongdoer is held accountable for his or her unlawful acts).

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be punished for his or her wrongdoing.”¹⁶⁶ Third, to satisfy the deterrent function of the FMLA, individual liability is necessary.¹⁶⁷

Public and private employees *can* be held liable in their individual capacity for violating the FMLA. The language of the FMLA, federal case law, and public policy considerations all support this conclusion more than they do the opposing side. Some may question why an employee would need to sue his or her supervisor when the employee can get more money by suing the overall employer. The answer was simply stated by one scholar: “Holding both individuals and employers liable . . . is the most effective means to accomplish the goals of [the law]: fully compensating victims and deterring future and continuing discrimination.”¹⁶⁸

In terms of statutory interpretation, the language of the FMLA resembles the FLSA more than it does the language of other antidiscrimination statutes such as Title VII and the ADA.¹⁶⁹ The definition of “employer” in each statute is compelling. The FMLA includes “any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer” in its definition of “employer.”¹⁷⁰ In an almost identical way, the FLSA describes an employer as a “person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency. . . .”¹⁷¹ The same cannot be said for Title VII, which defines “employer” as “a person engaged in an industry affecting commerce who has [fifteen] or more employees for each working day . . . and any agent of such a person.”¹⁷² Furthermore, by defining “employer” as “any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer,”¹⁷³ the FMLA does not require in-depth statutory interpretation to understand the mean-

166. *Id.* at 881 (stating that blame must be placed on the wrongdoer).

167. *See id.* at 879 (stating that individuals are less likely to discriminate when they know that their actions will be punished).

168. *Id.* at 862 (“While the plain language of current federal employment discrimination statutes excludes individual liability, federal statutes should be rewritten to permit individual, as well as enterprise, liability.”).

169. *See Brainerd, supra* note 20, at 1607 (“Most often compared is the FLSA, as the definition of ‘employer’ in FLSA most closely mirrors that of the FMLA. The vast majority of courts have found liability for public sector supervisors under FLSA.”).

170. *See* Family and Medical Leave Act, 29 U.S.C. § 2611(4)(A)(ii)(I), (iii) (2006) (indicating that the term “employer” also includes any “public agency”).

171. Fair Labor Standard Act, 29 U.S.C. § 203(d) (2006).

172. Civil Rights Act, 42 U.S.C. § 2000e (2006).

173. Family and Medical Leave Act, 29 U.S.C. § 2611(4)(A)(ii)(I) (2006).

ing of this language.¹⁷⁴ This language is clear on its face and requires no more than the plain meaning approach to understand its meaning.

Supervisors and managers are typically responsible for several employees of the employer. In this capacity, they are acting directly, and sometimes indirectly, in the interest of their employer to its employees. Thus, supervisors and managers fall within the FMLA's definition of employer and are therefore subject to individual liability in the event that they violate any provision of the FMLA.

Arguments in opposition to individual liability fail for several reasons. First, the plain language of the FMLA can only lead to the conclusion that employees, whether public or private, can be held individually liable. Even though the federal district courts are currently divided on the issue, "a majority of them have concluded that public employees may be liable in their individual capacities under the FMLA."¹⁷⁵ Second, protecting managers and supervisors from liability will not promote the main purposes of the FMLA. As mentioned previously, the FMLA was enacted for several reasons, including to protect the right to be free from gender-based discrimination in the workplace, to accommodate work/family conflicts, and to provide basic minimum standards of job security.¹⁷⁶ Without consequences for violating the FMLA, supervisors and managers will act without fear to discriminate against employees who need to take leave under the Act.

Since it can be successfully argued that managers and supervisors should be held individually liable, the natural progression would include those in the public sector as well as those in the private sector. Creating a difference between the public and private sector in terms of liability under the FMLA is without justification. In the Eighth Circuit's decision in *Darby*,¹⁷⁷ the court concluded:

[T]he plain language of the FMLA decides the question, ruling that there was no reason to distinguish employers in the public sector from those in the private sector; if an individual meets the definition of employer under the FMLA, then that person should be subject to liability in his or her individual capacity.¹⁷⁸

174. See *Wooster*, *supra* note 16, at 561; see generally *Longstreth v. Copple*, 101 F. Supp. 2d 776, 779 (N.D. Iowa 2000) (concluding that the plain language of the FMLA "expressed an intent to provide for individual liability").

175. EMPLOYMENT COORDINATOR: BENEFITS § 12:69 (2009).

176. See *Kim*, *supra* note 2, at 3.

177. See generally *Darby v. Bratch*, 287 F.3d 673 (8th Cir. 2002) (holding that under the FMLA, public as well as private sector employers should be subject to liability in his or her individual capacity).

178. EMPLOYMENT COORDINATOR: BENEFITS § 12:69 (2009) (citing *Darby*, 287 F.3d at 681).

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Following this opinion, a district court located in the Seventh Circuit¹⁷⁹ believed the holding of *Darby* to be so compelling that it “was persuaded that the Seventh Circuit would find that an FMLA suit can be maintained against a public official in her individual capacity.”¹⁸⁰ All supervisors and managers, regardless of their employer, should be responsible for knowing the FMLA’s policies and carrying them out without violation. Public and private employees are entitled to be protected under the FMLA from their superiors regardless of their employer’s status as public or private.¹⁸¹ To reiterate, “holding public sector supervisors to the same standard as private sector supervisors can only serve the public good by offering an additional incentive to such supervisors to abide by federal law, just as those in the private sector must.”¹⁸² Further, it is simply unfair to expect employees to anticipate different standards for their supervisors and managers regarding the FMLA that are solely dependent on their place of employment.

VI. SOLVING THE SOCIAL REPERCUSSIONS OF INDIVIDUAL LIABILITY

It is not enough to simply inform employers, supervisors, managers, and other high-level officials that violating the FMLA may result in personal liability. The gravity of social repercussions of permitting individual employee liability is far too severe to leave unaddressed and unsettled.

Many believe that permitting individual liability means that a manager or supervisor will be made to carry the burden of the employer. This belief is not true. An aggrieved employee may sue multiple persons or entities for an FMLA violation—whomever the employee believes is responsible for such violation. If common law agency principles are applied to such a situation, the “principal and

179. See generally *Barnes v. LaPorte Count*, 621 F. Supp. 2d 642 (N.D. Ind. 2008) (holding that a county auditor in a public agency can be held individually liable under the FMLA).

180. EMPLOYMENT COORDINATOR: BENEFITS § 12:69 (2009) (citing *Barnes*, 621 F. Supp. 2d at 645).

181. See *Kilvitis v. County of Luzerne*, 52 F. Supp. 2d 403, 415 (M.D. Pa. 1999); *Wooster*, *supra* note 16, at 561.

[T]he fact that a public official derives authority from a state statute should not result in a different outcome for public officials as opposed to private supervisors and managers, the court argued, since no rational basis exists for distinguishing between supervisory authority conferred by statute and that conferred by the corporate structure.

Id.

182. See *Brainerd*, *supra* note 20, at 1604.

agent can be joined in one action for a wrong resulting from tortious conduct of an agent . . . and a judgment can [be rendered] against each.”¹⁸³ This results in the supervisor or manager being liable for his conduct and the employer being liable for the conduct of its supervisor or manager that it could have prevented if proper steps had been taken to prevent FMLA violations. Allowing the victim to sue multiple defendants makes it possible for the liability to be divided according to fault. Furthermore, if the employer pays the victim and the individual supervisor who was responsible for the FMLA violation is not held individually liable, that supervisor may never be reprimanded for his or her misdeeds.

Unfortunately, situations where a victim may want to sue multiple defendants are not always clear. Oftentimes, several levels of individuals supervise aggrieved employees, thus making it difficult to determine who was really in charge of making FMLA leave decisions. In a scenario where a lower manager was directed to violate the FMLA by a higher manager, allowing the victim to sue whomever he or she believes is at fault, even a manager in his or her individual capacity, is important. This would result in the victim’s ability to sue both managers, as well as the employer, instead of having to conduct his or her own inquiry into who was at fault. At trial, the trier of fact then has the opportunity to determine liability based on who initially decided to violate the FMLA, which would likely be the higher manager. Additionally, in a situation where an employer files for bankruptcy, the victim will not be able to collect damages from the employer. Allowing the victim to sue his or her individual supervisor in such a situation is the only way to guarantee that the victim is made whole following an FMLA violation.

To eliminate confusion in the implementation of the FMLA, it is necessary that one broad approach is applied to all employers, public and private. Courts should not distinguish between the sectors for liability purposes.¹⁸⁴ To minimize the possibility of their managers and supervisors being sued in their individual capacities, employers can do

183. RESTATEMENT (SECOND) OF AGENCY § 359C(1) (1958). Thus, the employer will not be held liable due to the employee’s negligence. *Id.* Instead, the employer will only be vicariously liable and the burden of both the employee and the employer will be divided accordingly. Lees, *supra* note 77, at 882.

184. See Brainerd, *supra* note 20, at 1588 (“[This] does not conform with either the intent of the framers or the remedial and preventative purposes of the statute itself.”).

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several things within their organizations.¹⁸⁵ One way is to provide FMLA training courses to all employees.¹⁸⁶ This will allow everyone to understand what the FMLA allows in terms of leave, what constitutes an FMLA violation, the repercussions of violating the FMLA, how to avoid violating the FMLA, and what to do when a violation has occurred. Not only will this reduce the possibility of employees being held liable in their individual capacity, but it will also increase the efficiency of the FMLA by improving the quality and legitimacy of FMLA leave requests.

To make more clear whether an employee is requesting leave under the FMLA, employers should utilize a standard employee leave request form that requires employees to indicate their reasons for leaving under the FMLA.¹⁸⁷ Additionally, employers should require that all FMLA leave requests be approved by officials in higher positions, rather than lower level managers or supervisors. This will ensure that the person making the final decision regarding the FMLA leave request has, or should have, in-depth familiarity with the FMLA and how to avoid violations. It also reduces the risk that lower level managers and supervisors will face liability in the event of an FMLA violation.

CONCLUSION

The split in the federal courts relating to the issue of whether the language of the FMLA allows for both public and private supervisors and managers to be held individually liable for violating the FMLA must be resolved. The text of the FMLA supports petitioners in their abilities to sue both public and private managers and supervisors in their individual capacities, separate from the employer's liability, for violating the FMLA. To uphold the many purposes of the FMLA,

185. Employers should consider these things when implementing and administering the FMLA: "(1) the minimum obligations of [the] law; (2) the level of group health plan benefits that the employer desires to provide; (3) the cost of providing any group health plan benefits. . . ; (4) the ease of administration; and (5) the cost of administration." DECKER, *supra* note 3, at 245-46.

186. Courses should be tailored to address the FMLA issues faced by managers or supervisors and by regular employees. For an example of an FMLA training PowerPoint presentation, see Steve Albanese, *FMLA Training*, IOWA POSTAL WORKERS UNION (Feb. 7, 2010), [http://www.apwuiowa.com/FMLA Training.ppt](http://www.apwuiowa.com/FMLA%20Training.ppt).

187. For an example of such a form, see DECKER, *supra* note 3, at 257-58. Employers should then follow-up by providing the employee with an official response to the FMLA request, making clear what the conditions are surrounding the leave (i.e. duration of leave, eligibility, job restoration, etc.). *Id.* at 264-69.

including ending gender discrimination, promoting the resolution of work or family conflicts, and guaranteeing job security for workers, aggrieved employees must be permitted to file suit against whoever is responsible for violating the FMLA, whether it is the employer as a whole, or a specific manager or supervisor. By including “any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer” in its definition of “employer,”¹⁸⁸ the drafters of the FMLA clearly intended for managers and supervisors to be susceptible to liability in the event that one violates the FMLA’s provisions. Managers and supervisors work in the interest of the employer by overseeing its employees and therefore, fall within the FMLA’s definition of “employer.”

Additionally, even though the language of the FMLA closely mirrors that of the FLSA, the same cannot be said of the antidiscrimination statutes. Because of this, it follows that courts should resolve issues of individual liability under the FMLA in the same manner that they solve liability issues under the FLSA. Thus, supervisors and managers should be eligible to be sued in their individual capacity for violating the FMLA, just as they are eligible to be sued for violating the FLSA. As previously discussed, the plain meaning of the FMLA statute eliminates the need to reference many of the cases assessing individual liability under the antidiscrimination statutes, such as Title VII. The FMLA clearly allows for lawsuits against supervisors or managers in their individual capacities.

If managers and supervisors are protected under the FMLA, the guarantee of a discrimination-free work environment under the FMLA cannot exist. Managers and supervisors, not the employer as a whole, typically make decisions to grant leave requests under the FMLA. If such a manager has a discriminatory motive in denying a request, he or she must face consequences if the FMLA is to work for its intended purposes. The aggrieved victim must be able to sue the manager individually, as well as the employer, to be compensated for the damages the leave denial caused the employee and his or her family. Supervisors and managers must be held accountable if they violate the FMLA. Simply put, “it can only serve the public good by providing an incentive for *all* supervisors to abide by the law.”¹⁸⁹ Federal courts should therefore look to cases supporting the rationale

188. Family and Medical Leave Act, 29 U.S.C. § 2611(4)(A)(ii)(I) (2006). The term “employer” also includes any “public agency.” 29 U.S.C. § 2611(4)(A)(iii) (2006).

189. Brainerd, *supra* note 20, at 1607.

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used in *Knussman*, rather than the recent holding and reasoning of *Sadowski*, when faced with this issue in the future.



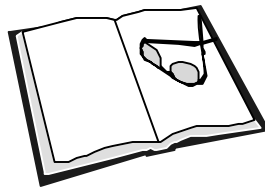


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