

THE COLUMBIA UNDERGRADUATE
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Dear Reader,

We are happy to present to you the fifth issue of the Columbia Undergraduate Law Review.

Our Spring 2010 issue features six exciting papers.

Svetlana Zusina's article "The Etruscan Chariot: the Legal Perspective on Its Ownership" examines the debate concerning the ownership of the Etruscan Chariot between New York's Metropolitan Museum of Art and the Italian town of Monteleone di Spoleto.

Chadni Saxena explores the constitutionality of students who advocate for the use of drugs in school. Saxena examines this issue within the context of the case *Morse et al. v. Frederick*.

In "The Case For a Non-Renewable Fixed Term of Tenure on the Supreme Court," Davida McGhee argues that the fixed term of tenure on the Supreme Court proves outdated and advocates for a non-renewable fixed term of 18 years.

Alyson Cohen's paper, entitled "A Web of Context: James Madison and the Source Selection of the Bill of Rights," analyzes James Madison's role in drafting the Bill of Rights.

Francis Weber's article "Do Urban Growth Boundaries 'Go Too Far' in Regulating Private Property? The Application of the Supreme Court's Taking Doctrine to Oregon's State-Mandated Urban Growth Boundaries" explores Oregon's statewide land use program, especially Goal 14 of such program, in the context of the Fifth Amendment.

Finally, in "*McCleskey v. Kemp*: The Death Nell for Racial Equality in Capital Sentencing," Veronica Couzo analyzes the implications and legacy of *McCleskey v. Kemp* within the context of the Supreme Court's prior attempts to eradicate racial discrimination within the American criminal justice system.

We hope you enjoy the articles

Sincerely,

Madeleine Goldstein

Solomon Kim

Co-Editors-in-Chief

The Etruscan Chariot: The Legal Perspective on Its Ownership

Svetlana Zusina

Abstract

This paper analyzes the dispute over the ownership of the Etruscan Chariot between New York's Metropolitan Museum of Art and the Italian town of Monteleone di Spoleto. The Etruscan chariot is considered to be the most important example of the ancient bronze metalwork and the only complete specimen of an ancient bronze chariot in the world. It was originally discovered in Monteleone di Spoleto in 1902 and, within about a year, transported to the Met. A hundred years later, Monteleone demanded the return of the Etruscan Chariot to Italy, its country of origin, claiming that the Met had acquired the masterpiece illegally. The Met's representatives, however, state that, since the Met has owned the chariot for more than a hundred years, it is too late for any legal claim to be brought. This paper seeks to establish which of the two parties has the legal right to possess this unique masterpiece of Etruscan art. For this purpose, the case is examined through the lens of both Italian and New York cultural property legislation. Tracing a more than a hundred year long history of the chariot since its discovery, the paper applies to it the cultural property laws of unified and pre-unified Italy as well as the Statute of Limitation of New York. Finally, the paper raises the question of how cultural property laws do not always take into account lingering ethical questions.

Introduction

Cultural property and its protection have been a matter of concern of museums, art historians, archaeologists, and nations for a long time. Over the past two hundred years, laws and policies governing the protection of the national cultural heritage have been a subject of constant change. Now, more than ever, the problem of the acquisition and ownership of works of art attracts the attention of the public and the media. This has been the result of a number of conflicts that have taken place in the last couple of decades in the worldwide art community. Foreign governments are now demanding the return of the antiquities that were taken from their countries of origin several hundreds years ago.¹ The dispute over the ownership of the Etruscan chariot between New York's Metropolitan Museum and the town of Monteleone di Spoleto in Italy is an example of one such case.

The analysis of the case of the Etruscan chariot clarifies a lot of issues of the cultural property law. It tracks the changes of the regulations on the sales and the export of antiquities in Italy from the 19th century up to the present time. It explores the legal system of the ownership rights in the United States. Most of all, the comparison of the cultural property law in both the countries allows us to make the right decision regarding the due place of this work of Etruscan art.

The Etruscan chariot and its importance for the world's cultural heritage

The Etruscan culture developed in Italy in the 5th century BCE. This name derives from the word "Etruria" – the area in which the culture began. It started from the coast north of Rome and spread to the areas around contemporary Oviato and

Florence. As far as the origin of the Etruscans is concerned, they are believed to be either an indigenous group or originally from the East. Their art was largely influenced by Greek culture, from which they borrowed the subjects for decorations of their works of art. The Etruscans themselves specialized and excelled in terracotta and metalwork.²

The Etruscan chariot (also called Monteleone chariot) is considered to be the most important example of the ancient bronze metalwork and the only complete specimen of an ancient bronze chariot in any museum.³ The chariot dates back to the 2nd quarter of the 6th century BCE. It belongs to a group of other parade chariots, which were used by noble men and other significant individuals on special occasions. The chariots in this group had two wheels and were drawn by horses. The Etruscan chariot is believed to have been used by a famous Tuscan warrior and nobleman Lars Porsena. When he died, the chariot was placed in his tomb in Umbria together with his arms and household utensils.⁴ It remained there for 2,500 years until it was discovered in 1902.

The surfaces of the Etruscan chariot are largely decorated with repoussé, a metalworking technique whereby a malleable metal is ornamented or shaped by hammering from the reverse side. The three panels of the car of the chariot display the scenes of life of Achilles, the Greek hero of the Trojan War.⁵ Professor Furtwängler, who saw the chariot in the Metropolitan Museum in 1904, noted that the subject of the chariot's decoration was greatly influenced by Greek art. On the front panel, there is a warrior, who receives his helmet and shield from a woman. On the left side, there are two heroes fighting over a body of the third. On the right panel, one can see a chariot drawn by two winged horses. The figures of the "Apollo" type, according to Professor Furtwängler, also suggest a strong connection to Greek art. The manner in which the figures were executed, however, "has not the life of genuine archaic Greek work".⁶ The figures are modeled clumsily and heavily. It is only in the minor decorations that the skill of the artist reaches its high level. The wings of the horses and the designs on the shields are created with delicacy and precision. The Etruscans were especially good at working on minor details. It was established that the chariot belonged to Etruscan art, and not Greek due to its location and artistic technique.⁷

The importance of the Etruscan chariot for the world's cultural heritage is that it is a wonderful specimen of the Etruscan work in bronze and one of the most significant examples of repoussé work of that time. In 1912, the *New York Times* reported that it was the only complete full-size bronze chariot known in the world. Over the last century, the importance of the Etruscan chariot has not diminished. Even today, after many excavations have been conducted, "(t)he bronze chariot from Monteleone ... easily passes as the most splendid, as well as the most perfectly preserved, example of Archaic metal art in our possession."⁸

Due to this uniqueness and great cultural value, the chariot is at the center of an international dispute over its ownership. One party of the conflict is represented by the small Italian town of Monteleone di Spoleto, where the chariot was discovered. The other party is New York's Metropolitan Museum of Art, which has been its home for the last one hundred years. Before arriving at any kind of decision, it is helpful to carefully explore how the Etruscan chariot found its way from Italy to New York.

The Journey of the Etruscan Chariot from Monteleone di Spoleto to the Metropolitan Museum of Art

The Etruscan chariot was found by the landowner Isidoro Vannozzi at Colledel

Capitano near Monteleone di Spoleto, Umbria, on February 8, 1902.⁹ He was digging on his grounds, when the earth suddenly gave way and revealed Lars Porsena's tomb with the chariot, arms, and utensils inside. Vannozi's family used the household utensils in the kitchen, and his children played with the chariot. Two months later, Isidoro took a pot from the tomb to the nearby town of Norcia, hoping to sell it. A man named Benedetto Petrangeli, who bought and sold antiques, saw the pot and became interested. Vannozi took the dealer to his house in Monteleone to show him the other discovered objects, including the chariot. After looking at the chariot, Petrangeli suggested that Vannozi should sell it to him. After some negotiations, the chariot was sold to Petrangeli for 950 lira (64 U.S. cents in today's currency).¹⁰ As the story goes, the chariot went undiscovered by the authorities.¹¹ After this first sale of the chariot, versions of the chariot's journey vary.

In his book *La Biga Rapita* ("The Stolen Chariot"), the historian Mario La Ferla, states that from Monteleone the Etruscan chariot was transported to Rome. There it was stored in a pharmacy in the region of Esquilino and was expected to be sold to a rich collector. The American banker J. P. Morgan happened to be in the Italian capital at that time and fell in love with the chariot. Apart from being one of the richest men in the world, Morgan was also a connoisseur of art, and a pillar of the Metropolitan Museum in New York. He bought it and transported the chariot to Paris where it was stored in the basement of the Credit Lyonnais bank. After that it was moved to Le Havre and then shipped to the U.S. In New York, the Etruscan chariot became the property of the Metropolitan Museum and in 1904, J.P. Morgan became the museum's director.¹²

The British newspaper *The Independent* offers a detailed report on how the chariot found its way to France. According to their report, Petrangeli sold the chariot to the cousins Amadeo and Teodoro Riccardi, who then sold it to J. P. Morgan for 250, 000 lira. The chariot was dismantled and taken to Paris by train, hidden inside other merchandise.¹³ This explanation is supported by the Montelone Chariot Fund. The website of this organization says that the Riccardis dismantled the chariot and stored it in large bean barrels in Rome. Subsequently two Frenchmen transported it to Paris, where it was then stored in the Credit Lyonnais bank.¹⁴

The *New York Times* focused on what happened to the chariot in Paris. In Paris, the chariot was offered for public sale. Great Britain, France, Germany competed for its purchase, but an American manufacturer bought it for \$50, 000 on behalf of the Rogers fund and presented it to the Metropolitan Museum. In 1903, General Luigi Palma di Cesnola, the first director of the Met, welcomed the chariot into the museum.¹⁵ This version is different from that offered by La Ferla, as it does not mention the name of J.P. Morgan and documents the chariot's history at auction,, which La Ferla did not discuss.

Representatives of The Metropolitan Museum offer yet another version of how the Etruscan chariot came to the museum. They argue that O. Vitalini bought the Chariot from Petrangeli and then took it to Paris. In Paris, the chariot was purchased from Vitalini by a representative of The Metropolitan Museum, who then brought it to New York.¹⁶ Like the report of the *New York Times*, this version of the chariot's history, does not acknowledge the participation of J.P. Morgan in the transaction. In contrast to the *New York Times*, The Metropolitan Museum does not support the notion of its sale at auction. At present, the Etruscan chariot is the centerpiece of The Metropolitan Museum's gallery of Greek and Roman art.

The versions of the Etruscan chariot's journey to the United States do differ. Yet, they have a common thread; the chariot was undoubtedly sold and exported from its

original location in Italy. The sale and export have led to a major conflict between the aforementioned parties and have become the cornerstone of the ownership dispute.

The History of the Conflict

Since 2004, Mayor Nando Durastanti of Monteleone di Spoleto and Tito Mazzetta, an American attorney, have been conducting a campaign to return the Etruscan chariot to Italy.¹⁷ Mazzetta sent several letters to the Metropolitan Museum. He argued that the Etruscan chariot was part of the cultural identity of the Italian nation and should therefore be returned to Italy, its country of origin. Mazzetta noted that Monteleone had the support of the Umbrian Regional Government and 48 Italian cities and towns. He claimed that J.P. Morgan was instrumental in illegally obtaining and smuggling the chariot out of Italy. To support this claim, Mazzetta mentioned that the sale and export of antiquities unearthed in Umbria and later in the unified Italy was prohibited from 1821. He said that in 1902 the new legislation declared them to be the property of the Italian state.¹⁸

In response to Mazzetta's claim, Sharon Cott, the chief legal counsel of the Metropolitan Museum, said that the Met has owned the chariot for more than 100 years. She stated that it was too late for any legal claim to be brought.¹⁹ As the *New York Times* reports, the Italian Government discovered that the Etruscan chariot was in the Met in 1904. On February 16th of that same year, Deputy Barnabei, the former director of Fine Arts in Italy, interrogated the Italian Parliament on the case of the mysterious departure of the Etruscan Chariot from Italy. Signor Pinchia, Under Secretary of Public Instruction, said that it was the result of the negligence of the Inspector at the time. The Under Secretary confirmed that the Inspector had already been dismissed.²⁰ After the incident in Parliament, Italy took no further action to reclaim the chariot until 2004.

The accusations brought in October, 2004 began a year after the Metropolitan Museum agreed to return a 2,500-year-old vase and twenty other artifacts back to Italy. The Italian Government expected the Etruscan chariot to follow the same path. However, Harold Holzer, a spokesman for the Metropolitan Museum, pointed out the difference between the situation with the returned objects and that with the Etruscan chariot. Holzer noted that the artifacts had been looted and were therefore returned to Italy. In contrast, the chariot was "purchased in good faith" and has since been "lovingly preserved, widely published and seen by millions of visitors from around the world"²¹.

The campaign held by the mayor of Monteleone is aggravated by the fact that it is not supported by the Italian Government. Maurizio Fiorilli, the head of the Ministry of Culture Commission in Italy, criticized Mazzetta's claim. Fiorilli noted that the expatriation of the Etruscan chariot predated the 1909 law on Italy's cultural heritage as well as the 1970 United Nations convention on cultural property that addressed looting.²² The Italian law of 1909 stated that anything that was found underground in Italy belongs to the state. The 1970 UNESCO convention prohibited the illicit circulation of a nation's cultural property.²³

In 2007, the Met debuted its new galleries of Greek and Roman art.²⁴ According to the report of the *New Jersey Times*, this new wing cost the Met \$250 million.²⁵ The Etruscan chariot has become the centerpiece of the new galleries, where it sits in a beautifully constructed glass box. Tom Vannozzi, the director of the Vannozzi Family Monteleone Chariot Fund, acknowledges that the budget of Italian museums would not allow them to take care of the chariot as well as the Metropolitan. In Italy, he

says, the chariot would end up in line with other works of art that are waiting until the state budget allows them to be placed in a museum.²⁶

Right before the opening of the Greek and Roman galleries in 2007, the Met's counsel Sharon Cott contacted Mazzetta. In her letter, she said that during the ceremony the representatives of the Met would be pleased to highlight the contribution of Monteleone to Etruscan art. However, she said, that would not happen if Durastanti continued with his claim. Mazzetta rejected the offer saying that it was much more important for Monteleone to get the chariot back than to have their name honored at the ceremony.²⁷

In his letters to the Metropolitan Museum, Mazzetta argues that the historical importance of the chariot and the moral standards should outweigh timelines, law and other issues. He said that "laws should be changed. The crimes of the past should not be condoned."²⁸ Mayor Durastanti asserts that they are open to any sort of dialogue with the Met. They are even ready to borrow the chariot from the Museum. "They'll get tired of hearing from us," said Durastanti. "We're mountain people. We don't give up."²⁹ Thus, the case of the Etruscan chariot represents the conflict between the Met's arguments – time frames and good care of the chariot— and the claims of Monteleone – cultural identity and the illegal export of the chariot. While the Etruscan chariot is still in New York, Monteleone is making do with a replica, which was constructed in the 1980s and is now on display at the former Franciscan monastery.³⁰ The legal battle is ongoing.

The Analysis of the Case from the Legal Perspective

In order to analyze the case through the lens of cultural property law, one first needs to define what cultural property means and whether the Etruscan chariot can be considered Italy's cultural property. There are three principles which help determine if the object can be called cultural property. The first two principles are outlined by the UNESCO Convention 1970. This convention defines the term "cultural property" as "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science."³¹ According to the second principle, the cultural property should belong to one of the specific categories outlined by UNESCO. One of them states that it should be a product of "archaeological excavations (including regular and clandestine) or of archaeological discoveries."³² Ultimately, the third principle says that an object of cultural property should embody "some expression of [a] group's identity, regardless of whether the object has achieved some universal recognition of its value beyond that group."³³

During the discussion at the Italian Parliament on February 16, 1904, the members of the Parliament considered the departure of the Etruscan chariot as a terrible loss to the archeological history of Italy. According to the *New York Times*, the members of the Parliament said that "the loss to Italian archeology was incalculable".³⁴ Thus, the Etruscan Chariot is an object of archeological importance, as the first principle says. As we know, it is also a product of archeological excavations since Isidoro Vannozzi discovered it while digging his land. That makes the Etruscan chariot fit with the second part of the definition of cultural property. Finally, when making the demand to the Metropolitan Museum, Mayor Durastanti argued that it is part of the Italian identity, which makes the third principle work as well.³⁵ According to all the three principles of the definition of cultural property, the Etruscan chariot can be considered the cultural property of Italy. We can therefore apply cultural property law as we examine the case.

1902, the year when the chariot was discovered, is a crucial year in the history of the Italian cultural property legislation. On June 12, 1902, the first law protecting the cultural property of the unified Italy was enacted.³⁶ That is not to say, however, that before that date there was no law protecting Italy's cultural heritage. The law of 1871 said that laws concerning antiquities active before the unification of Italy in 1861 remained legitimate.³⁷ Those pre-unified laws were valid until the aforementioned law in 1902 was enacted.³⁸ Since there is no record that would tell us if the chariot left Italy before June 12, 1902 or after that date, we will have to consider both cases to find out if its departure was illegal.

If we suppose that the chariot was exported from Italy before the law of 1902 was enacted, then we have to examine the laws of the cultural property in the pre-unified Italy. Before the unification of Italy, both Monteleone di Spoleto in Umbria, where the chariot was discovered, and Rome, where it was later transported, belonged to the Papal States. Umbria, in particular, was annexed to the Papal States in 1814 and continued to be so until the unification of Italy.³⁹ In the Papal States, the earliest cultural property regulation dates back to 1464 when Pope Pius II prohibited the exportation of antiquities from the Papal States. This law continued in the tradition of subsequent laws and regulations governing antiquities and excavations.⁴⁰ Specifically, Pope Pius VII contributed to the legislation of the trafficking of the antiquities during his ruling from 1800 to 1823. The *Chirografo* in 1802 and the *Pacca Edict* in 1820, introduced during his rule, established an important connection between cultural property and places of origin.

On October 1, 1802, Pope Pius VII enacted a new legislation called the *Chirografo*. The law was active in the Papal States. He requested that all varieties of art that either belonged to a church or a private citizen should be registered. He also banned the export of such objects.⁴¹ On the 7th of April in 1820, Cardinal Pacca introduced another law which continued the tradition of cultural heritage protection policies of Pope Pius VII. The law drafted the system of the administrative bodies that could guarantee the preservation of cultural heritage. The *Edict* aimed at creating an inventory map of all works of art that were later to be placed under the strict control of the Vatican. The Vatican was supposed to check the exportation of all works of art. In addition, heavy taxes were introduced to control their export.⁴² In 1852, Pope Pius IX created the Commission of Sacred Archeology to control archeological excavations.⁴³

We have discovered earlier that the Etruscan chariot was exported from Italy in pieces and hidden among other cargo items. Moreover, it had not been registered. However, since Benedetto Petrangeli, the seller, was an art dealer, and J.P. Morgan, the purchaser, was a connoisseur of art, it is highly possible that they knew that the chariot was an object of antiquity. Nonetheless, neither of them made an attempt to register the chariot or pay export taxes as the *Chirografo* and *Pacca Edict* required. This fact proves that the export of the Etruscan chariot was illegal and broke the cultural property laws in place at the time.

If we suppose that the chariot was exported from Italy after June 12, 1902, then its export was subject to the law n. 185. The law protected monuments and mobile and immobile objects that were considered to be antiquities. Those antique objects could either be part of a collection or singular objects, such as the Etruscan chariot. In case of the excavations, the Italian Government had the right to claim a fourth of the discovered objects or the equivalent value. Those who undertook excavations had to immediately inform the government if they found an antique object. The same rules applied to unintentional discoveries. The law further stated that the discoverer could not touch the

object until competent authorities arrived.⁴⁴ This rule, however, does not apply to Isidoro Vannozzi, since, as we mentioned earlier, he found the Chariot in February, and the law was passed in June. There is nothing in the law that would suggest that Vannozzi's possession of the chariot was illegal.

The law of 1902 further stated that all antique objects had to be part of specifically created catalogues. If the antique object was not part of a catalogue, as was the case with the Etruscan chariot, it could not be exported without the authorization of the Government. The sale of antique objects had to be authorized by the Ministry of Public Education. The Government had the right to establish the price and apply export taxes to those objects.⁴⁵ The purchaser and the seller of the chariot never received authorization from the Ministry of Public education. There was no record that the Government established its price or that the export tax was paid. Moreover, the inspector who let the export proceed was dismissed.⁴⁶ These facts prove that the chariot was sold and exported illegally. Thus, regardless of whether the export of the Etruscan Chariot pre-dated the law of 1902 or took place after, the illicit trafficking of the antiquity is of concern.

In 1939, Monteleone di Spoleto had a legal opportunity to get the chariot back. In that year, Italy passed a very important cultural property law. The law declared that all archeological artifacts are the property of the government unless they were privately acquired before 1902.⁴⁷ Since the Etruscan chariot was acquired in 1902, Italy could have used this law to return the Etruscan Chariot. Italy, however, never exercised its ownership right.

Since the Etruscan chariot has been in New York for more than one hundred years, we now have to look at the case through the lens of New York law. Under New York law, the original owner may be barred from recovering the title of the property by the Statute of Limitations. The Statute of Limitations of New York determines the timelines for lawsuits concerning the recovery of stolen property to be filed. The Statute says that "actions to be commenced within three years" include "an action to recover a chattel."⁴⁸ The law further states that "no action against the museum to recover property shall be commenced more than three years from the date the museum gives notice of its intent... to acquire title to undocumented property."⁴⁹ This three-year rule includes both local and international actions.⁵⁰ For this reason, the Statute applies to the case of the Etruscan chariot. Here the question arises: what is the starting point for counting these three years? The answer to this question depends on whether we are discussing a good or bad-faith purchaser.

For bad-faith purchasers, the Statute of Limitations runs from the time the theft occurs. This rule is valid even if the owner is not aware of the theft at the time when it took place.⁵¹ If we suppose that the purchaser of the chariot (J.P. Morgan, according to most versions) knew that he was buying and exporting cultural property illegally, then he was a bad-faith purchaser. As was the director of the Metropolitan Museum at the time, if he knew that the chariot had been stolen from Italy. According to this rule, Italy could only request the return of the chariot from 1902 to 1905. In this case, Durastanti's lawsuit against the Met is not valid.

As mentioned earlier, the spokesman for the Metropolitan Museum, Harold Holzer said that the Chariot was purchased in "good faith." That means that the purchaser, and later the director of the Met, did not know that the purchase and export of the chariot was illegal. In this case, the three-year period starts when the true owner demands the return of the stolen property from the current possessor and the current possessor refuses to give it back.⁵² Mario La Ferla notes that the Italians first made their

claim to return the chariot in October 2004. Mazzetta sent a letter to Philippe de Montebello, the museum's director, who promptly rejected it.⁵³ Since then, according to the Statute, they had three years to file a lawsuit. However, as of February 9, 2007, the lawsuit was never filed, which was largely due to the fact that Monteleone could not get support from the Italian government.⁵⁴ Since then there have been no records of a lawsuit on the Etruscan case. It turns out, that even if we accept the claim that the museum was a good-faith purchaser, Monteleone still does not qualify for getting the chariot back. The limitations period expired before they took a legal action.

Another rule, which speaks in favor of the Met's legal possession of the Etruscan chariot, is the unreasonable delay rule, or the due diligence rule. It means that the three-year limitations period starts from the time when the owner had an opportunity to locate the stolen property or make a demand and failed to do so.⁵⁵ As we stated earlier, the Italian Government discovered that the chariot was in the Met in 1904. At that point, however, nothing was done. A second chance to claim the chariot was in 1939, which did not happen. If they had claimed the chariot in 1939, they would still have faced the limitations rule, but this legal argument could enable the authorities of the Metropolitan to make an exception to the Statute, or at least to argue on the equal legal basis. Italy failed to follow the due diligence rule. Thus, based on all the aforementioned legal statutes and regulations, the Metropolitan Museum is now the legitimate owner of the Etruscan Chariot.

Conclusions

Though the Etruscan chariot now legally belongs to the Metropolitan Museum, Mazzetta continues to insist on its repatriation. "That [would be] an ethical and honorable thing to do," he says. "It's part of our identity."⁵⁶ He thus appeals to the ethical side of the case. "When lawyers challenged the slavery laws or fought for equal rights of women, people thought they were out of their minds," says Mr. Mazzetta. "Laws should be changed. The crimes of the past should not be condoned."⁵⁷ He touches upon a very important issue. Sometimes, laws of cultural property do not consider the seemingly minor ethical issues. In the case of the Etruscan chariot, the Statute of Limitations basically legalized the theft. Societies tend to follow the letter of law and not its spirit. This leads us to conclusion that the legally correct decision is not always an ethical one.

This problem is recognized on the international level, and some efforts have been made to fix it. In 1970 the International Council of Museums issued a statement on the ethics of acquisition of the works of art. It was followed by a much more complete Code of Professional ethics issued in 1990. The code suggests that museums should review their acquisition policy and refuse to purchase stolen antiquities. In terms of the cultural property return issue, the museum should initiate a dialogue with the country of origin. The dialogue should be based on the scientific and professional principles.⁵⁸

According to the Code of Professional Ethics, the director of the Metropolitan Museum should agree to a formal face-to-face meeting with Mr. Mazzetta. At this meeting, they should make a decision that could satisfy both the legal and the ethical side of the case. However, since the case in question deals with something that happened before the Code of Professional Ethics, the representatives the Metropolitan Museum cannot be forced to follow the ethical path and give the chariot back. One of the possible outcomes of the meeting could be some creative solution, such as reciprocal

and sharing arrangements. The Museum could, for example, allow the chariot to travel to Italy every five or ten years, during which the Italian government would provide another treasure for exhibition in the Met Museum. This could help to reconcile seemingly insoluble contradictions between law and ethics.⁵⁹

Cultural property laws should become more ethical. For example, if it is proven that something has been stolen, it has to be returned regardless of how much time passes from the moment of theft. Thus, we will not exclude the possibility that one day the law might change and the Etruscan chariot will find its way back to Monteleone. However, at this point in time, the Metropolitan Museum has the full legal right to keep this wonderful work of Etruscan art.

Endnotes

¹ Robin F. Rhodes and Charles R. Loving, The Acquisition and Exhibition of Classical Antiquities: Professional, Legal, and Ethical Perspectives. Ed. Robin F. Rhodes, (Notre Dame: University of Notre Dame Press, 2007) xi.

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Morse et al. v. Frederick: Dissenting Opinion

Chandni Saxena

Abstract

This paper, written for Professor Jay Topkis' and Professor Sidney Rosdeitcher's class on Constitutional Law at Columbia University in Fall 2008, explores whether students have the right to express a message potentially advocating the use of drugs in school within the specific context of *Morse et al. v. Frederick*. Simple advocacy is not sufficient to stifle the Freedom of Expression guaranteed by the First and Fifteen Amendments. Even in the school environment, where Constitutional freedoms are often limited, the Freedom of Expression, especially of a political opinion such as whether the use of drugs ought to be legalized, is extended via the precedence of *Tinker*. The precedence of *Hazelwood* does not apply, as in this case, the message of the student was clearly not school-sponsored, while the precedence of *Fraser* is also distinguished, as the ruling for that case involved a disruption to school activity and dealt with the obscene manner rather than the content in which the views were expressed, neither of which apply to this case. Education requires the free exchange of ideas, even unpopular ones, rather than state-sponsored propaganda.

A group of students, including the respondent *Frederick*, unfurled a banner displaying "BONG HiTS 4 JESUS" across the street from their school Juneau-Douglass High School during the Winter Olympics while watching the Olympic torch pass by. The students attended the event during school hours, and the event was school-sanctioned and supervised by the school's teachers. The petitioner *Morse*, the high school's principal, asked the students to take down the banner. When *Frederick* refused to do so, *Morse* confiscated the banner and suspended him, an action that the school superintendent upheld in violation of the school policy against the advocacy of illegal drug use, which was also upheld by the petitioner school board. Under 42 U.S.C. §1983, *Frederick* filed suit, alleging that the petitioners violated his First Amendment rights of Free Expression. The District Court ruled in favor of the petitioners stating that they had not violated *Frederick's* First Amendment rights, and were entitled to qualified immunity. The Ninth Circuit Court of Appeals reversed the judgment, stating that while *Frederick* advocated the illegal use of marijuana during a school-sponsored activity, he nevertheless did not disrupt the school activity, and *Morse* was not entitled to qualified immunity because she should have recognized that her actions were unconstitutional in violation of *Frederick's* First Amendment rights. (*Morse et al. v. Frederick*).

Although the banner may advocate the illegal use of drugs, simple advocacy is not enough to stifle the Freedom of Expression guaranteed by the First and Fourteenth Amendments of the Constitution. The banner's ambiguous phrase "BONG HiTS 4 JESUS" can be seen as a message encouraging the viewers to smoke marijuana, as a celebration of marijuana use, or as a statement that marijuana use is consistent with Christianity. Several other interpretations are possible, including *Morse's* contention that *Frederick* was advocating the illegal use of drugs via the banner. Either way, *Frederick's* banner was a political opinion, especially in the context of the medical marijuana ballot measure approved in Alaska in 1998 and the decriminalization ballot measure rejected in

2000 in the state (Brief for the Drug Policy Alliance). Clearly, Frederick's views were closely tied to the political environment of the State. Furthermore, had the banner stated the opposite message of "Jesus says 'No Drugs,'" the student would not have been asked to remove the banner (Amicus Brief of the ACLJ), furthering the fact that the student's expression was being stifled for his opinion. However, this court has held in *Brandenburg v. Ohio* (*Brandenburg*), that the

"constitutional guarantees of free speech and free press do not permit a State to... proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

In this case, it is clear that Frederick's advocacy of the use of an illegal drug via one banner was not enough to "incite" the viewers and not likely to produce "imminent lawless action". Simple advocacy was not enough for Morse, who acted as a representative of the State in her capacities as the Principal, to stifle the guarantee of the Freedom of Speech and Expression guaranteed by the First Amendment, and applied to State officials by the Fourteenth Amendment, of the Constitution.

It is true that the fundamental guarantees of the Constitution are often limited in the school environment. Therefore, while *Brandenburg* may guarantee adults the freedom to advocate illegal activities, even at a school-sponsored event, the rights of students to do the same are not as clear. Several Supreme Court cases such as *Bethel School District v. Fraser* (*Fraser*) and *Hazelwood School District et al. v. Kuhlmeier et al.* (*Hazelwood*) have restricted the rights available to minors in the school environment to avoid disruptions to education. However, as *Tinker v. Des Moines Independent Community School District* (*Tinker*) has established:

"First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." (*Tinker*)

It is important to balance the rights of students to self-expression, and that of the administrators in running the school smoothly and protecting other students and their rights. In this case, the question for the court is: does a student have the right to freedom of expression when his advocacy may be contrary to the law but in no other way disrupts the school at a school-sponsored event?

The precedent set by *Tinker* best applies to this case, and clearly favors the rights to the freedom of expression guaranteed to students, even in the school environment. *Tinker* stated that a student may express her opinions on controversial subjects in the school environment as long as her actions are not "materially and substantially interfere[ing] with the requirements of appropriate discipline in the operation of the school' and... [are not] colliding with the rights of others." In *Tinker*, three public school students' rights to wear black armbands to protest the government's policy towards Vietnam were upheld, and a "silent, passive expression of opinion, unaccompanied by any disorder or disturbance" was seen as an act that could not be limited simply because the opinion conflicted with the view propagated by the state. In

this case, Frederick did not disrupt the environment of the Olympic Torch relay by simply unrolling a banner, and his potential advocacy of the use of drugs, while in direct contradiction with the school's mission of reducing drug abuse among teens, is still only a silent and passive expression of opinion. His vague message of whether drugs ought to be used or legalized or celebrated is a political opinion, and as such deserves to be respected. *Tinker* established that student criticism of government policy or existing policy (laws against marijuana, in this case) cannot be stifled if there is no disruption of the school activity, as is the case here. In further similarity with *Tinker*, in this case too there is "no evidence whatever of petitioners' interference, actual or nascent, with the schools' work." Far from proving that any disruption to education occurred, the petitioners did not even bring up such an argument, but rather relied their case on as to whether the school can permit a student to advocate a popular contrary to the school's message. *Tinker* said it best when it cautioned us from suppressing merely unpopular opinions, even in the school environment:

"In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear... But our Constitution says we must take this risk."

Since Frederick's rights to self-expression definitely did not interfere with those of other students, and did not substantially interfere with the operations of the school, the school must take the risk of tolerating opinions it disagrees with instead of limiting Frederick's rights to political self-expression. (*Tinker*).

The restrictions imposed by the precedent of *Hazelwood* do not apply to this case. In *Hazelwood*, the school principal removed two articles on teen pregnancy and divorce from publication in the school newspaper that was sponsored by the school and a part of the journalism class. The Supreme Court upheld the right of the school to restrict the authors' rights to speech and expression by refusing to publish the two articles. However, *Hazelwood* was unique in that the question addressed in the case was not "whether the First Amendment requires a school to tolerate particular student speech," the question addressed in this case, but rather "whether the First Amendment requires a school affirmatively to promote particular student speech." The opinion stated that "educators are entitled to exercise greater control over this second form of student expression," as it is part of the school curriculum, and as the publisher of the newspaper, the school may "'disassociate itself' not only from speech that would 'substantially interfere with [its] work... or impinge upon the rights of other students.'" While Frederick exercised his right to speech at a school-sponsored event, his action did not require the school to "affirmatively... promote" his speech, but rather to simply "tolerate" it, where Frederick's First Amendment rights hold. Furthermore, the mode of Frederick's expression was not a part of the school curriculum in the manner of a school newspaper. It is evident that the school would not be associated with having sponsored Frederick's viewpoint simply because his views were expressed at a school-sponsored event, and especially not in the manner that the publisher of a newspaper would be liable for views published. Since in this case, the school would not be considered a sponsor of Frederick's viewpoint, it was its duty to tolerate his opinions and respect his First Amendment rights. (*Hazelwood*).

The precedent of *Fraser* applies closer to this case, but it too is distinguished from this case. In *Fraser*, Fraser, a student at the school, gave a speech filled with sexual innuendos in front of a high school audience at a school-sponsored event in favor of a candidate running for student government. The Supreme Court denied Fraser's First Amendment rights in this case in favor of the school for two reasons: first, that "First Amendment jurisprudence recognizes an interest in protecting minors from exposure to vulgar and offensive spoken language," and second:

"the states [have a right to] insist... that certain modes of expression are inappropriate. The inculcation of these values is truly the work of the school, and the determination of what manner of speech is inappropriate properly rests with the school board."

The first part of the ruling does not applying to this case, as Frederick's banner did not have any obscenity or vulgarity or any other content from which minors ought to be shielded. States have the right to censor certain inappropriate material from minors, but this right is not being violated in this case. Frederick's banner, although referring to drugs, did not do so in the explicit manner that would be required for this kind of censorship. There were no real images or images created via words of people smoking marijuana, and displaying a banner stating "BONG HiTS 4 JESUS" could hardly be qualified as explicit material from which minors ought to be shielded. Instead, Frederick merely expressed in vague terms a political opinion, which States have no right to censor. Furthermore, minors in the school were not the only or even the intended audience of Frederick, for although his banner was shown at a school-sponsored event in front of the school, the event was the Olympics, at which both adult and media coverage would have been large. With the general populace as his audience, his actions of expressing a political opinion on drugs could and would certainly not be censored by the State, as the restrictions surrounding the First Amendment's right to freedom of expression under school speech case would disappear. The second part of the ruling states that schools have the right to enforce the States' values via education. This does not mean, however, that schools have the right to stifle the expression of alternate values by students or teachers. See *Sweezy v. New Hampshire*. Even in *Fraser*, the right of States rests in the manner in which views are expressed, by discouraging the use of vulgar, offensive, or profane words, and not in the actual content of views expressed. In this case, the petitioners did not object to the manner in which Frederick's views were expressed, but to the content of the expression, and thus even that part of the ruling does not apply. Another factor in *Fraser* was that Fraser's obscene speech had caused other students in the audience to respond obscenely, and had thereby disrupted the smooth flow of the school-sponsored educational program on self-government; in this case, Frederick's actions did not disrupt the flow of the event, and therefore, *Fraser*, too, is distinguished from this case. (*Fraser*).

Guiles v. Marineau's (*Guiles*) recent ruling in 2006 furthers *Tinker's* ruling of 1969 and its application to this case. The plaintiff was a Middle School student who claimed his First Amendment right to wear a T-shirt criticizing President George W. Bush to school. The T-shirt had a series of images and texts that referred to the President as a "chicken-hawk" President and a former cocaine and alcohol abuser, and to enforce its opinion, the T-shirt depicted images of drugs and alcohol. The Supreme Court denied the writ of certiorari in this case, and the Second Circuit ruled in favor of the plaintiff with the following decision:

“We distill the following from *Tinker*, *Fraser*, and *Hazelwood*:

- (1) schools have wide discretion to prohibit speech that is less than obscene – to wit, vulgar, lewd, indecent or plainly offensive speech...
- (2) if the speech at issue is ‘school-sponsored’ educators may censor student speech so long as the censorship is ‘reasonably related to legitimate pedagogical concerns’...
- (3) for all other speech,... the rule of *Tinker* applies. Schools may not regulate such student speech unless it would materially and substantially disrupt classwork and discipline in the school.”

As has been stated before, Frederick’s banner was neither obscene nor “school-sponsored,” and therefore, as the ruling in *Guiles* states, the ruling of *Tinker* applies, and since Frederick did not disrupt the flow of the event, his First Amendment right to the freedom of expression is protected. *Guiles* is so similar to this case that the only difference seems to be is that *Guiles* used a T-shirt to express his opinion, while Frederick used a banner, and the precedent of *Guiles* supporting *Tinker* stands in this case. (*Guiles*)

The school’s stand that suppressing expression that encourages the illegal use of drugs seems laudable in light of the drug abuse crisis facing schools today, but is far-fetched at best. Even if it is granted that Frederick’s goal was to advocate the illegal use of drugs, although his banner is vague and can also be understood to simply state that the use of marijuana is compatible with Christianity, the petitioners have not proved that one banner on a sidewalk would actually lead to or substantially exacerbate the crisis schools face today. Furthermore, “students are ‘bombarded with pro-drug messages from classmates, adults, and the media,’” including 22 million websites that contain the word “marijuana,” and removing one banner would not be effective at all in addressing the problems, as the petitioners suggest (Brief for the Drug Policy Alliance). It would be more effective for the schools to open up the debate on substance abuse rather than stifle meager individual instances of expression.

Students ought to have the right to express their political opinions, even if they are unpopular, in the school environment for an ideal education. “The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools,” (*Shelton v. Tucker*) since

“scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, ...to gain new maturity and understand; otherwise our civilization will stagnate and die.” (*Sweezy v. New Hampshire*).

The pursuit of knowledge is not a one-way street, in which the State brainstorms the students to a certain point-of-view, but rather an activity involving reflection over a marketplace of ideas. In *Meyer v. Nebraska*, Sparta’s alternative style of education was discussed and dismissed:

“In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted [sic] their subsequent education and training to official guardians... Such measures... were wholly different from those upon which our

institutions rest; and... do... violence to both letter and spirit of the Constitution.”

The Constitution’s idea of the upbringing of good citizenship would be the State’s active encouragement of the free discussion of political opinions by minors and the development in emerging citizens the passion of caring about issues. From this point-of-view, Frederick’s actions are laudable and ought to be encouraged by schools. In fact, Frederick’s right to the freedom of expression would not have even been contended were his views expressed in a different setting: students in activities such as Speech and Debate, Model Congress, and Model United Nations routinely discuss the question of legalizing drugs such as marijuana. It is in the best interest of our nation to encourage the free expression of ideas.

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The Case for a Non-Renewable Fixed Term of Tenure on the Supreme Court

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Abstract

Article III of the Constitution declares, “the Judges [of the Supreme Court] shall hold their Offices during good Behaviour.” Although it makes no mention of life tenure, this clause has become synonymous with the term. While life tenure has been defended as a means to protect the independence and impartiality of the judicial branch, it no longer serves its purpose well. Strategic retirements allow for political resignations and increase the danger of incapacity on the bench, a random distribution of nominees among presidents takes away power from the voting public, and presidents wield unwarranted power over the bench by appointing younger justices. Life tenure, therefore, is both outdated and no longer productive. However, an overwhelming faith in the Constitution prevents the American public from holding the judiciary accountable to its constitutional standard by calling for reform. Insofar as a non-renewable fixed term of 18 years will better account for many of the problems affecting the judiciary, it is time for a change.

I. Introduction

Article III of the Constitution declares, “the Judges [of the Supreme Court] shall hold their Offices during good Behaviour.” Although the Constitution makes no mention of life tenure, this clause has become synonymous with the term, due in large part to the Federalist arguments in support of life tenure.¹ Barring cases of extraordinary misconduct, which result in impeachment, justices are entitled to sit on the bench until death, voluntary resignation, or retirement. Of the 111 justices who have served on the Court since 1779, nine currently serve, 49 have died in office, 19 have resigned, and 35 have retired.²

The Founders defended life tenure as a necessary safeguard to the independence--and in turn the impartiality--of the judiciary, designed to protect the justices from the encroachments of the other branches. Today, the American public sees life tenure as sacrosanct. Few question its modern applicability and, of those that do, even fewer are ready to replace or revamp it through Constitutional amendment. Perhaps because of the overwhelming American faith in the moral and intellectual superiority of our Founders to create a Constitution in a unique and exceptional moment, we still feel bound “by a document produced more than two centuries ago by a group of fifty-five mortal men, actually signed by only thirty-nine.”³ What we respectfully ignore is that “wise as the Framers were, they were necessarily limited by their profound ignorance.”⁴ Although the Framers consulted the best knowledge available at the time, they could not foresee the expansion of the American republic, and the ways in which it would affect the country’s governance. While this point seems insignificant, one must remember that the Founders were planning a government for a *small republic*. Given constraints of foresight, the final product of the Constitution was assumedly the best that one could expect for 1787, but that need not imply that it remains the best means of governance today, in a profoundly different historical setting.

As a consequence of faith in our Founders, we see a general reluctance on part of the American public to change. In some ways to change it is to admit imperfection, to admit that the world's oldest democratic constitution is not without fault. But change need not be seen as a threat to democratic ideals. If anything, it reinforces the ideology underlying our democratic system: that when something does not work we can strike, amend, and start over. Insofar as our judicial branch is no longer living up to its full potential, change is precisely what it needs. Although the judicial branch was intended to be a distinctly separate branch, life tenure allows the judiciary to go unchecked, becoming isolated and unaccountable. The increasingly insular nature of the branch, resulting from a lack of standards both qualitatively and procedurally, has made it too affected by and responsive to the political situation of the country.

It is not that life tenure is without merit, but that another more systematic approach to tenure would protect the independence of the judiciary while alleviating other ills that life tenure is unable to address. The most advantageous of the existing options is a non-renewable fixed term of 18 years staggered among the justices, in a way resembling the current election system utilized in both houses of the legislature. This paper will not consider the power of the Court to declare legislation unconstitutional, nor will it consider the scope of judicial review. The question at hand is to what extent life tenure on the Supreme Court is both outdated and no longer productive given that a non-renewable fixed term of 18 years will better account for many of the problems affecting the judiciary.

II. The Problem

In more ways than one, the Supreme Court has entered what Justice Felix Frankfurter called the “political thicket.”⁵ The Senate has more contested nominations, nominees have been subject to extreme personal scrutiny, and the cases on the docket have entered into the realm of politics. Surely, our Founding Fathers never expected the Supreme Court to decide the election of the president of the United States, to dictate education policy, or to strike down state electoral districting schemes.⁶ Foreseeing this trend, Justice Frankfurter declared that it is a “mischievous assumption that our judges embody pure reason” instead of being “molders of policy.”⁷ The increased politicization of the Court warrants a thorough discussion that this paper will not even attempt to address. Even ignoring these judicial issues, however, the Court has become increasingly insular and unchallengeable over the past few decades and is thus plagued by a number of problems that have gone unresolved. The current problems in the judiciary can be reduced to one general theme: a lack of standards, both qualitatively and procedurally, which either stem from or are exacerbated by the existence of life tenure.

Qualitatively, there are no standards for the judges, because they are guaranteed a seat for life; the Good Behavior Clause makes them virtually unaccountable to anyone. Indeed, there is a case to be made for unaccountability in the Court; it secures independence from majority will and changing trends. However, unaccountability becomes dangerous when it allows and encourages the standards of the judiciary and of the justices themselves to deteriorate. To begin, life tenure allows “bad” judges, those who are incompetent, biased, and unproductive, to retain their posts indefinitely. Even in the case of “good judges”, those who are adept and dedicated, life tenure allows them to remain on the bench far past their prime, when they are no longer

performing at their full potential. “Good” and “bad,” in this sense then, have little to do with party lines and rulings and everything to do with productivity, impartiality, and potential. Since 1970, the average tenure of Supreme Court justices has increased by about 10 years, increasing from about 14.9 years before 1970 to about 25.6 in the period up to 2005. Although the average appointment age has remained steady, in the low fifties, the average retirement age has jumped from about 68, pre-1970, to somewhere around 79.⁸

Historian David Garrow’s, extensive studies of the Court showed that of the ten justices that retired from 1971 to 1994, at least half of them were “too feeble or mentally incompetent” to participate in cases.⁹ This trend is in no way novel or long forgotten. In 1975, William O. Douglas suffered a debilitating stroke but refused to step down from the bench despite his sickness. Likewise Chief Justice William Rehnquist insisted upon remaining on the bench despite an incapacitating bout of throat cancer that left him constantly attached to feeding tubes and oxygen tanks. During the 2004 term, Chief Justice Rehnquist wrote only nine opinions, out of a total of 203 opinions garnered for 79 cases. One would surely expect more participation of a Chief Justice. For Rehnquist, who was appointed at the age of 47, the Supreme Court was a way of life, something he could not leave. Limiting Supreme Court tenure forces judges to retire when they cannot necessarily part with their positions and it acts upon both “good” and “bad” judges equally.

Along these lines, another qualitative danger of life tenure is that it allows judges who are unreceptive to modern political movements to remain on the bench. Some argue that it is not in the interests of the nation for Supreme Court justices to be responsive to popular sentiment, but this is not what is being advocated. Justices need not be responsive, but they must be receptive. To use Hamilton’s own language, because of such prolonged tenures, justices are too far removed from a “long and laborious study” of the “records of those precedents” of the “variety of controversies which grow out of the folly and wickedness of mankind.”¹⁰ Long tenures do not necessarily cause this trend, but they are sufficient to increase the danger of it.

One could argue that it is irrelevant to examine the extent to which justices are unreceptive to modern constitutional movements, positing that it is rather their reasoning and intellectual skills that matter. However, because our conception of justice is one that is constantly changing, we need a judiciary that is both up-to-date and receptive to objectively evaluating the newest constitutional arguments, whose ideas apply foundational ideas in new ways. The Supreme Court must be a force of reason, but it also needs to have a pulse on the values of our time. A judge lacking these qualities is a danger to both liberty and justice.

The judiciary is meant to be impartial and moderate, a counter to the affections and passions of the majority; however, there is value to be found in the interjection of new ideas. Society’s conceptions of certain rights change over time. Justices must be familiar with or at least willing to thoughtfully consider and engage with these new arguments by adapting the conception of age-old rights to be more true to themselves. A stagnant court further polarizes the beliefs of justices, removing the ongoing analysis and re-evaluation of precedent that is necessary for justice. Each filled vacancy on the court creates an entirely new court, because justices opine not only based on their own constitutional interpretation but also in reaction to each other. Increased turnover on the bench means more energy on the bench and newer, fresher approaches gleaned from new scholarship and new experiences. One need not equate increased vitality with the destruction of the independence and impartiality of the judicial branch.

Procedurally, the problems affecting the judicial branch are threefold: strategic retirements wield judges unwarranted power in selecting the ideological bent of their successors, the random distribution of nominees among presidents takes power away from the American electorate because it gives some presidents more power over the bench than others, and it gives presidents an unfair incentive to appoint younger and more inexperienced justices.

Strategic retirements have become more commonplace over the past few decades, becoming even more blatant after the post-Vietnam War era. Chief Justice Earl Warren allegedly attempted to resign while a Democratic president was in office.¹¹ Furthermore, Justice Thurgood Marshall is known for having joked that “should he die on the bench, they should ‘prop [him] up and keep on voting.’”¹² Determined to retire under Johnson, and not Nixon, Marshall was one of the first overtly public examples of strategic retirement. Today, there continues to be speculation that Justices O’Connor and Rehnquist both remained on the bench in order to avoid having their successor appointed by Clinton.¹³ This is the great irony of life tenure, and thus of strategic retirements:

Life tenure is supposed to insulate federal judges from politics so that they will act apolitically in deciding cases. In reality, though, life tenure encourages Supreme Court Justices to be overly mindful of politics – in particular the partisan political landscape of the White House and the Senate—in deciding when to retire.¹⁴

A study contained in the May 2009 issue of *American Politics Research* reinforces this sentiment through statistical tests. It concludes that, all else equal, the likelihood of a Justice’s retiring in any given year is inversely correspondent to his ideological distance from the president and the Senate.¹⁵ Strategic retirements, then, have turned resignation from the court from an ordinary occurrence into a politically motivated venture.

In the current system it is the prerogative of every justice to step down when he sees fit and retirement thus becomes strategic. The danger here is that strategic retirements give justices the unjustifiable power to affect the court’s makeup in the act of leaving. “Life tenure ... is one thing; life tenure with a right to influence confirmation of a successor is rather another.”¹⁶ The Constitution grants the president the right to appoint a successor and the Senate the right to confirm such appointments for a reason. Supreme Court justices should have no scheme of affecting this outcome in any way.

Strategic retirement also increases the possibility of what David Garrow has termed “mental decrepitude,”¹⁷ or the diminishing capacity to fulfill one’s judicial duties due to age or other unforeseeable events. Justices Marshall and Brennan attempted to remain on the bench for twelve years in order to wait out the Presidencies of Reagan and Bush, both ultimately failing.¹⁸ Likewise, in 1978, Justice White considered retirement because he was unsure that Carter would be re-elected. He remained on the bench another fifteen years, until 1993 when President Clinton named his successor.¹⁹ That Justices should go to such great lengths to remain on the court in order to see an ideologically compatible successor appointed is an injustice in two ways.

First, it is an injustice to American democracy. Considering retirement, Chief Justice William Howard Taft wrote: “I am older and slower and less acute and more confused. However, as long as things continue as they are, and I am able to answer in my place, I must stay on the Court in order to prevent the Bolsheviki from getting control.”²⁰ This attitude is both reckless and dangerous. The Supreme Court should be

packed with justices whose full attention is given to the Court; we need not justices who are simply biding their time. Second, this tendency is an injustice to the justices, themselves. Such a weight should not be placed on the justice's shoulders to worry about their replacements. The Constitution makes no such requirement of them, and our Founding Fathers would be appalled that they should have become so beholden to outside forces in the execution of their duties.

There is another procedural problem exacerbated by the trend of strategic retirements. The opportunity to appoint justices to the Court has been randomly distributed among American presidents; there is no standard of procedure to regulate the amount of appointees per president or the interval between appointments. Conservative presidents have controlled appointments in the Supreme Court, and the inferior courts, for 28 of the past 41 years.²¹ In that time period, 15 justices were appointed to the Supreme Court, only three of which were appointed by the democratic presidents that served for a total of 13 years in that span.²² One could argue that this phenomenon is a reflection of the wishes of the American public, and that the public votes presidents into power with the knowledge that they will be responsible for making judicial appointments. However, some presidents have made no judicial appointments while others have been able to appoint nearly half the bench so this explanation does little to explain the random distribution of appointees among presidents. The problem is not, as it might seem, that conservative presidents have had more power in shaping the Court than their liberal counterparts, but rather that there is an unequal distribution of power from one president to the next in affecting the court's makeup.

Looking back just over this 41 year period, one can see that of the serving Democratic presidents, Jimmy Carter was unable to appoint anyone to the Court in his four year term and Clinton was only able to appoint two justices in his eight year occupancy of the White House. On this point, Obama has fared better, appointing Sotomayor to the Court within his first year. By contrast, Nixon was able to appoint four justices in little more than four years, Ford able to appoint one in less than four years, Reagan able to appoint three in his two terms, G.H.W. Bush two in four years, and G.W. Bush two within the first two years of his eight years in office.

This trend of random appointments is historical, and more often than not works in favor of Republican presidents. Howard Taft made five appointments in just four years and Warren Harding is known for appointing four justices to the bench in just three years.²³ Again, one could argue that this trend is a consequence of popular sovereignty, that the American public has given power to specific presidents for a reason, and that these presidents are able to exercise their constitutionally given power in form of influence on the Court. Looking beneath the surface, however, one can see that the power of the voting populace is actually being undermined by such a random distribution of appointments among presidents.

The problem with random appointments is that the American public loses its power in the voting process. There should be some relationship between the voters' choice of a president and the relative influence that president has on the Court. Each president voted into office is presumed to have power equal to that of his predecessors, just as each session of Congress is presumed to be no more powerful than the last. This should be reflected in judicial appointments. That one president should have no appointments while another has had five illuminates the inequality of power among our presidents in influencing the Court. That a party can see its nominees kept off the Court for decades, even if that party wins several presidential nominees is a fundamental flaw in our democratic system and is dangerous to the preservation of democracy.

Random appointments may be due in large part to the strategic retirements of the justices, themselves, but they cannot be explained away in full by this trend. Even if all political motivations were removed from decisions to retire or resign, one would still see a random distribution of appointments among presidents. Deaths are sporadic and unforeseen circumstances may render a justice unable to perform his duties at any given notice. The only way to fully address this problem is to end life tenure by adding a definite and foreseeable end to the tenure of Supreme Court justices, one equally staggered term on the bench to standardize the distribution of appointments among our presidents.

Because resignations from the bench are so sporadic, each vacancy on the bench becomes a political specter. The entire government becomes consumed with the nomination process and nominees are scrutinized in a way that could have never been foreseen by the founders. Their lives are brought into the political sphere so much so that some scholars and judges with extraordinarily great potential decline consideration in advance in order to protect themselves from media scrutiny.

Supposing, even, that the former two procedural issues were absent, life tenure creates an unnecessary incentive for presidents to appoint young justices who will be able to sit on the bench for a long term. In effect, presidents are able to pack the bench and ensure that their party's youthful nominees are able to wield influence on the bench long after they have left office. Although this might have the potential benefit of temporarily bringing vitality to the bench, it would in fact exacerbate the problem of a Court who is removed from contemporary constitutional conversations.

It would seem that this is a part of the presidential prerogative to select nominees to the bench. However, younger appointees allow political parties to control the Court through the presidency in a way that is beyond the scope of the presidential power to appoint nominees. Each candidate to the bench should be nominated and evaluated on the merits that will prove him an asset and beneficial addition to the court: experience, impartiality, perhaps even one's ideological inclination. Age, however, has nothing to do with a person's ability or potential to serve as a justice. It would seem that this point would work against a former argument in favor of justices who are in touch with the times, but youth and an appreciation of the times need not be synonymous. Likewise, the potential length of a justice's tenure, in relation to controlling the ideological bent of the bench and not in relation to securing the Court's independence, should be irrelevant in evaluating potential nominees to the court. Yet, these factors remain.

In 1993 and 1994, Clinton drew criticism from the Democratic Party for his appointments of Ruth Bader Ginsburg, at age 60, and Stephen Breyer, who was then just 12 days shy of 56. Clinton's Supreme Court nominations were the first made by a democratic president since Lyndon B. Johnson's 1967 nomination of Thurgood Marshall. Thus, the party expected him to consider the potential longevity on the bench of his nominees. This criticism was in large part a reaction to the recent, relatively youthful nominations of David Souter, at age 51, and Clarence Thomas, who was then just 43, by G.H.W. Bush. Youth and staying power continue to be key factors in presidents' choices of nominees; thus, the system requires a procedural change.

Life tenure is in no way perfect, and more often than not it exacerbates the problems already present in the judiciary. Underlying the majority of these problems is a lack of standardization. The appointment, resignation, and retirement processes have become randomized to the point of chaos, allowing political motivations to creep into a branch that is entrusted with the duty of upholding impartiality and independence. Even

barring the lack of procedural standards, there is no mechanism in place that attempts to assure that the quality of the justices and of their work is more than lackluster. It is undoubtedly time for a change.

III. The Justification for Life Tenure

Some defend life tenure on the belief that the Constitution has worked for over 200 years and that to change its policy is to admit its inefficacy. These advocates maintain that critics of life tenure are exaggerating problems that are both insignificant and inconsequential. What they underestimate, however, is the impact of these problems on the judiciary. Surely, every branch will have a few minor hiccups, but the American public should insist on doing all it can to alleviate and prevent these ills from even occurring. Professor Ward Farnsworth has provided a more pragmatic defense of life tenure. He argues that life tenure is a necessary slowing force: that the judicial independence and insolence that results from our current constitutional structure contributes to a slower form of lawmaking.²⁴ For Farnsworth, the Court is “a major anchor to windward that slows down social movements for change.”²⁵ The question in this regard, then, is to what extent conservatism is desirable in the lawmaking process.²⁶ While conservatism is desired, it is not sought after to the extent that it prevents necessary change as a result of nescience and lack of exposure, and most assuredly not to the extent that it allows the bench to become a death bed.

Many advocates of life tenure provide a defense in terms of the Founders’ Federalist arguments. In *Federalist* 78 Alexander Hamilton lays out his justification for life tenure in the judicial branch. He argues that if the judiciary were to be the impartial body of government, it would need to be independent insofar as it could not rely on outside parties for monetary support or for its legitimacy. If the judiciary were to become beholden to another branch or outside party its judgments would become undoubtedly tainted. Independence was the means to “guard the Constitution... from the effects of those ill humors which... occasion dangerous innovations in the government, and serious oppressions of the minor party.”²⁷ Independence would guard the judicial branch from tyranny of the majority and the other branches of government.²⁸ Thus, life tenure enabled the judiciary to stand alone from the other two branches, to be as apolitical as possible in comparison and to be a force of reason and moderation.

As Hamilton argues, the judiciary has “neither force nor will but merely judgment.”²⁹ One can take this argument a step further in the contemporary context. The power of the judiciary is reason; its only true strength lies in the rapport it establishes with the American people as a legitimate source of impartial judgment. Today, the perceived legitimacy of the Court can be interpreted as a function of its respect for tradition and precedence, the extent to which its rulings are enforced and viewed as sacrosanct, and its role as an unbiased arbiter, unswayed by the politics, popular sentiments of the public, and the personal prejudices of the judges. The average American citizen has little conception of the nuances of legal procedure, precedent, and argument. Given this fact, one could safely argue that the majority of the American population cares far less about the legality of decisions, measured by their adherence to constitutional statutes, than they do the perceived legitimacy of them. This does not suggest that the Court need be popular. Indeed it must be willing to be unpopular at times if this translates to constitutionally sound opinions. Instead, the Court’s decisions, even when disagreed with, must be respected and adhered to.

The American citizenry's belief in the legitimacy of the Court is the only real force that allows the judiciary to keep its counterparts in check. The judicial branch needs impartiality more than any other branch because unlike its complements, it exists not to do but to oversee, not to create or execute but to supervise. Hamilton's argument on the necessity of independence for impartiality still holds, especially considering the complications, resignations and appointments that party affiliations bring.

In order to secure this independence for the judiciary, Hamilton saw it necessary to ensure adequate wages that could not be diminished, thus guaranteeing the economic stability and self-sufficiency of judges. The establishment of a tenure during good behavior, insofar as "nothing can contribute so much to its firmness and independence as permanency in office," was called the "the citadel of public justice and the public security."³⁰ Life tenure shields judges from the political pressure that come with "periodic accountability to the electorate."³¹ Judges do not need to worry about raising funds and campaigning or about pleasing constituencies with unpopular but constitutionally sound decisions.

This long tenure was further necessary to keep both the executive and the legislature "within the limits assigned to their authority" by allowing the judges to gain an in-depth knowledge of the court and its rulings and an "inflexible and uniform adherence to the rights of the Constitution." In this sense, life tenure provides judges with a wisdom that can only come with experience, in the form of familiarity with laws and precedent. Lastly, life tenure keeps judges from improperly deferring to the wishes of other branches and removes the concern that one must opine in a certain way to ensure the acquisition of a new job at the end of a term.³² If life tenure ensures that the Supreme Court is the last stop in one's professional life, there is no fear that there will be an incentive for judges to try to court other high positions and thus compromise the Court's impartiality.

Although Hamilton explains why a long tenure is necessary, he problematically never defines the very term that ends up in the Constitution: "good behaviour." Though Hamilton brings up the term in *Federalist 78*, it is not until the next paper that he begins to explore what the phrase means. The idea of life tenure is first established when Hamilton discusses "judges who, if they behave properly, will be secured in their places for life."³³ He notes that a provision providing for the removal of judges for incompetence and incapacity would be neither followed nor beneficial because it would "oftener give scope to personal and party attachments and enmities, than advance the interests of justice or the public good."

The absence of a definition is problematic because the phrase makes the spirit of the Constitution unclear in regards to the sufficient and necessary components of good behavior. Thus although judges may be impeached for outright "malconduct", one has no way of judging whether or not a judge is no longer acting properly aside from mere sentiment and opinion, which can easily be shrugged off as politically motivated accusation and given no weight. Indeed, some scholars have argued, "so long as the judges' "behavior" is within the range viewed as "good," that is, uncorrupted ... then they are protected against losing their positions."³⁴

Although "good behavior" has come to mean "life tenure," the two are not nor should they be synonymous terms. The use of the term "good behavior" and not "life tenure" in the Constitution implies that we are to have standards for the judiciary. However, the lack of defined standards has led to a sentiment of apathy on the part of the American people. The American people have no Constitutional mechanism to hold their justices accountable to the constitutional standard. Without a clear definition, the

good behavior clause is in effect futile. One could argue that impeachment is the way,³⁵ but not one justice in the history of the Supreme Court has actually been impeached. Without clear and defined standards, it is near impossible to fault the judiciary for not doing its job.

Given these facts, one could argue that it would be in the public interest to establish a Constitutional clause defining good behavior, and letting the public hold the government accountable for ensuring its proper usage.³⁶ However, though it is indisputable that we should have a standard and clear expectations for our judges, clauses such as these have no place in our Constitution. Indeed, just as Hamilton argued in *Federalist 84*, “minute details” outlining specific requirements of Justices, such as participating in x amount of cases or writing x amount of opinions per term, are “certainly far less applicable to [the American] Constitution... which is merely intended to regulate the *general* political interests of the nation, that to a constitution which has the regulation of every species of personal and private concerns.”³⁷ Each branch is given broad powers of interpretation, especially the legislature, which is left to define its own operating procedures.

Furthermore, even supposing a clause defining good behavior were added to the Constitution, it would be unable to alleviate many of the ills currently plaguing the judiciary. It would have little power to remove inept justices, to stop them from resigning at politically beneficiary moments, to remove the incentive for the executive to appoint younger, inexperienced justices, and to stop the legislature from making the confirmation process more political than is necessary. Though there are some merits of a clause allowing the judiciary to set its own standards of good behavior, it is more important to focus on judicial reform by limiting the tenure of justices on the Supreme Court.

IV. The Solution: Staggered Appointments of Non-Renewable Fixed Terms of 18 Years

Having explored the merits of limiting life tenure, it is now worth exploring how to best accomplish this task. Although there are a number of ways to limit life tenure on the bench, most scholars advocate either mandatory retirement ages or non-renewable fixed terms. Mandatory retirement ages, however, are limited at best in their success at addressing the problems of the judiciary. Non-renewable fixed terms of tenure are much more promising for the simple fact that they add not only a definite end to tenure, but also a definite beginning. This paper advocates a non-renewable fixed term of 18 years, with appointments staggered every two years between the nine justices. Logistically, this plan guarantees every president two appointments for every four-year term and replaces the entire Court over an eighteen-year cycle. Early retirements would be filled by presidential appointment for the remainder of the departed justice’s tenure.³⁸ Before analyzing why the proposed system is most effectual in standardizing the judiciary, it is worth exploring why mandatory retirements are an insufficient resolution.

Thirty-six states currently impose mandatory retirement ages on their judges and a number of scholars have proposed that the same system be instituted in the Supreme Court.³⁹ Among the ranks of its vocal supporters are Artemus Ward, Chief Justice Earl Warren, Justices Owen Roberts and Lewis Powell, and Presidents William Howard Taft, John F. Kennedy, Lyndon Johnson, and George H. W. Bush.⁴⁰ *Gregory v. Ashcroft* upheld the constitutionality of state retirement statutes, and scholars look to this as a sign of promise.⁴¹ However, a mandatory retirement age does nothing to account for

the greatest ills: incapacity on the bench, strategic retirement, the incentive to appoint younger justices, and the random distribution of appointees among presidents.

A mandatory retirement age may in fact exacerbate the amount of strategic retirements from the bench. The institution of a mandatory retirement age protects justices from accusations that their workload is too much to handle or that they are hanging onto their seat for partisan reasons because the system assumes that they are only capable until they reach a certain age. Justices leaving the bench early would have to answer to the public about whether or not their choice to leave was strategically motivated. Accordingly, as Professor Artemus Ward argues, because a mandatory retirement age would make early retirements more suspicious, it would provide “justices with a strong disincentive from acting strategically when they depart.”⁴² Ward’s argument, however, is not without its problems. What Ward ignores is that it would provide just as strong of a disincentive from leaving the bench when one’s mental faculties or health were in decline. The very media scrutiny that is essential to his thesis would act as a shaming force. In order to avoid accusations of political motivation, one would have to announce his declining mental state, something that justices would presumably rather not face.

However, it seems questionable from the start that there would even be a disincentive to strategically depart the bench at all. There is such a level of respect and veneration for our Supreme Court justices that it might be a stretch to even assume that their motives for leaving the bench early would be questioned at all by public scrutiny with a mandatory retirement age in place. It seems far more likely that these questions would be speculative murmur, given no real weight and only fully discussed after quite some time had passed. Not only this, but if a justice acting under political pretenses were to be questioned, he could hide behind the auspicious cover of his moral duty to step down from the bench in lieu of declining mental faculties, effectively turning a strategic retirement into a celebration of a justice’s dedication to justice.

Age and staying power are already irrelevant factors that continue to figure into presidential nominations. Knowing the mandatory age of retirement would increase the incentive for presidents to appoint younger, more inexperienced justices. Say, for example, a mandatory retirement age of 65 were put in place. One would expect presidents to attempt to appoint justices whose tenure could remain around the average length of service today, about 25 years. Candidates around the age of 40 would fair far better in nominations and appointments than candidates around the age of 50 or 55. Not only would this do nothing to stop youth from being a factor in appointments, but it might also have the effect of keeping some of the most promising justices off of the bench entirely because there would be little incentive to appoint anyone over the age of 55. Horace Lurton, Ruth Bader Ginsberg, and Stephen Breyer might never have been appointed under this system.⁴³

Perhaps most problematically, instituting a mandatory retirement age would do nothing to standardize the distribution of appointees among presidents. Indeed, one would know the final date of one’s tenure, but strategic retirements would still be an option. Furthermore, appointments could be timed by ages so that every justice of one ideological viewpoint would turn 65 at the same time, leaving a lump sum of appointments to one president. This could even happen organically, so that the entire Court would be replaced within a short time and vacancies scarce for another twenty year. Although a mandatory retirement age does something to regulate the judiciary, it does not go far enough.

A non-renewable fixed term of tenure, on the other hand, provides an answer to these problems in a way that neither life tenure nor mandatory retirement ages can. Like these two methods, a non-renewable fixed term of tenure recognizes the importance of long terms in establishing the independence of the judiciary. An eighteen-year term is still eight years longer than any president can possibly serve.⁴⁴ The point of the proposed system is not to limit the term, insofar as long tenure is both beneficial and necessary to protect the independence of the judiciary, but rather to remove the political impetus from judges and presidents to act politically in a completely non-political sphere. Fixed terms are successful at alleviating a number of the ills of the judiciary, because they implement both a definite start and end to tenure.

The problems in the judiciary have been outlined thus far in terms of a lack of standardization, both qualitatively and procedurally. Qualitatively, the proposed system increases the vitality on the bench by increasing judicial turnover. Because the entire bench is replaced within an eighteen-year period, there is a stronger guarantee that justices will be more in touch with the times. At the end of their tenure they will be less than twenty years, a mere two decades, removed from real world experience. This is not to say that long-serving justices *will* become removed but that there is a greater danger that they *might*. This, alone, is a danger worth protecting against. Furthermore, because of the increased turnover, one can expect a new sort of energy on the bench. One could argue that energy is both unnecessary and undesirable in a branch whose greatest value is longevity and moderation. However, energy need not mean that the judiciary will become a victim of the passions of the public. Rather, it allows for justices who are still excited about the law, assuming that they will not see their posts as mundane as those who have served for longer periods of time might.

On this point, one can also expect the prevalence of diminishing capacity on the bench to decline because presidents will have a greater incentive to appoint justices who will maximize the impact of their eighteen-year tenure on the Court, as well as justices who are still quick of mind and are alive and well. Surely, presidents would want to appoint justices young enough to fulfill the whole term, but because of the limited term there would be an equal, if not greater, incentive to appoint someone with more experience. A shorter term means there is less time for a judicial “trial period.” That is to say, there is less time for justices to figure out what they are doing while on the bench. Given this, it would be in the presidents’ interests to appoint someone with greater experience, someone who could come onto the bench with a working knowledge of the court and its precedence, persuasive powers, and the requisite respect necessary to make a real impact on judicial outcomes and rulings. Thus, in large part, the proposed system will eliminate age as a factor in appointments.

In some respects, it may seem counterintuitive to say that term limits act as quality control by removing bad justices and good justices who are no longer doing good work from the bench. What makes a justice “good” or “bad” is largely subjective and often these judgments fall along party lines. Still, reducing life tenure has its merits for both parties. It has been said that “losing a Holmes is offset by the advantage of retiring a James C. McReynolds and a Willis van Devanter.”⁴⁵ Likewise, a Democrat today might say that losing a Breyer would be offset by the advantage of retiring a Clarence Thomas while a Republican might argue that retiring a Ginsburg or a Breyer would offset losing a Scalia. Limiting tenure, however, means that both parties have a greater opportunity to see “good” justices, or those committed to understanding what is constitutionally correct, sit on the bench. Limiting the term of justices will provide a greater incentive for a decreased reliance on law clerks and encouragement for justices

to do their own research, in hopes of make a substantive and lasting impact in their limited time on the Court.

Likewise, it will eliminate all opportunity for strategic retirements because there is a definitive end to tenure and early retirements would do nothing more than transfer the end of the term to which the justice is already entitled into the hands of another. Without removing any independence from the judiciary, term limits remove the power of the judges to have any influence in deciding who their replacements will be. In this way, term limits return the power of appointments and confirmations to the president and the Senate, respectively, thus restoring the Constitutional balance that was originally desired.

Furthermore, because terms would no longer be sporadic and unpredictable, the American electorate would regain its power over the bench. An important point is that limiting life tenure will normalize the appointment process, making it no longer a crisis situation when someone steps down from the bench. As the American populace becomes more acquainted with the idea of regular appointments, one can expect to see less politicization of the process in the Senate and fewer potential justices turned away from potential service by an overwhelming amount of media scrutiny, Staggering appointments among the justices would standardize the amount of appointments per presidential term, translating electoral victory into proportional influence on the Court. This is important in that it makes each American vote for the president hold even more weight. The only danger is that one president serving two four-year terms can appoint nearly half the bench, possibly creating a greater opportunity for polarization in the Court. Still, no party would be able to appoint the entirety of the Court without winning five consecutive presidential elections, something that has only occurred once in the past hundred years.⁴⁶ Because of the increased turnover, the potential drawbacks of the system are outweighed by its potential benefits.

V. What The Critics Say

There is relatively little scholarship available today that willingly defends life tenure. However, a few scholars have responded to critics of life tenure in an attempt to justify its institution and to critique alternative proposals intended to change it. The most formidable arguments challenge the assertion that term limits would in fact protect the independence of the judiciary. To begin, some argue that the proposed system would impair the judicial independence of the Court because it treats the appointment process as political one. The proposed term limit would thus force judges to become more partisan and to pick party lines as presidents began to run on platforms of appointing certain justices in line with their ideological affiliations. The Court is supposed to be divorced from popular democracy and if you treat the office as political, it will become political. This concern is worth considering but, in some ways, making the process more responsive to the democratic electorate will actually have the effect of making the Court more moderate and less political.

Despite how separate the judiciary should be from the other political branches, it is already inextricably linked to popular democracy as the Constitution grants presidents the right to nominate justices and the Senate the right to confirm them. Surely, the framers of the Constitution realized this link and maintained it for a reason. Secondly, although it is true that presidents could run on a platform of appointing certain justices, who might polarize the court with extremist views, this is not likely to happen.

Not only is it already implicit in the voting process that presidents run on a platform that they will appoint justices in line with their ideological views, but also there is a danger for presidents in nominating extremists because they will lose the moderate vote, which is always crucial. In this case, then, linking the appointment process with a political electorate actually works to make the Court less political.

In a somewhat different vein, constitutional scholars David Stras and Ryan Scott claim that the quick turnover of the Court will have costs for its legitimacy insofar as it will lead to quickly overturned precedent. “To be sure,” they contend, “a rapidly changing democratically accountable Court could swiftly reverse unpopular decisions, even moving back and forth repeatedly, if needed, to accommodate fickle public preferences. But that behavior world, over time, undermines confidence in the courts as an impartial, independent branch of our republican government.”⁴⁷

This concern has its merit: binding and meaningful precedent is necessary in the Court. However, term limits still secure the independence of the judiciary because it makes only appointments, and not also judicial proceedings, responsive to the electorate. Also, justices themselves have an incentive to remain impartial given the fact that they take power, in form of perceived legitimacy, away from themselves when they act in such a capricious manner. Insofar as it takes eighteen years to replace the entire body of the Court and no president can appoint a majority on the bench, there is a level of stability even in the midst of change that would prevent this concern from ever manifesting itself in a fickle Court.

A final concern maintains that shortening the length of tenure both does nothing for the independence of the Court and that the framers of the Constitution intended the average length of tenure to grow over time. These scholars cite both Federalists and Anti-Federalists in the discussion of their expectations for life tenure. Robert Yates in *Federal Farmer No. 15* discusses that judges would eventually serve “thirty or forty years,” far longer than the average 26 years today.⁴⁸ Hamilton, too, expected life tenure to last this long insofar as he assailed a mandatory retirement age of 60 because deliberating faculties usually “preserve their strength much beyond that period in men who survive it.”⁴⁹ Stras and Scott argue that the founders knew that life tenure would increase and chose it anyway, a profound statement. Furthermore, we have seen periods where the average tenure levels were as high as those today and still, “we have not come close to a point of constitutional crisis.”⁵⁰ This argument is dangerous. Regardless of the founders’ intentions, problems have crept into the judicial branch and every branch for that matter that need fixing. It is for this very reason that we have added upwards of ten amendments to our Constitution since 1787. Indeed we have yet to reach a constitutional crisis, but we need not wait for the judiciary to deteriorate to this point when change is a possibility.

VI. Conclusion

Though life tenure does something to ensure the independence of the judiciary, it is in no way perfect and may in fact be detrimental to American democracy because it allows the problems affecting the branch to remain unchecked. The greatest point to be gleaned from this argument is that although life tenure may be beneficial in numerous ways, it need not be seen as a necessary evil. There are other options and, more often than not, these other options account for problems that life tenure cannot even begin to address. As Edward Lazarus, former clerk to Justice Blackmun, has so aptly put it, “the question is not whether life tenure is essential to judicial independence, but whether

other judicial tenure rules could equally preserve judicial independence while better serving other goals.”⁵¹ Life tenure of Supreme Court justices is not essential to the preservation of American liberties.

Part of the paradox of popular sovereignty is the vicious cycle of democratic legislation, where people break and change the rules and laws they give themselves. According to Rousseau, the great problem in politics is how to put the government above man.⁵² The answer, at least in this case, is regulation. The great root of the problems plaguing the judicial branch is the lack of a standard operating procedure regarding appointments, resignations, and expectations of the judiciary. One could argue that the Constitution has worked for upwards of 200 years, but insofar as we have created a political order that is responsive to change, in form of amendment, we should embrace and not shun improvements that are both warranted and necessary.

Reducing life tenure regulates the judicial branch just as we have regulated the other branches of government. The Constitution itself limits the terms of Congressional representatives in Article I, and one need only look as far as the 22nd Amendment to see that term limits are anything but un-American. In 1807, Jefferson wrote, “if some termination to the services of the chief Magistrate be not fixed by the Constitution, or supplied by practice, his office, nominally four years, will in fact become for life.”⁵³ One can argue, and with some success, that the 22nd Amendment was meant to act as a bulwark against monarchy, a concern not present in the judiciary. Though life tenure may not protect against monarchical power, it provides a check on judicial power that is largely nonexistent in the Constitution. As Justice Fleming argues,

The Twenty-second Amendment carries the strong implication that limitation of the term of office of a President serves to combat the corrosive effect of power on the person who holds the office. Would not the same beneficent result flow from an amendment limiting the term of office of members of the Supreme Court to a specified number of years?⁵⁴

The benefits of limiting life tenure are numerous: it would standardize the judicial processes and act as a form of quality control within the branch. Insofar as an eighteen-year non-renewable term of tenure would protect the independence of the judiciary while accounting for many of the ills that life tenure cannot, it is time for a change. Indeed, life tenure has outlived its stay.

Endnotes

¹ See Federalist 78 & 79 in Hamilton, Alexander, James Madison, John Jay, Clinton Rossiter, and Charles R. Kesler. 2003. *The Federalist papers*. New York (N.Y.): Signet Classic.

² Included in the resigned count is William Howard Taft who was forced to resign in 1930 due to illness. There is some dispute over whether he retired or resigned. Included in both the resigned and retired counts is Charles Evans Hughes who served two terms on the bench. He resigned from his first appointment by Taft, date unknown, and was reappointed to the bench in 1930 by Hoover, serving until his retirement in 1941.

³ Dahl, Robert Alan. 2001. *How democratic is the American Constitution?* The Castle lectures in ethics, politics, and economics. New Haven: Yale University Press. 2.

⁴ *Ibid.*

⁵ DiTullio, James, and John Schochet. 2004. "Saving this Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms". *Virginia Law Review*. 90 (4): 1093. 1095.

⁶ *Bush v. Gore*, 531 U.S. 98 (2000), *Brown v. Bd. Of Educ.*, 349 U.S. 294 (1955), *Reynolds v. Sims* 377 U.S. 533 (1964)

⁷ DiTullio at 1095.

⁸ Lindgren, James. 2006. Term Limits For the Supreme Court. *Harvard Journal of Law and Public Policy*. July 1.

⁹ Garrow, D. J. 2000. "Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment". *University of Chicago Law Review*. 67: 995-1088. See also Atkinson, David N. 1999. *Leaving the bench: Supreme Court justices at the end*. Lawrence: University Press of Kansas.

¹⁰ Federalist 78.

¹¹ Oliver, Philip D. 1986. "Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court" *Ohio St. L.J.* 47: 805. See also Schwartz, Bernard. 1983. *Super chief, Earl Warren and his Supreme Court: a judicial biography*. New York: New York University Press, and White, G. Edward. 1982. *Earl Warren, a public life*. New York: Oxford University Press. 306-308.

¹² DiTullio at 1101.

¹³ Amar, Akhil Reed, and Vikram David Amar. 2002. "Should U.S. Supreme Court Justices Be Term Limited?: A Dialogue" WRIT <http://writ.findlaw.com/amar/20020823.html>

¹⁴ *Ibid.*

¹⁵ Nelson, Kjersten, and Eve Ringsmuth. 2007. "Departures from the Court: The Importance of the Political Landscape" *Paper presented at the annual meeting of the Midwest Political Science Association, Palmer House Hotel, Chicago, IL*. http://www.allacademic.com/meta/p196816_index.html

¹⁶ DiTullio at 1110.

¹⁷ Garrow at 997.

¹⁸ Oliver at 809.

¹⁹ Amar.

²⁰ Pringle, Henry F. 1939. *The life and times of William Howard Taft: a biography*. New York: Farrar & Rinehart. 967.

²¹ From Nixon (January 20, 1969) to Present (December 4, 2009). Rounded up to forty-one years.

²² The Justices and their Nominating Presidents: Warren E. Burger (Nixon – R), Harry Blackmun (Nixon – R), Lewis F. Powell, Jr. (Nixon – R), William Rehnquist (Nixon – R), John Paul Stevens (Ford – R), Sandra Day O'Connor (Reagan – R), Antonin Scalia (Reagan – R), Anthony Kennedy (Reagan – R), David Hackett Souter (G.H.W. Bush – R), Clarence Thomas (G.H.W. Bush – R), Ruth Bader Ginsburg (Clinton – D), Stephen Breyer (Clinton – D), John G. Roberts (G.W. Bush – R), Samuel Alito (G.W. Bush – R), Sonia Sotomayor (Obama – D)

²³ Taft Appointees: Horace Harmon Lurton (1910), Charles Even Hughes (1910), Willis an Devanter (1911), Joseph Rucker Lamar (1911), Mahlon Pitney (1912); Harding Appointees: William Howard Taft (1921), George Sutherland (1922), Pierce Butler (1923), Edward Terry Sanford (1923)

²⁴ Farnsworth, Ward. 2006. "The ideological stakes of eliminating life tenure." 29 (3). 407 and Farnsworth, Ward. 2005. "The regulation of turnover on the Supreme Court." 2005 (2).

²⁵ Calabresi, Steven G., and James Lindgren. 2006. "Term limits for the Supreme Court: life tenure reconsidered." 29 (3). 844.

²⁶ *Ibid.*, 844.

²⁷ Federalist 78.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Lazarus, Edward. 2004. "Life Tenure for Federal Judges: Should It Be Abolished?" Find Law. <http://writ.news.findlaw.com/lazarus/20041209.html>

³² Federalist 78.

³³ Federalist 79.

³⁴ Levinson, Sanford. 2006. *Our undemocratic constitution: where the constitution goes wrong (and how we the people can correct it)*. Oxford: Oxford University Press. 126.

³⁵ Samuel Chase is the only justice to have been impeached, in 1804. He was acquitted by the Senate in 1804 and died on the bench in 1811.

³⁶ See Levinson.

³⁷ Federalist 84 in Hamilton, Alexander, James Madison, John Jay, Clinton Rossiter, and Charles R. Kesler. 2003. *The Federalist papers*. New York (N.Y.): Signet Classic.

³⁸ For a more detailed discussion of non-renewable terms of 18 years, see DiTullio.

³⁹ Epstein, Lee, et al. 2001. "Comparing Judicial Selection Systems." *Wm. & Mary Bill Rts. J.* 7 : 58.

See also Garrow at 1086.

⁴⁰ Levinson at 341 *Supra* Note 86.

⁴¹ *Gregory v. Ashcroft*, 501 U.S. 452, 470-73 (1991).

⁴² Ward, Artemus. 2003. *Deciding to leave the politics of retirement from the United States Supreme Court*. SUNY series in American constitutionalism. Albany: State University of New York Press. 247.

⁴³ Horace Lurton, appointed at 65 in 1909; Ruth Bader Ginsberg, appointed at 60 in 1993; Stephen Breyer, appointed at almost 56 in 1994.

⁴⁴ A President can serve ten years at most: two years of a former President's term, in case of death, incapacitation, or impeachment, and two four-year terms of his own.

⁴⁵ DiTullio at 1100.

⁴⁶ This occurred from 1932-1948.

⁴⁷ Stras, David R, and Ryan W Scott. 2005. "RETAINING LIFE TENURE: THE CASE FOR A "GOLDEN PARACHUTE". *Washington University Law Quarterly*. 83 (5): 1397. 36.

⁴⁸ Federal Farmer No. 15 *supra* note 35 in Bennett, Walter Hartwell, and Richard Henry Lee. 1978. *Letters from the Federal farmer to the Republican*. University: University of Alabama Press.

⁴⁹ Federalist 78.

⁵⁰ Stras, David R, and Ryan W Scott. 2005. "RETAINING LIFE TENURE: THE CASE FOR A "GOLDEN PARACHUTE". *Washington University Law Quarterly*. 83 (5): 1397. 35.

⁵¹ Lazarus.

⁵² Rousseau, Jean-Jacques. 1950. *The social contract, and Discourses*. New York: Dutton. Books III and IV.

⁵³ Jefferson, Thomas. 1807. "Reply to the Legislature of Vermont."

⁵⁴ DiTullio at 1100.

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A Web of Context: James Madison and Source Selection of the Bill of Rights

Alyson Cohen

ABSTRACT

In this paper, I argue that as part of understanding the role, relevance, and interpretation of the Bill of Rights, we must understand the sources that James Madison used to draft it and his intentions in choosing them. This subject has a rich historical and legal scholarship, so in addition to offering my own interpretations of primary source material, I also provide a “road map” to the existing scholarship and seek to categorize and distinguish the relevant historiographies.

I first analyze the Anti-Federalist push for the Bill’s inclusion, and categorize the three major historical understandings of the decision to include the Bill: first, that the Bill represented a real political compromise to the Antifederalists that adjusted the meaning of the Constitution; second, that Madison offered the Bill as a shrewd political distraction that would garner Antifederalist support without actually weakening the Constitution’s federalism; and third, that the Bill reflected Madison’s liberal desire to protect against future minority oppression.

In the second half of the paper, I focus on six major sources from which Madison derived the Bill of Rights: lessons from the Articles of Confederations, state and colonial conventions, colonial experiences and revolutionary responses, English common law and the Magna Carta, and moral philosophy and Enlightenment ideals. I look at particular historians and legal scholars who have focused on each source type, and argue that the particular source category that these authors have focused on has led to a particular (and somewhat predictable) vision of the Bill.

I end by synthesizing all of these sources and their historiographies to argue that we can only understand the Bill of Rights if we understand the web of context in which James Madison wrote it. Histories that claim to unlock the true story of the Bill by focusing on merely one source type oversimplify the story and overlook the rich interplay between Madison’s various ideas and sources.

However, I caution the reader that while Madison is an important founder—particularly because he authored the Bill, we must not overlook the various contributions and differing mind sets of all those who played a role in advocating for, amending, and ratifying the Bill. There is no one founder’s intent, but Madison’s is certainly one worth getting to know.

I. INTRODUCTION

Today the Bill of Rights is a revered and integral part of the American Constitution. When American politicians and citizens talk about the ‘freedoms’ of our democracy, they implicitly refer to the Bill and the rights enshrined in it. Americans view this Bill as unique to their own national story—as essential to their government and their understanding of liberty. James Madison, one of America’s deified founders, is viewed as its proud father.

In reality, however, the Bill was a constitutional afterthought, and James Madison had a far more complicated, less heroic relationship with it than has previously

been portrayed. Historians and legal scholars have told many stories about its adoption: the Bill as political compromise, as an Antifederalist distraction, and as farseeing protection against future minority oppression. Furthermore, though the Bill has assumed a mythic quality as the bastion of uniquely American freedoms, Madison did not write the document from scratch. Here to, many stories are told about its sources, with differing emphases placed on each source: the lessons from the Articles of Confederation; state and colonial conventions; colonial experiences and revolutionary responses; English common law and the Magna Carta; and moral philosophy and Enlightenment ideals. The way that these stories are told can and have greatly influenced how the Bill is understood. To get beyond the myth of the Bill, it would be fruitful to categorize and understand these historiographies.

This project is particularly relevant in an era when many legal philosophies, including the much discussed Originalism, harp on the importance of judges staying faithful, sometimes even exclusively, to the original intent of the founders. In fact, in Justice Sonia Sotomayor's recent confirmation hearings, she was pointedly asked about the extent to which she planned to stay faithful to these intentions instead of applying her own life experiences and vision of the Constitution.¹ The stories told about Madison's authorship of the Bill of Rights, particularly his impetus to write it and the sources he utilized, therefore, are not restricted to legal and historical academia; they have very real repercussions for how our justices are chosen and how they then understand and interpret the Bill of Rights. Their judgments have serious implications with regards to the nation's laws, and more broadly the structure of American society.

Thus, the way that scholars have framed James Madison's decision to author the Bill of Rights and the sources that influenced him have had an impact on their understanding of the meaning and role of the Bill at the time of its adoption. If we seek to understand James Madison's intentions for the Bill, we must understand these two important contexts and the narratives written about them.

II. MADISON'S VIEW OF THE BILL

In the summer of 1787, when the Constitution was written, it included no Bill of Rights.² This omission was no accident. As Madison and his fellow Federalists would later explain, they feared that any enumeration of rights would give the impression that *only* these rights were reserved by the people and the states. In reality, the Constitution would limit the federal government exclusively to the rights enumerated, and all other rights would be reserved to the people and the state.³

Furthermore, Madison did not believe a mere list of reserved rights would have any real impact. As Madison saw it, the goal of the Constitution was to set up a system of government that would locate abuses of power and by the inherent nature of the government created, limit them.⁴ A Bill Rights would be a mere "parchment barrier" to rights abuse. He explained,

Experience proves the inefficacy of a bill of rights on those occasions when it's control is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every state. In Virginia, I have seen the bill of rights violated in every instance where it has been opposed to a popular current.⁵

Thus, he argued, the success or failure of the government, and therefore the American experiment, would hinge on the founders' ability to create a system that inherently guarded against such rights abuses, where "the rights in question are reserved by the manner in which the federal powers are granted."⁶

In a letter on June 12, 1788, Madison explained this concept of appropriate rights protection regarding freedom of religion. This freedom, he argued, would come not from a written guarantee, as "if there were a majority of one sect, a bill of rights would be a poor protection for liberty." This liberty instead "arises from that multiplicity of sects, which pervades America, and which is the best and only security for religious liberty in any society."⁷ Again, only the actual design of societal and governmental institutions could protect these essential liberties, not mere "parchment barriers." Furthermore, he argued, creating a Bill could be dangerous. By mentioning these rights at all in the Constitution, the founders might give the impression the federal government had jurisdiction over these areas.⁸

Madison argued that the Constitution would create the type of government necessary to prevent rights abuse. It "blend[ed] a proper stability & energy in the Government with the essential characters of the republican Form" while retaining "a proper line of demarcation of between the national and State authorities."⁹ Madison did not want a Bill of Rights to dilute the power of the federal government under the proposed Constitution, as he had envisioned an even stronger central government and worried that this level of vertical separation of powers would render the federal government ineffectual "neither effectually answer[ing] its national object nor prevent[ing] the local mischiefs which every where excite disgusts agst. the state government."¹⁰ His penchant for a stronger federal government was made clear in his proposal, eventually rejected, for a Congressional veto on state legislation. Any further concessions he feared, would risk anarchy domestically and in foreign relations, and thus, liberty.¹¹

Thus, Madison argued, the Constitution intrinsically prevented rights abuse by creating a federal government strong enough to maintain peace and stability. A Bill of Rights was unnecessary, and potentially dangerous.

a. **ANTI-FEDERALIST OBJECTIONS**

Other founders, known as Antifederalists, objected to the absence of a Bill of Rights as one indication that the new federal government would be too powerful, too much like the British rule they had left, and under-protective of the rights of the states and of the people. They argued forcibly against the passage and ratification of the Constitution as presented, and took a stronghold in powerful states like Massachusetts, New York and Madison's own home state Virginia.¹² As Massachusetts' James Bowdoin noted in its Convention Proceedings, of the "objections offered against the constitution... the one most thoroughly urged has been the great power vested in Congress."¹³

To those who feared this great central power, the Bill of Rights was a way to limit the federal government without entirely rejecting the new Constitution. They demanded explicit guarantees that the liberties for which they had fought would be protected from the possible tyranny of a centralized government. Patrick Henry argued, "That sacred and lovely thing, religion ought not be allowed to rest on the ingenuity of logical deduction."¹⁴ He feared that a Constitution that did not protect these rights

“squints towards monarchy” as “Your president may easily become a King.”¹⁵ Thomas Tudor Tucker (writing under the pseudonym Philodemus) argued that while the Bill and the liberties it secured might bring “disorder,” that threat was far less dangerous than the threat of tyranny from too strong of a central government.¹⁶ New York delegate Melancton Smith argued that he was willing “to sacrifice everything for a union, except the liberties of his country” and that a better balance could be struck between liberty and order with a bill of rights or a new convention.¹⁷

The Anti-Federalist threat to the Constitution had mass appeal, and there was a real risk that the Constitution would not be ratified by enough states, or by the states powerful or large enough to be integral to the success of the Union, such as New York, Massachusetts, and Virginia. As Kenneth Bowling argues in his article “A Tub to the Whale,” “Madison and other leaders in the fight to strengthen the federal government during the 1780s made a critical—almost fatal—error at the Federal Convention by not attaching a bill of rights to the proposed Constitution when Antifederalists George Mason of Virginia and Elbridge Gerry of Massachusetts had called for one.”¹⁸

Thus, the Antifederalists were powerful, they were poised to block the ratification of the Constitution, and they demanded explicit protection of liberties in a bill of rights.

b. THE BILL OF RIGHTS AS POLITICAL COMPROMISE

Madison thus needed to respond to see the Constitution passed, privately in correspondence, in constitutional debates, and in public, in the *Federalist Papers*, co-authored with Alexander Hamilton and John Jay. Eventually, he conceded, and agreed to father the Bill of Rights.

Some historians, such as Paul Finkelman in his article “Between Scylla and Charybdis: Anarchy, Tyranny, and the Debate over a Bill of Rights,” Lance Banning in his book *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic*, and Richard Labunski in his book *James Madison and the Struggle for the Bill of Rights*, thus frame the process by which Madison proposed the Bill of Rights as a story of partisan politics, with dueling political figures seeking to appeal to their constituencies and reach political consensus.

Finkelman sets up a Federalist party and Antifederalist party in the vein of our modern day Democratic and Republican dual party system, and frames the Bill of Rights as a modern day ‘reach across the aisle,’ where parties must each compromise to get a piece of legislation passed. In his narrative, the Federalist Party ‘platform’ was “liberty through strength” and the Antifederalist party ‘platform’ was “liberty through democracy and guarantees of rights.”¹⁹ He writes,

Simply put, the Federalists feared the nation would collapse into anarchy if they failed to secure the adoption of the Constitution as written and if they failed to prevent the addition of amendments that might alter the structure of the new government and weaken its power. Conversely, Antifederalists feared that the nation would slip into tyranny if the Constitution were adopted without amendments explicitly protecting liberty.²⁰

Both parties understood that the American experiment hung in the balance, that the Articles of Confederation were not working, and that they needed to protect the liberties they had won in the Revolution.²¹ Furthermore, the Antifederalists had the power to block the Constitution's power, and the Federalists wanted their Constitution passed. So in 1789 Madison 'reached across the aisle' and proposed a bipartisan Bill of Rights, settling on amendments that protected the fundamental liberties the Antifederalists sought to protect while maintaining the basic structure and set-up of the Federalist government. Madison conceded that "in a certain form and to a certain extent, such a provision was neither improper nor altogether useless."²² As Finkelman concludes, "In the end the desire for national harmony overcame most Federalist opposition to amendments."²³ In the true spirit of political compromise, both sides were willing to concede lesser points to get their basic vision enacted.

Banning also adopts a modern political trope. He points out that Madison repeatedly promised his constituents he would include a Bill of Rights, giving the impression his decision to author the bill reflected political pandering.²⁴ Madison's statement in an October 1788 letter to Jefferson that he had "always been in favor of a bill of rights, provided it be so framed as not to imply powers not meant to be included in the enumeration" rang false considering his past record of speeches and letters, and seemed to indicate political shrewdness in the face of mounting political opposition and a constituency demanding a policy change.²⁵

Banning also emphasizes the personal respect Madison had for other politicians of the day, and that Madison "thought that the proponents of a bill of rights were too respectable... to be ignored" and that "to ease the anxious minds of men whose judgment he respected—men like Jefferson himself—was an appropriate republican objective."²⁶ Madison showed his personal respect for Jefferson as a politician by incorporating his argument from his March 15 letter, that the Bill would give the Courts an important check on legislative actions.²⁷ Banning thus emphasizes the political networking that influenced Madison's concession. Therefore, as Banning frames it, Madison sought to satisfy both respected politicians who would support the Constitution if only a Bill of Rights were added and his dissatisfied constituency.²⁸

Labunski highlights the political pettiness that played a role in the creation of a Bill. The author claims that Patrick Henry "never intended to support the new government" and sought to "reclaim his honor by punishing his longtime nemesis, James Madison."²⁹ Thus, Madison needed to accept a Bill to prevent more drastic measures from being taken. Furthermore, Labunski also argues many of New York's Antifederalists only agreed to support the Constitution because of hints New York City could become the nation's capital if they did. Here, the Bill was only a front for New York's hidden political motives.³⁰ Additionally, Labunski points out, Madison urged debate on the amendments only because continuing to delay such a discussion "may tend to inflame or prejudice the public mind against our decisions."³¹ Madison explained that "it will be proper itself, and highly politic, for the tranquility of the public mind... that we should offer *something*... as a declaration of the rights of the people" (emphasis mine).³² From this explanation, it seems Madison saw the Bill as a political gesture rather than a substantive change to the Constitution. Thus, Labunski emphasizes the petty politics involved in the adoption: the dueling politicians, political bids for power, and need to appeal to constituents.

These political framings of the adoption of the Bill and Madison's role in it represent a realist approach to politics. Underlying these descriptions is an argument that the much mythologized moment of the founding was not above the type of partisan

politics, constituent pressures, complex relationships between prominent politicians, and political promises that we see today. These historians are not so heavy-handed as to 'claim' the founders for a modern political party, as Rene de Visme Williamson claims the founders for the conservative movement; they do not argue that the Antifederalists or Federalists are equivalent with our modern day political system in their ideology.³³ However, Finkelman, Banning and Labunski frame the adoption of the Bill as an intrinsically political proceeding in a long lineage of political events in the constitutional system to come after, marred by the same political influences as any other. The language used to discuss Madison and the Bill's adoption could just as easily be written about the passing of a bill today.

c. THE BILL OF RIGHTS AS AN ANTIFEDERALIST DISTRACTION

While the preceding historians focus on the political compromise narrative, others focus on the Bill of Rights as an Antifederalist distraction, a tool Madison used to "give great quiet to the people" without making any of the substantive changes the Antifederalists demanded.³⁴ In this interpretation, Madison presented the Bill not as an genuine compromise, but as a feigned one, as a grand gesture to provide the appearance of change when in fact he intended none.

Many of the Antifederalist calls for a Bill of Rights were indicative of larger flaws they saw in the Constitution. They objected to the power and consolidation of the federal government, which they thought could lead to tyranny. The lack of a Bill of Rights was only one sign of this perceived larger flaw.³⁵ Madison thus had reason to believe that the Antifederalists would demand more changes, and would use the call for a Bill as an opportunity to revise the Constitution. In September 1787, Antifederalist Richard Henry Lee of Madison's own Virginia did just that, when he attempted to attach amendments that not only guaranteed personal liberty, but also limited the power of the new federal government and adjusted the governmental structure.³⁶ The amendments failed, but this experience, and much of the Antifederalist argumentation, taught Madison an important lesson: the Bill of Rights was only the tip of the iceberg of Antifederalist demands.

Madison feared that the Antifederalists would chip away at the aspects of the Constitution he found most essential. For example, Madison saw the ability of the federal government to operate directly on not just the states but also on individuals, as essential, and feared that this power would be amended.³⁷ The great opposition mounting to the Constitution meant Madison had to make some concession if he wanted it to pass, but he needed to find a way to do so without giving up the government structures he found most important. In this historiography, Madison chose to, as he put in a letter to Jefferson, "extinguish opposition to the system, or at least break the force of it" by offering a Bill of Rights.³⁸ Madison felt the Bill, unlike other more substantive changes, would be "harmless."³⁹

Robert Rutland and his co-editors of "The Papers of James Madison" and Kenneth Bowling in his article "A Tub to the Whale" embrace this viewpoint, arguing that Madison's decision to father the Bill of Rights was a politically shrewd move that fractured opposition to the Constitution without actually making the changes the opposition demanded.

Rutland et al. argue that Madison's "great fear was that the unreconciled Antifederalists would succeed in calling a second convention and proceed to attach

crippling amending articles to the Constitution.”⁴⁰ So, Madison decided to “preempt the issue” with a Bill of Rights, sponsored by Congress rather than a second convention, which might calm the opposition without offering more radical changes.⁴¹

Bowling frames the narrative similarly. Bowling starts his article with a quotation from Samuel Bryan in the October 7, 1788 *Independent Gazetteer* of Philadelphia that “Like a barrel thrown to the whale, the people were to be amused with fancied amendments, until the harpoon of power, should secure its prey and render its resistance ineffectual.”⁴² Thus, Madison, forced by the political realities of the day rather than convinced by Antifederalist arguments, put forward a series of amendments that might “detach the Antifederalists from their leaders” and preempt other changes.⁴³

These historiographies emphasize Madison’s political shrewdness, even disingenuousness. While the previous historiographies we looked at emphasized the typical political concerns that informed Madison’s decision to author the Bill, these framings go even further to undermine a lionized version of Madison as founder extraordinaire. Instead of portraying the Bill as a genuine ‘reach across the aisle,’ this approach portrays Madison’s decision as a tactic to defeat, rather than genuinely compromise with, his political opponents. These historians argue that Madison merely created the appearance of concession with the Bill of Rights, so that he would not actually have to concede. This approach is thus rather cynical about Madison’s intentions, making him look like just the sort of tyrant suppressing democratic impulses that the Antifederalists feared.

d. THE BILL OF RIGHTS AS FORESIGHT AND PROTECTION AGAINST MINORITY OPPRESSION

The final category of historiography regarding Madison’s decision to author the Bill claims that he understood that protecting the liberties of minorities against majority strongholds in the legislature would be essential in the future. In this framing, Madison saw that in a republic, voting majorities could use the powerful legislature to strip minority groups of their basic liberties. In the *Federalist* #51, he wrote, “It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part... If a majority be united by a common interest, the rights of the minority will be insecure.”⁴⁴

Thus, the story goes, Madison offered the Bill of Rights as a long-term solution to this perceived “evil,” to protect minority rights against majoritarian rule and thus prevent the domestic unrest that this could cause.⁴⁵ Madison highlighted the need for protecting minority rights in his 1788 speech at Virginia ratification convention, when he exclaimed, “On a candid examination of history, we shall find that turbulence, violence, and abuse of power, by the majority trampling on the rights of the minority, have produced factions and commotions, which, in republics, have, more frequently than any other cause, produced despotism.”⁴⁶ Historian Eric Kasper even argues that Madison foresaw the enforceability of the Bill in the judiciary and the importance of the codification of rights in the national identity and consciousness.⁴⁷

One of the best example of this historiography is Jack Rakove’s article “James Madison and the Bill of Rights.” Rakove argues that by May 1787, Madison’s great fears of rights abuse was by the “legislative power by the popular and populist majorities who seemed poised to seize control of American politics...”⁴⁸ He cites an April 1787 statement by Madison that a frequent cause of unjust legislation “lies among the people

themselves.”⁴⁹ In this framing, Madison began to see the tyranny of the majority as the prime abuser of personal liberty. Rakove thus argues that Madison was not skeptical of the Bill of Rights because he believed the liberties the Antifederalists sought to protect were not valuable, but because he felt a Bill would not be an effective means of protecting minority rights, that these statements would be mere ‘parchment barriers.’⁵⁰ Thus, though he valued the principle of the Bill, he had not, in his words, “viewed it in an important light.”⁵¹ Though Madison eventually accepted the Bill, he still believed that his proposed veto on state law would be more effective at protecting the personal liberties of minority groups.⁵²

Unlike the other two historiography types we analyzed, this type maintains the idealized vision of James Madison as a great founder. Madison is almost portrayed as a prophet, able to predict how important the Bill of Rights would become in getting minority rights protected by the Court against hostile majorities. In addition to upholding Madison’s esteemed reputation, this interpretation also justifies the modern role of the Bill and of the Court in protecting minority rights. As Rakove writes, “The idea that rights needs protection against legislative abuse... is for us so much a matter of common sense...”⁵³ But in our modern world, where legal thinkers and politicians have shown a great concern for the intentions of our founders, there is a need to justify our common sense today with the well-thought-out plans of the founders. This historiography, therefore, implicitly argues that the role of the Bill of Rights in minority rights protection did not happen as a result of the Civil War, the Fourteenth Amendment, and the Civil Rights movement, but was instead the vision of its author.

Madison certainly did show concern for the protection of minority rights, but the language of Federalist #10 weakens the Rakove interpretation of Madison’s vision for the Bill. In Federalist #10, Madison does not show a desire to protect the rights of the factions, but instead to “break up and control the violence of faction.”⁵⁴ He accepts faction because it is inevitable, but does not celebrate it; he fears that, as in modern day interest politics, factions care only about their own interests rather than the greater good. Madison thus feared that a prevalence of factions would turn government into anarchy. So while Madison certainly does show concern for minority rights, this historiography type, as exhibited by Rakove, can go too far in imposing our modern-day values of minority rights protection, developed in a country that lived through the civil rights movement, the women’s rights movement, the disability rights movement, the gay rights movement, among others, on Madison.

What can we learn from the types of historiographies that are produced about Madison’s reluctant decision to father the Bill of Rights? The history of the founding of the Constitution is obviously a key moment in American history, and lawyers, politicians, and scholars have often turned back to this moment to teach key lessons about the meaning of the Bill of Rights and its function in American society. The historiographies we looked at have shown that we not only seek to derive values from this event, but also often seek out our own as a way to justify and legitimize what we believe and what our modern government has become. Thus, we often understand the founding within our modern day conception of law, politics, and the importance of the Bill.

III. THE BILL’S SOURCES AND LESSONS FROM THEIR HISTORIOGRAPHIES

A similar theme has arisen in the historiographies produced about the sources Madison used to compile the Bill of Rights before its 1789 proposal. Madison drew on many sources to craft the bill, and the particular source material that scholars emphasize impact their interpretation and understanding of the Bill's meaning.

a. LESSONS FROM THE ARTICLES OF CONFEDERATION

The Constitution was a replacement for the government system initially adopted after the Revolution, the Articles of Confederation. The Articles of Confederation was a loose federation of sovereign states joined by a very weak overseeing government. This federal government lacked the power to tax, to effectively conduct foreign policy, to levy war, and other key powers, which rendered it ineffectual.

Furthermore, it required the consent of a majority of seven states to make congressional decisions; this structure left the federal government "incapacitated," a battleground for the interests of the states, rather than of some larger national good.⁵⁵ Madison feared that the Articles would leave states unequal with differing interests, and that they might turn to European alliances for strength. Once that happened, colonial influence would be reinstated and the states would turn against each other. Thus, Madison argued, the "defects of the federal system should be amended" because they risk "its very existence," the independence for which the colonists had fought.⁵⁶

Furthermore, Madison argued that this type of set-up, in which any Congressional action were legal if seven states deemed it such, would not foster long term prosperity. He resented the maxim that, in his words, "the interest of the majority is the standard of right and wrong," as this standard would protect only short-term interests and boiled down to "force as a measure of right."⁵⁷ He argued that majority interests needed to be weighed against a "necessary moral ingredient"—justice and equal rights.⁵⁸ In Madison's opinion, a majority of states could not trample upon the rights of a minority of states, just because they agreed to do so. And a system that allowed them to—a system like the Articles of Confederation—was patently unjust.⁵⁹

Madison prepared a document, the "Vices of the Political System of the United States," in April 1787, in which he listed his major grievances with the Articles of Confederation. Madison expressed his frustration with the weakness of the federal structure and the lack of federal sanction to keep the states in line and serve the public good of the country, not merely of the good of a majority of states.⁶⁰ Furthermore, Madison argued that the Articles did not actually protect the states' sovereignty, because it was unable to protect states from each other.⁶¹ Madison also resented that the Articles derived their authority merely from the states, not from the people. This system of government, he argued, rendered the laws of the land "mutable," "unjust," and "impotent."⁶²

Madison, thus, had lived through the Articles of Confederation, and had learned from its mistakes. He sought a new Constitution that would amend these faults. It would have real 'teeth,' with the ability to wage war, levy taxes, oversee interstate commerce, and present a united front in foreign diplomacy. It would have long-term principles of justice and equality, beyond the temporary whims of the majority. Its sovereignty would come directly from the American people. In Federalist 40, published in January 1788, Madison wrote,

The truth is, that the great principles of the Constitution proposed by the convention may be considered less as absolutely new, than as the expansion of principles which are found in the articles of Confederation. The misfortune under the latter system has been, that these principles are so feeble and confined as to justify all the charges of inefficiency which have been urged against it, and to require a degree of enlargement which gives to the new system the aspect of an entire transformation of the old.⁶³

In short, the authors of the Articles of Confederation had good intentions, but they had failed to create a system of government that would enact those intentions. The new Constitution drew from these intentions, but enacted them by a dramatically different means.

Robert Morgan's book *James Madison on the Constitution and Bill of Rights* particularly emphasizes Madison's view of the Articles as formative in his compilation of the Bill. He notes that in an October 24, 1787 letter to Jefferson, Madison argues that under the Articles of Confederation, rights had been left under the control of the states rather than the federal government. Thus, under the new Constitution, there would have to be a concerted effort to protect personal liberties; the Bill of Rights was such a measure.⁶⁴ In this understanding, the Bill of Rights, then, was not only a statement and protection of rights, but also an announcement that the government and its principles had changed, and that under the new Constitution, the federal government would have the authority to protect personal liberties, through the Courts.

Furthermore, the context of the Articles of Confederation explains Madison's willingness to accept the Bill of Rights, even though he feared it could weaken the constitution. Comparing the Constitution to the Articles of Confederation, Madison wrote, no "man would refuse to give brass for silver or gold, because the latter had some alloy in it."⁶⁵

b. STATE AND COLONIAL CONVENTIONS

Many states refused to ratify the Constitution without a Bill of Rights, so Madison turned to several states' bills of rights to appease them. Starting in their days as colonies, many states had passed declarations of their collective and individual rights, including the 1776 Virginia Ordinances, 1639 Fundamental Orders of Connecticut, 1682 Pennsylvania Frame of Government, 1683 New York Charter of Liberties and Privileges, 1680 General Laws and Liberties of New Hampshire, and 1649 Maryland Toleration Act.

Madison was from Virginia, so it made sense for him to draw heavily on his home state's example, both because he was most familiar with it and because it would appeal to his constituency.⁶⁶ In Farrand's Records of the September 12, 1787 of the Federal Convention, George Mason, the primary author of the Virginia Bill of Rights, emphasizes this point, explaining he "wished the plan had been prefaced with a Bill of Rights... and with the aid of the State declarations, a bill might be prepared in a few hours."⁶⁷ First, the Virginia Bill begins with a justification for having a Bill of Rights: "That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact,

deprive or divest their posterity...”⁶⁸ This explanation for the Virginia Bill closely echoes Madison’s own eventual embrace of a federal Bill.

Madison also seems to have borrowed specific rights from the Virginia Bill. It addresses the right “to a speedy trial by an impartial jury,” a right echoed in the Sixth Amendment. It notes “that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,” a sentiment later expressed in the Eighth Amendment in almost the same language. It bans general warrants for search and seizures, a right the Fourth Amendment adopted. The language that the “ancient trial by jury is preferable to any other” in the Virginia Bill was tightened to a trial by jury requirement in the Sixth and Seventh Amendments of the federal Bill of Rights. The Virginia Bill praises “the freedom of the press” and “free exercise of religion,” later protected in the First Amendment. Finally, the Virginia Bill statement “that a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state” deeply informed the federal Second Amendment.”⁶⁹ Thus, many of the rights stated in the Bill of Rights can be tied back to the Bill in Madison’s own Virginia.

Other earlier state charters also tie to the federal Bill of Rights. The first state constitution was the 1639 Fundamental Orders of Connecticut. This document defined individual rights and the relationship between these rights and government. Massachusetts did the same in its 1641 Body of Liberties. William Penn’s 1682 Frame of the Government of Pennsylvania also sought “to secure the people from the almost of power.”⁷⁰ These documents provide a conceptual framework for the Bill of Rights.⁷¹

Madison also derived specific rights from earlier state documents. The 1683 New York Charter of Liberties and Privileges states that “All Tryalls shall be by the verdict of twelve men, and as neer as may be peers or Equals,” an early version of the trial jury requirement found in Sixth and Seventh Amendments.⁷² The Charter also offers freedom of religion within Christianity, stating “That Noe person or persons which professe ffaith in God by Jesus Christ Shall at any time be any wayes molested punished disquieted or called in Question for any Difference in opinion or Matter of Religious Concernment...”⁷³ The 1680 General Laws and Liberties of New Hampshire protects trial by jury, saying “if any difference or controversy shall hereafter arise amongst us about the titles of land wthin this Province, it shall not be finally determined but by a Jury of 12 able men...”⁷⁴ The Maryland Toleration Act of 1649 was also dedicated to protecting freedom of religion, though within Christianity.⁷⁵

With this evidence in mind, Donald Lutz argues that state bills of rights were the most substantial sources for the federal Bill of Rights. He lists all the rights in the federal Bill and traces nearly all of them to an American document or constitutional guarantee.

To explain why the Constitution’s roots would be so heavily states-oriented, Lutz argues that Madison sought to appease the states that had problems with the Constitution, without accepting their amendments that would substantially change the government. Thus, he sought to mollify the states by using their Bills of Rights as inspiration for a federal Bill, “effectively extracted the least common denominator from these state bills of rights, excepting those rights that might reduce the power of the federal government.”⁷⁶

However, Lutz’s argument exudes American exceptionalism. He argues that “the Bill of Rights had a long historical pedigree, but that pedigree lies substantially more in documents written on American shores” and that Americans developed a “set of rights...characterized by a breadth, detail, equality, fairness, and effectiveness in

limiting all branches of government that distinguished it from English common law.”⁷⁷ Lutz then proceeds to minimize all other sources of the Bill of the Rights. The common American trope, often reiterated by politicians and often problematized by scholars, embraces an idea of the founders leaving England to set up a new society with new freedoms, a City on the Hill, which would be a beacon of democracy from which all other countries could learn. This narrative underlies Lutz’s argument.

A jurisprudence based on Lutz’s argument would look solely at American sources to understanding the Bill, separating it from its Western European tradition of rights. Furthermore, a jurist in Lutz’s image might view the interpretation of a right by a state, which originated the right, to interpret it in the federal Bill. For example, the Virginia Bill of Rights states

that a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that, in all cases, the military should be under strict subordination to, and governed by, the civil power.⁷⁸

A federal judge seeking to interpret the Second Amendment in Lutz’s school of thought would likely look at this original source, the Virginia Bill of Rights, and thus understand gun rights in a collective context as a defense against standing armies and the militarization of society.

Lutz’s argument also empowers the states and their rights conceptions. In our post-Jim Crow world, we understand that the federal government has been used to force states forward on civil rights issues. Here, Lutz turns that argument on its head, claiming that the states not the federal government were ahead on rights issues, and defined these rights for the federal government.

Thus, this focus on the state bill of rights origin creates an America-centric jurisprudence and a blurring of federal and state interpretations of rights.

c. COLONIAL EXPERIENCES AND REVOLUTIONARY RESPONSES

Other historiographies emphasize the importance of ideas and laws Americans developed in colonial times and in response to the British in revolutionary times as Madison’s source for the Bill of Rights. Richard Primus writes, “The major source of threats with which the Founders were concerned was the British colonial administration, and many rights of the founding arose in reaction to specific British policies of the time.”⁷⁹ The framers sought to explicitly reject several aspects of their former ruler’s policies, and thus define their own government and its sense of rights in opposition to British policy. Thus, “The impulse to reject and prevent the recurrence of specific incident to British rule guided much of rights discourse at the founding...”⁸⁰ Because “Americans of the founding generation commonly saw their rebellion as a rights-oriented rejection of the reigning political order,” the founding of the Constitution, and particularly the statement of rights retained by the people in the Bill of Rights, was a logical extension of this mission.⁸¹

Bernard Schwartz gives the quintessential argument in this respect. He argues that “the colonists had, by the end of the Colonial period, gone far towards creating the

constitutional policy which is the great American contribution to political science.”⁸² He argues that the Colonists sought to claim a greater right to self-government, and appealed to fundamental rights, sometimes codified in the colonial documents cited above, to substantiate these claims. These claims sped up the revolutionary process; the more colonists sought to define fundamental rights, the more they came to understand that the British were depriving them of rights. Thus, they sought a redress of grievances from the British for perceived rights violations. In the post revolutionary period when Madison drafted the Bill of Rights, it makes sense that he would reference these very same grievances, and seek to ensure that the American government would not repeat the British government’s rights deprivations.

The Declaration of Independence of 1776 is the colonists’ most well known statement of grievances. The grievances that “He has kept among us, in times of peace, Standing Armies without the Consent of our legislatures,” that “He has affected to render the Military independent of and superior to the Civil Power” and that he was “quarter[ed] large bodies of armed troops among us” resounds in the Second Amendment, which extols the benefits of the citizen militia, and the Third Amendment, which bans the quartering of British soldiers.⁸³ The grievance of “depriving us in many cases, of the benefit of Trial by Jury” is addressed in the Sixth and Seventh Amendment. Thus, some of the rights Madison chose to include in the Bill can be traced to actions taken by the British to deprive the American colonists of these rights. As Schwartz summarizes, “the claim that Britain was acting in an unconstitutional manner with regard to the colonies led naturally to the provision in written Constitutions of the basic rights which government might not infringe.”⁸⁴

Schwartz also points to James Otis, Jr’s arguments against the writs of assistance in *Lechmere’s Case* in 1761 as another example of a Madisonian right developing in reaction to a perceived British encroachment on that right. In the case, the British had begun a policy of writs of assistance—a generalized search warrant—to search for smuggled goods. Otis argued vigorously that this policy violated the colonists’ property rights.⁸⁵ This argument echoes in Madison’s Fourth Amendment, which requires specific warrants for search and seizure.

Even more so than Lutz’s argument, this type of argument fits perfectly into the notion of American exceptionalism. Think of the common American trope that the colonists escaped the religious oppression of the Church of England and came to America to establish religious toleration. The subtext of this argument is that the Americans, unlike the British, have an innate understanding fundamental rights, and left on a mission to establish a government to protect these rights. America becomes the City on a Hill, and the Bill of Rights announced its freedoms. This grand language and idealization of America and its mission rings in Schwartz’s words: “the great American contribution to political science.”⁸⁶

A jurisprudence based on this type of argument would most likely ignore the precedents in British or Western history, and turn a blind eye to decisions in the rest of the world (as several justices on today’s Supreme Court are known to do). A judge with this sense of the Bill would believe that American is uniquely defined by certain experiences and a certain mission, and that it must be the frontrunner not the follower in the interpretation of rights.

Logically, Schwartz’ argument is somewhat muddled. He argues that the colonists developed an idea of right x through the sense that the British had encroached on right x. But if they did not have a *preexisting* idea of right x, how could they have a sense that they were deprived of that right? Perhaps he intends to explain that the

colonists' sense of rights developed in opposition to their sense of tyranny, i.e. they defined rights against treatment that should *not* be constitutional. But this sense of rights would likely not have developed by this source alone (as Schwartz fully admits in his five volumes covering many other sources of the Bill of Rights).

d. ENGLISH COMMON LAW AND THE MAGNA CARTA

While Schwartz argues how the Bill of Rights developed in opposition to British rule, some see it as an extension of British rights and Americans' sense of rights as former Englishmen. In 1764, James Otis wrote "Every British subject born on the continent of America...is...entitled to all the natural, essential, inherent, and inseparable rights of our fellows subjects in Great Britain."⁸⁷ But even after the Revolution, the colonists still felt connected to their rights as Englishmen. As Richard Primus argues, "Rather than relying on natural rights, many colonial writers grounded their rights in traditional English liberties, real or imagined. They claimed protection of the common law, the constitution, Magna Carta, and sometimes the rights of Englishmen generally, without bothering to specify a particular source."⁸⁸

Some of the rights in the Bill of Rights can be directly traced to these foundational British documents. The Magna Carta of 1215 was one of the first examples in Western history of the ruled, in this case the barons, claiming and codifying rights from the ruler. The Magna Carta protects trial by jury later found in the American Bill of Rights, stating "No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land." It also states, "To no one will we sell, to no one will we refuse or delay, right or justice," a predecessor to the American Sixth Amendment right to a speedy trial.⁸⁹

Furthermore, the 1628 British Petition of Right mentions the protection against forced quartering of soldiers, found in America's Third Amendment and protection against undue seizure or interference with property rights, reflected in America's Fourth Amendment.⁹⁰ The 1689 English Bill of Rights mentions the right to redress grievances, related to the First Amendment; freedom from forced quartering of soldiers, found in America's Third Amendment; protection against excessive bail, fines, and cruel and unusual punishment, found in America's Eighth Amendment; and the right to trial by jury, found in America's Sixth and Seventh Amendments.⁹¹ Thus, several of Madison's rights can be traced back to preceding British documents.

Several historians embrace this narrative and argue that the British constitution—the Magna Carta, the Petition of Right, and the English Bill of Rights—and the common law were by and large the prime source for American ideas of rights. In his chapter "The Best Constitution in Existence: The Influence of the British Example on the Framers of Our Fundamental Law," M.E. Bradford argues, "our American forbears cherished the English constitution and did not change their opinion of its merits just because Parliament and the ministers of King George III failed to observe some of its provisions."⁹² He asserts that the colonists fought for *British*, not uniquely American, rights in the Revolution--after all, it was the British right to representation that led colonists to claim they could not be taxed without it. Their grievances with the British Empire, he claims, were based in their sense that they were being treated as second class citizens within the British Empire, not the sense that the rights found in the British constitution were theoretically insufficient.

With this background in mind, Bradford argues that James Madison derived the idea of judicial review and the responsibility of the Courts for interpreting the Bill of Rights from the British system.⁹³ In his view, Madison had the highest respect for the theoretical rights represented in British doctrine, just not how that rights protection played out in practice. Thus he sought to develop a Bill of Rights that would codify these rights, and a government system that would protect them.

This historiography calls for an interpretation of the Bill that fits this American code within the British tradition. As Bradford argues, the Bill of Rights “makes no sense apart from an intimate familiarity with British legal history.”⁹⁴ If we accept the explanation that the American Bill of Rights is deeply rooted in its British predecessor, we should expect jurists to have a deep understanding of the British context and interpretation of these rights to understand how to properly interpret the American one.

e. MORAL PHILOSOPHY AND ENLIGHTENMENT IDEALS

Madison’s selection of the Bill of Rights was also influenced by the Enlightenment ideals of his day. These Enlightenment ideals influenced Madison on two levels, as the secondary source material emphasizing this influence, such as Chester Antieau’s *Rights of Our Fathers* and Richard Primus’ *The American Language of Rights*, make clear. First, the importance of rights to Revolutionary Americans crystallized the call for the Bill of Rights; their experience with the British and their exposure to rights talk in Enlightenment age philosophy translated into demands for specific statements of rights retained by the people. Second, the actual content of the works of these philosophers, particularly Locke, influenced the rights Madison prioritized and included in the Bill of Rights.

As Richard Primus explains in *The American Language of Rights*, “the long tradition of English common law and the newer vogue of Enlightenment philosophy both spoke the language of rights, and, under those influences, Americans and especially American elites were disposed to understand political questions in terms of rights.”⁹⁵ This rights talk was, in Jack Rakove’s words, the American “mother tongue”; it had solidified their call for rebellion and would now solidify their call for a Bill of Rights.⁹⁶ Because the idea of rights and rights protection struck such a deep chord with Revolutionary Americans, it makes sense that the demand for the Bill of Rights was so powerful. Having lived through the colonial period, Americans could not trust their government to protect the rights; they wanted guarantees. Richard Henry Lee expressed this position in 1787, explaining that Americans had liberated themselves from British tyranny based on particular ideals and needed a federal Bill of Rights to solidify the rejection of tyranny and the embrace of their ideals.⁹⁷

Within the Primus and Antieau historiographies, however, we see an important distinction in how they emphasize this source. While Primus qualifies that Madison did not consider all of his Rights to be natural rights, Chester Antieau goes farther and argues that the mission of the Constitution was essentially the preservation of natural rights, and the Bill is simply an extension of this goal.⁹⁸ He writes,

“For hundreds of years jurists and philosophers had believed that man possessed rights that must be honored by the political state—rights that flowed naturally from his essence and his end; but it was not until the doctrine of natural rights came into the hands of the American

Founding Fathers that to became the basis of a system of government.”⁹⁹

Citing Madison’s statement that “a right towards men, is a duty towards the creator,” he argues that “the federal government constitutionalized... our natural rights by adoption of the Bill of Rights in 1791...”¹⁰⁰

Antieau’s claim calls for a radically different interpretation of the Bill, and we can see how even within historiographies emphasizing the same source, radically different jurisprudence can result. First, unlike Primus, Antieau sees the Bill of Rights as a logically consistent system. He argues that each of the rights expressed belong to a category of philosophical rights grounded in Enlightenment ideals, from freedom of religion to freedom from physical restraint to the property right, and that all of these rights essentially boil down to natural rights. Thus, a jurisprudence based on this system would logically turn to Madison’s philosophical sources and understanding of natural rights to interpret the Bill. Because Primus focuses on the eclectic and diverse origin of the American understanding of rights—a collection of different philosophers, ideas and rights, a jurisprudence based on his system would be much more complex.

Beyond influencing an Antifederalist call for a Bill of Rights, Enlightenment philosophy also influenced the types of rights Madison chose to include. One of Madison’s main influences from the Enlightenment was John Locke.¹⁰¹ In his *Two Treatises on Government*, Locke argues that political power is “a right of making laws, with penalties of death, and consequently all less penalties for the regulating and preserving of property, and of employing the force of the community in the execution of such laws, and in the defense of the commonwealth from foreign injury, and all this only for the public good.”¹⁰² This understanding of political power deeply influenced Madison. The definition emphasizes “the force of the community” and “the public good”—it emphasizes a collective rights. Thus, as Richard Primus emphasizes the Lockian influence, he also emphasizes the collective nature of the Bill of Rights.¹⁰³

Some of Madison’s specific amendments were derived from Locke’s theory. The Locke definition of political power emphasizes the protection of property, and thus fixes the government within a capitalist system. The importance of protecting individual property is clear in the Third and Fourth Amendments, regarding quartering of soldiers in a citizen’s home and the search and seizure of a citizen’s property. The Locke definition also focuses on the right to punish, to enforce law. This theme is also apparent in the Bill of Rights, as the Fifth, Sixth, Seventh and Eighth Amendment all address ways in which these punishments can be administered, and the process by which guilt can be determined.

Furthermore, Locke’s explanation of “that equal right that every man hath to his natural freedom” influenced not only the Declaration of Independence, but also the idea that the Bill of Rights should apply to all (white, landholding) men.¹⁰⁴ Furthermore, Locke argues vigorously for a toleration of religious freedom, later encapsulated in the First Amendment.¹⁰⁵ Thus, Locke’s priorities in defining rights influenced Madison’s priorities for the Bill of Rights.

James Madison’s commitment to Enlightenment thinkers and philosophical treatises on government is clear from his January 1783 “list of books for the proper use of Congress” that he sought to publish and purchase.¹⁰⁶ These works include Cumberland’s *Law of Nature*, Wolfius’ *Law of Nature*, Hutchinson’s *Moral Philosophy*, Beller’s *Delineation of Universal Law*, and more. Madison saw an understanding of these works of political philosophy as integral for Congress to fully understand the

Constitution. Thus, Antieau and Primus argue, we too must understand Madison's political philosophy and the works he respected to fully appreciate the Bill of Rights and how it ought to be interpreted.

The extent to which authors understand this influence—from Antieau's solid embrace to Primus' qualified acceptance—have an impact on the usefulness of Enlightenment philosophy in analyzing the Bill, and the extent to which the Bill is considered an intellectual rigorous and consistent system.

IV. MADISON AS A FOUNDER NOT THE FOUNDER

In my argument, I have focused on the role of Madison, his motivation for producing the Bill, and his choice of sources in compiling it. Madison is a leading founder, and his decisions about the Bill can tell us much about its meaning and role at the founding. In fact, his Bill of Rights was accepted with little substantial change, excluding the rejection of two of the proposed twelve amendments.¹⁰⁷ Thus, as Madison biographer Ralph Ketcham argues, “[f]or better or for worse, as we consider ‘the framer’s intent,’ we are, preeminently, examining *Madison’s* intent.”¹⁰⁸ He proposed these amendments, and he was active in getting them ratified as closely as possible to their original form.

While Madison is a key founder for understanding the Bill, he is but one of many founders, and we cannot turn a blind eye to all the other intentions at play, and their likely very diverse reasons for accepting the Bill and ways of understanding its content. As Kasper explains, “Madison’s intent may be a *necessary* criterion of interpreting the Constitution, but it alone is certainly not *sufficient*.”¹⁰⁹ Many scholars have and will continue to provide explanations of the different founders and their visions of the Constitution and Bill of Rights. Though here I address only the scholarship on Madison’s reasons for and sources when compiling the Bill, and explain the ramifications for our understanding of the Bill from these various historiographies, I see myself as part of a larger, ongoing project. I feel my contribution provides insight into understanding the Bill’s original role, but I do not intend Madison’s process to be a stand-in for all the founders.

V. MULTIPLICITY OF SOURCES VS WEB OF CONTEXT: THE APPROPRIATE VIEW

Thus far we have grouped the historiographies written about Madison’s sources. Each of these historiographies emphasizes one particular source group as the most important—as the key to unlock an understanding of the Constitution. While I have much respect for these historians and their work, and I do not intend to oversimplify scholars’ work who seek to isolate the influence of each source, I ultimately find historiographies that overly emphasize one particular source material unconvincing and flawed.

First, these source materials overlap more than many of the narratives admit. Enlightenment ideals and English Common Law could have shaped state bill of rights or revolutionary decrees, so it is near impossible to prove that the latter are exclusively or primarily American (and the desire to prove such is in and of itself questionable). Enlightenment ideals could have influenced the growth of English Common law, and the Magna Carta could have influenced the political and philosophical conceptions of British Enlightenment thinkers. None of these sources occur in a vacuum. Efforts to

emphasize one source over all others obscure the truly interconnected web of the sources upon which Madison drew that together form a context for his decisions about what to include in a bill. Scholarship that focused on elucidating this web of context, rather than arguing which source was the most influential, would provide far more insight into Madison's view of the Bill. We have seen above how one particular amendment can be traced to multiple sources; this is the web of context at work.

Second, I reject the efforts of scholars to find one intellectually rigorous, consistent theory that explains the Bill of Rights. Madison was essentially pragmatic—he picked and chose rights that he felt would appease the states that had refused to ratify the Constitution, best represent the needs of the country now, and might best protect liberties in the future. In this system, “the choice of sources was often immaterial to the substance of the founders’ arguments.”¹¹⁰ The product of this system is a list of liberties that make pragmatic sense to serve America’s past, present, and future needs, without one singular overarching vision. As Richard Primus argues,

Simply put, Americans of the Founding era felt that rights came from many different sources, human, natural, and divine, and no source was accepted to the exclusion of the others. This willingness to tolerate many different theories and sources of rights simultaneously may have signaled a failure of theoretical synthesis, because the Founders’ eclecticism regarding the sources of rights contained large potential contradictions.¹¹¹

I do not argue that this “failure of theoretical synthesis” is necessarily negative; the eclectic rights Madison compiled served and continue to serve American well. It simply makes attempts to find one overarching ideal fruitless. Instead, historians should seek to elucidate the web of context in which Madison compiled the Bill.

VI. CONCLUSIONS

Because the Bill of Rights and the intentions of founders like Madison have become so important to Americans, scholars have come up with many narratives about why Madison compiled the Bill and what sources he used to do so. These stories have a didactic purpose, to teach us about the creation of the government and the rights of the founding. They have a political and legal purpose, providing insight into how the Bill should best be interpreted. They have informed the view of the founders’ intent that lies at the heart of originalism and influences modern legal theory. Because these stories are so influential, it is essential that scholars continue the project of analyzing them objectively and critically. When doing so, they should look at Madison’s decision within his web of context, rather than arguing for the preeminence of one particular source or one overarching political or philosophical vision. There is already a huge body of scholarship on this subject, but it is essential that it continue, that there be an ongoing debate about what the meaning of the Bill of Rights and its protected liberties meant at the founding, have meant throughout our nation’s history, and what they should continue to mean.

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Do Urban Growth Boundaries “Go Too Far” in Regulating Private Property? The Application of the Supreme Court’s Takings Doctrine to Oregon’s State-Mandated Urban Growth Boundaries

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Abstract

In 1973, Oregon passed a statewide land use program establishing planning goals that local governments must adhere to in the creation and implementation of their land use plans. This paper will focus on one of the most visible and hotly contested goals. Goal 14: Urbanization requires local governments to define and adopt urban growth boundaries (UGBs), within which development is encouraged and expected, and outside of which development is restricted. Although recent referenda have since changed the original form of the law, its restrictions on private property rights outside of UGBs remain strict enough to raise important takings questions. The Fifth Amendment of the Constitution provides, “Nor shall private property be taken without just compensation.” This article will discuss the Supreme Court’s analysis of this statement, first in general, and then specifically to the case of Oregon’s state-mandated UGBs. The central question to be addressed is: Will restrictions on private property outside a UGB effect a “taking without just compensation?” The final section will evaluate the UGB from a policy perspective. Do UGBs help to curb suburban sprawl? Even if they do, are the restrictions on some private property owners too much to pay for the public good? After considering the statistics and balancing the burdens on private property owners with the public good, it is concluded that Oregon’s anti-sprawling metropolitan development is related to the implementation of UGBs and that the state’s regulatory scheme does not place undue burdens on private property owners.

I. Introduction

The State of Oregon has been renowned for the beauty of its natural environment for as long as it has been inhabited. Early descriptions of Oregon portray the landscape as a modern day Garden of Eden.¹ The preservation of the landscape became an important issue in the mid-1960s and 1970s, when the forces of suburban sprawl began affecting every metropolitan area in the state. Increased development in the state threatened the existence of productive farmland, and raised fears of pollution and of the deterioration of Oregonians’ quality of life. In response to this trend, Governor Tom McCall spoke to the state legislature in 1973 with poignant words: “There is a shameless threat to our environment and to the quality of life – the unfettered despoiling of the land...Sagebrush subdivisions, coastal condomania, and the ravenous rampage of suburbia in the Willamette Valley all threaten to mock Oregon’s status as the environmental model for the nation...The interests of Oregon for today and in the future must be protected from grasping wastrels of the land.”² In framing suburban sprawl as a moral issue, Governor McCall provided the impetus for passage of a comprehensive state land use regulation program aimed at preventing sprawl and preserving Oregon’s natural landscape.

The first part of this paper will examine the state's land use regulations, with a focus on the state mandated urban growth boundary (UGB). This section will also detail the recent debate over these regulations, which resulted in the passage of two voter referenda, Measures 37 and 49. The second section will present the takings doctrine developed by the Supreme Court over the past 90 years. This section will include an analysis of a land use regulation in light of substantive due process limitations. Even if the law does advance a legitimate state interest, when does a governmental regulation amount to a taking without "just compensation" as set forth in the Fifth Amendment of the Constitution? The third section will apply the takings doctrine to Oregon's statewide planning goal that requires local governments adopt and define UGBs. Do the regulations on land outside the UGB "go too far" and, thus, constitute a regulatory taking without "just compensation?" The fourth and final section will evaluate the merits and flaws of the UGB from a policy perspective. Does the boundary effectively control many of the problems associated with suburban sprawl? And, even if it does, do the benefits to the public as whole outweigh the burdens imposed upon individual private property owners? After considering the statistics and balancing the burdens on private landowners with the public welfare, it is concluded that Oregon's anti-sprawling metropolitan growth is related to the implementation of the UGB, and its regulatory scheme does not place unreasonable burdens on landowners outside the UGB. The UGB is a useful tool for promoting more compact urban development that more governments should consider when creating comprehensive land use plans.

II. Land Use Regulation in Oregon

A. Oregon Land Use Regulations, pre-Measure 37

Legislation aimed at protecting the state's prime natural resources began in the 1960s when the state enacted a differential assessment law that taxed farmland based on its farm use value rather than its fair market value. This system allowed farmers to pay lower real property taxes for their properties and increased the probabilities that commercial farming would remain economically feasible by protecting them from higher taxes associated with a development-driven speculative land market. Next, the legislature passed Senate Bill 10, which required cities and counties to prepare comprehensive land use plans and zoning ordinances that met ten broad goals. This legislation was not successful because it failed to create an agency that had the ability to review and enforce local plans, and the planning goals were defined too loosely.

Finally, the state legislature built upon SB 10, with the passage of Senate Bill 100 in 1973.³ First and foremost, the legislature found that the "uncoordinated use of lands within this state threatens the orderly development, the environment of this state and the health, safety, order, convenience, prosperity and welfare of the people of this state."⁴ The rest of the findings established a process for executing this broad statement. The statute created two statewide agencies, the Department of Land Conservation and Development (DLCD) and the Land Conservation and Development Commission (LCDC), "to prescribe planning goals and objectives to be applied by state agencies, cities, counties and special districts throughout the state."⁵ The bill required local governments to draft comprehensive plans that "promote and manage the local aspects of land conservation and development for the best interests of the people within their jurisdictions," which are then subject to review by the LCDC.⁶ After the plans have been acknowledged as being consistent with statewide goals by the LCDC or returned

for revision, it is once again up to the cities, counties, or special district⁷ to implement the local comprehensive plan.⁸ In short, the bill gives local governments the ability to best serve their residents, provided that the plans and implementation comply with statewide goals.

Portland, Oregon's largest city, encountered a unique problem under this statute. Since the land use policies adopted in Portland were inextricably linked to those of its surrounding suburbs, a regional agency called the Portland Metropolitan Service District (Metro) was created in 1979 to coordinate the land use plans in the Portland Metropolitan area. The Metro, a special service district, includes 24 municipalities in parts of three counties and covers 369 square miles (236,000 acres) of land.⁹

Currently, the LCDC has established nineteen statewide planning goals, following extensive hearings and public meetings attended by many Oregonians.¹⁰ The goals set by the LCDC encompass every aspect of planning, including restrictions on lands zoned for agriculture and forestry, economic development, housing, transportation, public facilities and services, and energy conservation among others.¹¹ This paper will focus primarily on Goal 14: Urbanization, which is meant to "provide for an orderly and efficient transition from rural to urban use."¹² This goal mandated the establishment of urban growth boundaries, within which there must be sufficient land for the development of housing, employment opportunities, and public facilities consistent with 20-year population projections.¹³ Inside the boundary, land is reserved for "urban uses," which the Oregon courts have defined over the years since the meaning is not specifically stated in the statute. Outside of the UGB, land is reserved for "rural uses," which includes agricultural uses, forestry, or very low density residential use. The UGB creates a line within which development is encouraged and expected, and outside of the line, development is severely limited.¹⁴ Stated simply, the UGB halts outward development, unless a local government can show that the future growth of its region necessitates the use of more land.

B. Measure 37 and its aftermath

The passage of ORS 197 should not suggest that all Oregonians support these strict land use regulations. In 1976, 1978, and 1982, Oregon voting ballots included voter referenda to repeal the law.¹⁵ Each referendum was voted down, but the turn of the millennium brought on new challenges to the regulatory scheme. A non-profit group, Oregonians in Action (OIA) has operated with the sole purpose of reducing land use regulations in order to give more rights to landowners since 1989.¹⁶ In 2000, Oregonians passed Measure 7, inspired and promoted by OIA through a voter referendum, 54 percent to 46 percent. The measure allowed a landowner whose property had been reduced in value by a land use regulation to be entitled to just compensation equal to the reduction of its fair market value. Only two exceptions were included; the first did not allow compensation by regulations enacted by the Federal government and second, compensation for state recognized nuisance laws were not recognized. Measure 7 was challenged in court and eventually deemed unconstitutional because it violated the "separate vote" requirements of the Oregon Constitution, which requires voters be able to express their opinions on every proposed change to the state constitution separately.¹⁷

Oregonians in Action reacted quickly and introduced Measure 37, which was passed by voter referendum in 2004, by a larger margin than Measure 7, 61 percent to 39 percent. Measure 37 was similar to Measure 7 in its general intent, but it improved certain aspects of Measure 7. Measure 37 allowed landowners to collect "just

compensation” if a government regulation has restricted the use of a property and led to a reduction in its fair market value. The compensation is equal to the reduction of the fair market value at the time of the demand for compensation.¹⁸ Unlike Measure 7, Measure 37 gave the government the option of waiving the regulation instead of paying compensation. The measure gave those who owned land before the offending regulation a two-year period, starting from the enactment of the measure within which they could submit a written demand for compensation.¹⁹ A two-year statute of limitations for any claims resulting from a future offending regulation started from the passage of that regulation.²⁰ Measure 37 claims, therefore, were possible for any previous land use regulation and any future regulation that has an adverse affect on a landowner’s property value. The measure defined ownership as the “acquisition of the property by the owner or a family member of the owner.”²¹ Thus, ownership of a parcel of land could be transferred through the family or legal entity. Compensation was not available for owners who acquired property after the offending regulation (most often ORS 197, codified in 1973) and a waiver of land use regulation was not transferable to a new property owner.

Measure 37 was promoted as an act that would give landowners more freedom to use their lands as they desired. The measure allowed them to subdivide their parcels either for development or sale, or for giving a piece of land to a family member.²² As such, many of the advertisements centered on the plight of owners of small to medium size parcels. However, as the end of the two-year statute of limitations approached, it became clear who would benefit most from the measure. Timber companies, operating on large parcels of land, filed \$600 million worth of Measure 37 claims, while many who supported the bill did not file.²³ Due to the costs associated with paying landowners compensation, most local governments simply waived the regulation, since many cities and counties found it futile to challenge the claims.²⁴ Although this measure did allow landowners to use their lands more freely, the impacts of this freedom could have undermined Oregon’s entire statewide land use regulation system.

Landowners and one specific interest group, the 1000 Friends of Oregon sensed this possibility. The 1000 Friends of Oregon, founded by Governor McCall in 1975, is an interest group dedicated to preserving the state’s natural environment by preventing “uncontrolled growth.”²⁵ A group of landowners and the 1000 Friends joined in challenging the constitutionality of Measure 37.²⁶ They argued in the Oregon courts that neighbors developing their lands would have an adverse affect on agricultural uses of surrounding properties and that there was not a sufficient process in the measure for challenging claims. Judge Mary James of the Marion County Circuit Court accepted three of the landowners’ claims and found the measure unconstitutional: she ruled that Measure 37 impaired the state legislature from enacting zoning regulations without compensating landowners (“impermissibly intruded on the legislature’s plenary power”²⁷); the measure violated Federal due process as it did not afford neighboring landowners the right to contest compensation decisions; and it violated Federal substantive due process in that Measure 37 does not advance any legitimate state interest.²⁸

The *MacPherson* victory was short lived, however, as the Oregon Supreme Court reversed the decision. The court noted, “Legislative Assembly and the people, acting through the initiative or referendum processes, share in exercising legislative power.”²⁹ Therefore, the measure did not limit the legislature’s plenary power since it was passed by voter referendum. The court rejected the violation of the procedural due process clause, explaining “Nothing in Measure 37 denies predeprivation procedures to

individuals such as plaintiffs who may wish to challenge particular governmental actions that may harm individual property interests. Neither does Measure 37 preclude responsible governmental entities from implementing such predeprivation procedures.”³⁰ The court rejected the substantive due process argument because the plaintiffs did not meet the burden of showing that the measure bears no reasonable relationship to a legitimate state interest.³¹ Having lost the legal battle to Measure 37, opponents sought another way to limit the potential deleterious effects that the measure could lead to.

C. Limiting Measure 37: Measure 49

The effort to “fix” Measure 37 began in the state legislature. Democrats proposed Measure 49 as a way to limit Measure 37, but it lacked enough votes to pass without any Republican support. As a result, the measure was included on the 2007 voter ballot and once again it was up to the voters to decide the future of the state’s land use regulations. The measure was considerably longer than its predecessor (21 pages compared to 2), and its goal was to provide a process for evaluating claims, which was lacking in Measure 37, and also to limit the scope of Measure 37 claims. As before, interest groups shaped the debate, as the OIA and lumber companies fiercely opposed the measure, and the 1000 Friends defended the measure. The measure passed in 2007 by the same margin as Measure 37, 61 percent to 39 percent.

Measure 49 did not allow claims for development of nonresidential land uses, and followed the statewide planning goals of protecting high value farmland, high value forest land, and ground water restricted areas lying outside the UGB.³² The measure provided Measure 37 claimants and any future claimants with three tracks on which they could proceed. The express track was for small parcel claims, and it allowed owners to build three homes if this was allowed at the time the owner acquired the property.³³ The conditional track allowed landowners to build four to ten homes if they could show that the regulation had negatively affected their property value.³⁴ Unlike Measure 37, Measure 49 included a process for determining if a devaluation of property had taken place. Landowners had the value of their property determined by an appraiser one year before the offending regulation and then this value was compared to its value one year after.³⁵ If the land is on highly valued agricultural or forest land three homes is the maximum number that may be built, regardless of property devaluation. The vested track allowed claimants to proceed with any size of development so long as they had had a vested right on the day of Measure 49’s enactment.³⁶ A vested right is the right to complete development that is already underway at the time when a regulation that would prohibit the development is passed.³⁷ *Clackamas County v. Holmes*³⁸ is the leading case in Oregon setting the principles that govern whether a person has a vested right to finish a development. Four factors will inform the court’s analysis of the existence of a vested right: the ratio of money spent to the total cost of the development (some level of physical work must be completed at the site), good faith of the landowner (possession of relevant permits, submission of a master plan, etc.), whether construction already completed could be used for a legal land use, and the nature of the development (the court will evaluate the feasibility of the use with respect to its location and surrounding uses).³⁹

D. Review

Oregon has had an interesting experience with land use regulations over the past 40 years. Adoption of ORS 197 required local municipalities to comply with statewide land use goals when constructing their land use plans and to have their plans

reviewed and amended, if necessary, by the LCDC. The legislative findings of the statute make it clear that there is great interest in controlling development in order to protect prime farmland, forestland, and the state's natural resources. Oregon's legislature also recognized that it must provide ample land for the increasing amount of development occurring in the state. The urban growth boundary creates two separate markets that allow these goals to be met. First, within the boundary, all of the land (except protected natural resources) is considered urban and eligible for development. Outside of the boundary, there is market for rural uses, comprised of low density residential, commercial farming, and foresting. Measure 37 threatened all of the regulations in ORS 197 as it allowed compensation for any loss of property value. Since governments could not afford to pay the claims, the offending regulation was waived in most cases. Measure 49 reined in Measure 37 as it limited the size and type of developments, especially in the areas of environmental importance, and provided a detailed process by which one could make a claim.

III. The Takings Issue

This section of the paper will step away from the UGB in Oregon to discuss the takings issue in general. Land use regulations have expanded exponentially since the early 20th century with the Supreme Court's landmark 1926 decision in *Euclid*⁴⁰, which affirmed the ability for municipalities to adopt zoning ordinances that regulated land use, site density, lot coverage, parking, and road signs. Although land use regulations have expanded in scope and become more complex, the decisions handed down by the Supreme Court over the last 90 years do provide a cogent framework with which to analyze the takings issue. The takings issue is one of balancing the public benefit against the restrictions imposed upon landowners. How much power should the government have in regulating the use of private property in order to promote the general welfare of society? Justice Oliver Wendell Holmes began to answer this question in *Pennsylvania Coal Co v. Mahon*⁴¹, when he stated "government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."⁴² But he also noted, "If a regulation goes too far it will be recognized as a taking."⁴³ Thus, the central question of a taking can be posed as such: even if a regulation does promote the general welfare of society, at what point does a regulation burden a landowner's use of property so much that it qualifies as a "taking" under the Fifth Amendment and, thus, entitle him or her to "just compensation" for the loss of the property right?

A. A Word on Eminent Domain

Before discussing regulatory takings, we must distinguish between them and the power of eminent domain. Eminent domain refers to the power of government to condemn private property so that the land may be used for public use. The government can carry out these proceedings if it shows necessity for the land (for example it may be need to construct a highway or public facility) and pays "just compensation" to the landowner for his or her property.⁴⁴ A "taking" refers to a situation where a regulation "goes too far" in restricting the use of a person's property such that it constitutes a taking under the Supreme Court's doctrines, though the government does not compensate the landowner as he or she would be in the case of an eminent domain proceeding.⁴⁵

B. A Few Words on Substantive Due Process

This section discusses how the test of substantive due process in a takings analysis has been put forth and later rejected by the Supreme Court. Courts generally defer to the legislature when deciding on an issue of substantive due process. They assume that a regulation or law has some reasonable relationship to the general welfare, unless a challenger can show otherwise.

The Court in *Agins v. City of Tiburon*⁴⁶ seemed to bring the issue of whether a regulation passes the test of substantive due process into the takings analysis. A landowner contested a zoning change that limited the number of homes he could build on a recently purchased five-acre plot. The Court held that because he was still able to build one to five single family residences and that “in this case, the zoning ordinances substantially advance legitimate governmental goals... The specific zoning regulations at issue are exercises of the city’s police power to protect the residents of Tiburon from the ill effects of urbanization. Such governmental purposes long have been recognized as legitimate.”⁴⁷ The Court in *Agins* held that a regulation would result in a taking if it did not substantially advance a legitimate state interest or denied a landowner all economically beneficial use of his or her land. As we will see later, the denial of all economically beneficial use will effect a taking of property without “just compensation”, but many analysts have criticized the substantive due process part of this holding. The due process question is separate from, and in many ways a preliminary issue to the takings issue.⁴⁸ If a regulation was not related to a governmental interest, there will be no takings question to consider because the regulation would be held unconstitutional. Similarly, if a regulation does advance a state interest, it must still pass muster under the takings analyses that will be discussed below.

Justice Sandra Day O’Connor re-examined this ruling in *Lingle v Chevron U.S.A. Inc.*⁴⁹, when she noted, “This case requires us to decide whether the ‘substantially advances’ formula announced in *Agins* is an appropriate test for determining whether a regulation effects a Fifth Amendment taking. We conclude that it is not.”⁵⁰ This consideration of the “substantially advances” formula was necessary because the lower court ruled solely on the question of whether the statute (controlling gasoline prices) substantially advances the state’s general welfare. The lower court did not apply the second holding in *Agins*, the denial of all economically beneficial use, suggesting that the “substantially advances” formula could be a freestanding takings test. Justice O’Connor furthered, “the ‘substantially advances’ inquiry reveals nothing about the *magnitude or character of burden* (emphasis in original) a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners. In consequence, this test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property.”⁵¹ The “substantially advances” formula only addresses whether a regulation is related to a governmental interest, and says nothing of the effect of a regulation on private property rights. Any takings analysis, provided it is not a “categorical, or *per se*, taking,” must consider both of these elements, the public interest and the private burden. For this reason, the Court found it necessary to strike down the “substantially advances” formula as a freestanding takings test.

C. Takings Requiring “Just Compensation”

This section continues using Justice O’Connor’s opinion in *Lingle*, as she described the four types of takings, and the reasoning that courts will use to analyze

them. The first two types of takings requiring just compensation refer to what Justice O'Connor considers a "categorical, or *per se*" taking.⁵² In *Loretto v. Teleprompter Manhattan CATV Corp.*⁵³, a New York law required that landowners allow a cable company to install its products on their properties for a one-time fee of \$1. Justice Thurgood Marshall noted, "to the extent that the government permanently occupies physical property, it effectively destroys the owner's rights to possess, use, and dispose of the property. Moreover, the owner suffers a special kind of injury when a stranger invades and occupies the owner's property."⁵⁴ Consequently, any type of physical invasion, no matter how small the economic harm, will be considered a taking and require just compensation to the landowner.

A second type of *per se* taking is governed by the Court's decision in *Lucas v. South Carolina Coastal Council*⁵⁵. A landowner, David Lucas, paid \$975,000 for two residential lots on the Isle of Palms, but was barred from building any habitable structures on the parcels after the State passed the Beachfront Management Act.⁵⁶ The act created a "no build zone", the area of which included the entirety of his parcels. Justice Antonin Scalia, writing for the majority, concluded that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property idle, he has suffered a taking."⁵⁷ There are two exceptions to the *Lucas* analysis in which a state may not be required to pay compensation when land is deprived of all economically beneficial uses. Compensation is not required when the affected property interests were not allowed in the first place under the background principles of state property and nuisance law. For example, a landowner may not apply for compensation when the affected use is considered a nuisance under state law or the use was not valid use of property before the regulation was passed. Lucas' intention to develop the parcels for residential use was not a nuisance and was a permitted land use before the Beachfront Management Act was passed.

The third type of taking analysis is described as follows by Justice O'Connor in *Lingle*; "Outside of these two relatively narrow categories [*Loretto* and *Lucas*] (and the special context of land-use exactions discussed below [*Nollan* and *Dolan*]), regulatory takings challenges are governed by the standards set forth in *Penn Central Trans. Co. v. New York City*."⁵⁸ In *Penn Central*⁵⁹, the Court had to determine how to analyze a "partial taking," that is, a regulation that does not remove all economically viable uses from a piece of land. Most regulations on private property fall into this category, and, thus, *Penn Central* has been established as the default position that the courts will use to analyze a takings claim. In the case, New York City's Landmarks Preservation Law prevented Penn Central from erecting a 55-story office building on top of Grand Central Terminal. After recognizing the difficulties in applying the takings doctrine, Justice William Brennan Jr., writing for the majority, noted, "The Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant, and particularly, the extent to which the regulation has interfered with distinct investment backed expectations are of course relevant considerations. So too is the character of the governmental action."⁶⁰ The Court concluded that the Landmarks Law is a permissible governmental action that sought to protect the architectural character of the city, and that Penn Central may function in the same way it always has, which lessens the economic impact. Furthermore, the Court found that its designation as a historic landmark allows Penn Central to obtain a reasonable return on its investment.⁶¹

The fourth taking category is an instance where a government imposes an exaction that requires a landowner to give away an interest in his or her property in order to gain permission to develop the land.⁶² In *Nollan v. California Coastal Commission*⁶³, the Nollans were prohibited from building a larger house on their property, unless they granted a lateral easement along the beach to the Commission. According to the Commission, the public walkway along the Nollans' seawall would ostensibly lessen the blockage of the public's view of the beach that the larger house would cause. The Court found that this requirement lacked an "essential nexus" to the problem caused by the development. Explanation of an "essential nexus" is necessary Justice Scalia noted, "Unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"⁶⁴ The Nollans' permit was denied because the development would obscure the public's view of the beach though the donation of a public walkway along the beach did not address this problem. Later, the Court ruled in *Dolan v. City of Tigard*⁶⁵ that the exaction imposed on the property owner not only required an "essential nexus" to the governmental interest, but that it also bore a "rough proportionality" to the harm that exaction was designed to address. Dolan sought to increase the size of her plumbing and electrical supply store. Her development permit was approved, contingent on her dedicating a public greenway in a floodplain along the creek on the western edge of her property as well as a 15-foot bicycle and pedestrian pathway. The Court acknowledged that provisions to protect the floodplain and to reduce traffic congestion had a "nexus" to the expansion of Dolan's store. However, the exactions required far more from Dolan than the expansion of her store necessitated. Simply imposing a development ban on the greenway would have sufficed as a way to protect the floodplain and reduce traffic, but the donation of a public greenway on her property was too much to require from Dolan. The Court determined that the municipality did not have the power to deprive her of essential property rights in order to fulfill a government interest that could have been resolved without such an imposition. These decisions require that any land use exaction have an "essential nexus" to the proposed development and, furthermore, that the exaction imposed on a property owner have a "rough proportionality" to the development sought.

D. How to Characterize the "Property Interest" in the Takings Analysis

Any takings claim requires courts to evaluate how burdensome a regulation is on a parcel of private property. Therefore, it is necessary for the courts to determine exactly what the property interest in question is. When evaluating a takings claim, the court determines the economic impacts as they relate to the entire parcel. In *Penn Central*, the plaintiff acknowledged that the Grand Central Terminal itself was not being taken, but instead it argued that it was being totally deprived of its air rights, as the Landmarks law prohibited any building above the façade.⁶⁶ Justice Brennan found this argument to be flawed, noting, "in deciding whether a particular government action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole, here, the city tax block designated as the 'landmark site.'"⁶⁷ If the air rights had been considered separately from the entire site, then the Landmarks Law would have deprived Penn Central of all economically beneficial use of the property. Had the courts recognized such segmenting of private property, many more claims would fall under the *Lucas* doctrine. As we see in *Palazzolo v. Rhode Island*⁶⁸, the plaintiff's entire tract retained some economic value, even though most of the parcel had been rendered valueless by

the law protecting coastal lands. Similarly, the Supreme Court has held that a temporary moratorium on all building does not render a property bereft of all economically beneficial use, and thus is not subject to a takings analysis under *Lucas*. “An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner’s interest.”⁶⁹ Clearly the “geographic dimensions” refers to *Penn Central*, and *Tahoe* furthers this definition of property as the entire duration of ownership, which cannot be broken down into segments.⁷⁰ If this segmenting were recognized, any delay in a decision by a governing body (a zoning board hearing for example) would connote a loss of all economically beneficial use of land.

IV. Application of Takings Doctrine to Urban Growth Boundaries

Having explained the Supreme Court’s general takings criteria, we will now apply these to Oregon’s land use program that requires all cities, counties, or special service districts to adopt and define urban growth boundaries. Clearly, the “physical taking” doctrine in *Loretto* and the government imposed exactions in *Nollan* and *Dolan* can be eliminated from the analysis. The UGB establishes a line within which “urban uses” are permitted and outside of which “rural uses” are permitted. There is no physical encroachment on private property nor does the government seek to impose an exaction on a private person’s property. The more interesting analysis lies in the answers to the questions that follow.

A. Should land outside the UGB be considered a “per se taking” under the principles of the Lucas case?

The answer to this question is not immediately obvious, but after considering the Supreme Court’s opinion in *Palazzolo* and how Oregon courts have defined “urban uses” and “rural uses,” it is clear that land outside the UGB does retain economic value. Thus, takings claims arising from restrictions of property use by UGBs should not be analyzed as a “per se taking” under *Lucas*.

In *Palazzolo*, the plaintiff and his associates formed Shore Gardens, Inc. (SGI), and purchased a 20 acre tract of land in an area considered to be a salt marsh along Rhode Island’s Coast.⁷¹ The group submitted three applications to subdivide the land for development, each of which was denied. In 1971, the Rhode Island legislature created the Rhode Island Coastal Resources Management Council (“Council”), which designated salt marshes as protected “coastal wetlands.”⁷² Then, in 1978, the SGI had its charter revoked for failure to pay corporate income taxes, and the title to the land was passed to Palazzolo, the sole shareholder in SGI. He submitted two more plans for a special permit allowing development on the land in 1983 and 1985, and, once again, these were denied.⁷³ Palazzolo filed suit alleging that the regulations on his property denied him of “all economically beneficial use” of his land, and should be compensable under *Lucas*.⁷⁴

The main holding in the *Palazzolo* case is that the Court recognized the ability for landowners to proceed with a takings challenge, even though they purchased property with knowledge of the restrictive regulations. In addition, and more important, to our discussion is that the Court agreed with state court that Palazzolo’s land was not denied “all economically beneficial use” of his land because his parcel retained \$200,000 in development value under the Rhode Island’s wetlands regulations.

Palazzolo asserted, nonetheless, that he had suffered a total taking and contended that the Council “cannot sidestep the holding in *Lucas* ‘by the simple expedient of leaving a landowner a few crumbs of value.’”⁷⁵ The Court rejected his claim and remanded the case for a takings analysis under the *Penn Central* rubric. This is an important decision, as the Court clarified the parameters for what a “total taking” is under *Lucas*.

Palazzolo established that if land holds any value, it will be considered under the *Penn Central* analysis. Professor Lewyn noted, “landowners in Oregon can do far more with their land than the *Palazzolo* plaintiff could do with his, for two reasons. First, the Oregon courts have held that houses on ten-acre lots are not ‘urban uses’, and thus may be built outside UGBs...Second, Oregon landowners are not even limited to building one house on a large parcel of land: instead, they may also use land outside UGBs for agricultural purposes, and may even convert such land to urban uses if ‘it is impracticable to allow any rural uses’ on such land.”⁷⁶ Lewyn was writing before the passage of Measures 37 and 49, which gave Oregon landowners significantly more latitude in deciding how they can use their lands.

B. Do the restrictions on private property outside the UGB pass the Penn Central balancing test?

Like the majority of takings claims, those relating to restrictions imposed by a UGB should be evaluated under the *Penn Central* balancing test. Since land outside the UGB retains value as farmland or as low density residential, a challenge will need to be a “partial takings” one.

The first element of the *Penn Central* balancing test is the extent of the economic impact that a regulation has on the fair market property value of a piece of land. The Court in *Penn Central* held that the mere fact that a regulation adversely affects the market value of a property does not make it a taking.⁷⁷ This interpretation was affirmed in *Lucas* as Justice Scalia noted that even a 95 percent loss of property value did not necessarily constitute a taking.⁷⁸ Justice Scalia clarified the issue by explaining that a 95 percent diminution in value could result in a taking, but the claim must be evaluated under the two remaining tests set forth in *Penn Central*. Clearly, the land outside the UGB experiences a diminution in value because “urban uses” of land, which are not permitted, are more economically valuable than “rural uses.”

The second element is the extent to which the regulation has limited reasonable investment backed expectations. Justice O’Connor shed some light on this notion in her concurring opinion in *Palazzolo*, “If existing regulations do nothing to inform the analysis [of reasonable investment backed expectations], then some property owners may reap windfalls and an important indicium of fairness is lost.”⁷⁹ She noted that a regulation does have an influence with respect to the investment backed expectations. For example, a landowner cannot claim that he or she intended to build a 10-story hotel on a piece of farmland and be compensated for the loss of value that his or her land would have if such a project were allowed. The use of land for such a high-density development is not a reasonable expectation that a landowner in the area can have for his or her property. But, if a piece of marginal farmland lying just outside the boundary was bordered by heavy development immediately on the other side of the boundary, the landowner may be able to claim that a low or medium density residential development is a reasonable investment backed expectation.⁸⁰

Another interesting case is a situation in which a parcel of land is zoned for commercial, industrial, or higher density residential development before being placed outside a UGB. In this case, the landowner would have significantly more valuable

investment backed expectations because the regulation would not have allowed these types of uses. Authors have foreseen this type of situation, and have proposed that the easiest solution for a local government is to simply include areas previously zoned for intensive development within the UGB, where these types of uses will be expected.⁸¹

The final element of the *Penn Central* test is the “character of the governmental action”⁸² as it is related “to the promotion of the general welfare.”⁸³ The character of the governmental action refers to whether a regulation is an acceptable response to a given problem. For example, speed limits are instituted in order to prevent accidents caused by high speed driving. The Court in *Penn Central* noted that a permissible government action might be one that prohibits the “most beneficial use of the property.”⁸⁴ If taken to trial, an Oregon municipality would need to provide evidence that the imposition of a UGB is an appropriate response to the legislative findings that the, “Uncoordinated use of lands within this state threatens the orderly development, the environment of this state and the health, safety, order, convenience, prosperity and welfare of the people of this state.”⁸⁵ There are several compelling reasons that a UGB in Oregon meets this requirement. First, the original legislation was passed by voter referenda and has survived three subsequent calls for its repeal. It is also important to note that after Measure 37 was passed, Oregon voters realized that it could undermine the entire land use regulation system, and immediately passed Measure 49 to limit the provisions of Measure 37. The relationship between the imposition of UGBs as a response to the legislative findings is recognized in the eyes of the legislature and Oregon voters.⁸⁶ Similarly, the thorough procedure of statewide reviews of local land use plans provides evidence that the regulatory scheme can be executed as it was intended to in practice. The bill enables a statewide agency, the LCDC, to prescribe statewide planning goals and then provides a comprehensive and detailed procedure for evaluating the plans from cities, counties, and special service districts to ensure that they comply with these goals. The local governments themselves must follow a strict procedure of fact-finding and public meetings in order to have their plans acknowledged as conforming with the statute.⁸⁷ The statewide scope of the statute adds legitimacy to the UGB as a response to the problems associated with suburban sprawl. The regulation would not have as much validity as an appropriate response if it were enacted by a local level of government.⁸⁸

Oregon courts have upheld the state’s land use laws, but they have never specifically ruled on the constitutionality of UGBs.⁸⁹ Washington State’s Growth Management Act is similar to the Oregon’s UGBs in that it separates urban and rural areas. In *Buckles v. King County*⁹⁰, the U.S. Court of the Appeals for the Ninth Circuit ruled on a takings challenge involving the zoning of a landowner’s property as a “Rural Area”.⁹¹ *Buckles* argued that his property value was damaged by this zoning classification, but did not claim that his investment backed expectations were limited. This holding is consistent with the analysis offered above. A court will not find a taking simply because the regulation causes a reduction in property value, a second economic indicator, loss of reasonable investment backed expectations, is required as well. The *Buckles* decision also corroborates that the character of the governmental action is related to the “promotion of the general welfare” as King County offered compelling evidence for its residential zoning classification that separated urban and rural uses.

Any takings claim regarding the UGB in Oregon would be considered in a similar fashion as *Buckles* in Washington. Most likely there would be a loss of economic value if a property can only be used for “rural uses”, and the courts will also recognize that the “character of the governmental action” regarding a UGB is significant.

It seems then that the extent to which the UGB has interfered with a landowner's investment backed expectations would greatly influence a takings challenge. We have seen that both the regulation and the location of a property help courts decide what a "reasonable expectation" is. In Oregon, a takings claim that seeks to subdivide a parcel for low to medium density residential development is viewed as more "reasonable" than a claim for commercial, industrial, or multiuse project. Oregon's definition of "rural uses" includes low density residential, so a claim for higher density residential development may not be too far of a stretch for the courts to make. Location of a property also plays a key role in influencing investment backed expectations. A claim closer to the UGB will have a better chance of showing that impending development on the urban side of the boundary makes it reasonable that the parcel outside the boundary should be afforded the same development rights, and, thus, allow the landowner to collect "just compensation" for the loss of this property right.

A takings claim in Oregon is possible under the unique circumstances presented above, but it is important to note that a process for land exemptions in ORS 197 may preempt many of these takings claims. A provision in the law allows lands zoned as "forestry" or "agricultural"⁹² to be exempted from these classifications so that they may be eligible for "urban uses." The statute allows land that can no longer serve goals 3 and 4 to be granted exemptions if it has been physically developed, adjacent uses make the land no longer suited for area, or there are reasons that justify why the state policy should not apply. A local government must make a factual finding for the exemption by citing one of these reasons, give public notice, hold a public hearing, and develop a record suitable for the LCDC's review of the case.⁹³ The reasons that can affect an exemption resemble the considerations that are used when evaluating the extent to which investment backed expectations are limited. This provision frees land from the restrictions placed upon it by the "forestry" or "agricultural" classifications, and allows development consistent with "urban uses," whereas a successful takings claim for a landowner would allow him or her to collect "just compensation" for the loss of property rights that the UGB imposes.

The passage of Measures 37 and 49 may also preempt many takings challenges stemming from restrictions on property outside a UGB. The measures permit landowners to use their properties more freely, namely granting them the ability to subdivide their properties for residential development. Thus, it would be necessary for a landowner to pursue one of the three tracks established in Measure 49, before bringing a takings claim involving the restriction of residential development to the Oregon courts.

V. Analysis of Urban Growth Boundaries from a Policy Perspective

A Are UGBs effective tools for limiting suburban sprawl?

This section will identify traits associated with suburban sprawl, and then offer statistics from the Portland metropolitan area to determine how Oregon's land use regulations, especially the UGB, have reined in suburban sprawl.

Certain metropolitan areas are distinguished by the fact that population growth in the suburbs far outpaces population growth in the central city. Since 1980, the Atlanta metropolitan region has experienced an 80% growth in population, yet the central city population has decreased from 425,000 to 416,000.⁹⁴ In contrast, Portland's central city population has grown by 40%, and although other comparable West Coast cities like Denver, Seattle, and Salt Lake City have grown as well, "the UGB allowed

Portland to gain a proportionate share of the region's population growth while Denver, Seattle, and Salt Lake City were left in the dust by their suburbs."⁹⁵

In addition, development taking place in the suburbs occurs at a much lower density than that of urban areas, so that the growth of land area in metropolitan regions is at a rate that far exceeds the rate of population growth. This phenomenon is much more pronounced in older Midwestern and Northeastern cities than in the West, but as a Sierra Club report notes, "nationwide land consumed for building far outpaces population growth. Urban areas expand at twice the rate the population is growing."⁹⁶ Portland is an exception to the national trend as from 1980 to 1994 the population of the Portland metropolitan region increased by 25 percent, while its urban land uses increased only 16 percent.⁹⁷ This orderly development has continued to this day, as smart growth activists praise Portland as a model for a city developing in a compact urban form.

The differences in the characteristics of the cities and suburbs of many metropolitan areas experiencing suburban sprawl do not stop at population densities. In sprawling metropolitan areas, the population of the central city has a much higher rate of poverty than that of its suburbs. Thus, a significant indicator of suburban sprawl is the ratio of the central city poverty rate to the suburban poverty rate. Once again, Portland's ratio, currently at 1.61, is lower than that of Denver, Seattle, and Salt Lake City. It is important to note that Portland's ratio was 1.81 in 1979, indicating that the UGB may have contributed to its improvement. Lewyn concludes, "because of Portland's growth and prosperity, Portland is one of the few central cities that have not become dumping grounds for the region's poor."⁹⁸

While cities still remain centers of employment, in most cities, jobs have left in much the same fashion as people, by gradually relocating in the suburbs for a litany of reasons, including lower taxes, better highways, and more parking, among others. In Portland, private sector jobs increased by 21.4% from 1992 to 1997, while Salt Lake City, Denver, and Seattle increased by only 6.6%, 8.8%, and 9.4%.⁹⁹ This is not to say that Portland's suburbs are suffering, as Abbott notes that nonfarm employment in the Portland metropolitan area grew by 272,000 jobs from 1991 to 2000.¹⁰⁰ Abbott also argues that Portland's compactness (which is associated with reduced infrastructure costs) and its access to rural wilderness gives the metropolitan area a "distinctive recruiting pitch and competitive niche" that can and will attract companies.¹⁰¹

Preservation of Oregon's natural resources, including farmland and forestland, is one of the main goals of the state's land use regulations. Lewyn's analysis shows that Portland has experienced losses of farmland similar to those of Denver, Seattle, and Salt Lake City.¹⁰² This should not be surprising for two reasons: first, the Metro included a significant amount of rural land within the UGB in order to allow development necessitated by 20-year population projections,¹⁰³ and second, the Oregon courts and Measure 49 have acknowledged that rural uses may include low-density residential areas.

Although some rural lands are used for development, Oregon's land use program protects the state's most prime natural resources. When local governments consider which lands to include within their UGBs, they select potential areas for inclusion based on a hierarchy of lands. The hierarchy is as follows (beginning with the lowest priority): "designated urban reserve land," "land adjacent to a UGB acknowledged as an exception area or nonresource land," "marginal farmland," and then finally "agriculture and forestry," with a grading system that uses the lowest quality land first.¹⁰⁴ If land of one class is not sufficient to provide for uses consistent with the

statewide goals, the city, county or special service district will continue down the hierarchy of lands when considering which lands to include within its UGB.

One characteristic associated with suburban sprawl that the UGB has not limited is automobile dependency, and, consequently, air quality. Portland's rates of public transportation have increased comparably to Denver, Seattle, and Salt Lake City, but the city's vehicle miles traveled per capita have not decreased.¹⁰⁵ Since air quality is linked to automobile use, Portland has not been especially successful in improving it.¹⁰⁶

The last remaining measure discussed in this section is the issue of housing affordability. Although high housing costs are not necessarily linked to suburban sprawl, Portland's perceived housing affordability crisis is a favorite target for critics of the UGB.¹⁰⁷ The argument goes that since the UGB limits the supply of land that can be developed, land values within the boundary will be higher than they would be were there no UGB. Lewyn's analysis of this has shown that Portland's housing prices have increased slightly more than Seattle and Salt Lake City, but less than those in Denver. However, after adjusting housing prices with respect to Portland's lower wages, the city turns out to be as affordable as its West Coast counterparts.¹⁰⁸ Abbott has a different answer to this criticism. He notes that a study has shown that the UGB adds about \$10,000 to the price of a home, "an important effect but one dwarfed by demand factors."¹⁰⁹ He argues that Portland housing prices were "playing catch-up" during the mid-1990s, and the prices were driven up the impact of growing "population, employment, and income growth combined with speculation."¹¹⁰ Thus, he attributes the rising housing costs to factors that affected housing prices in all other cities, and Lewyn's findings that Portland's housing prices are equivalent to its similar West Coast cities seem to corroborate this. Abbott also highlights Portland's rental market, an often overlooked aspect of housing. The LCDC's housing rule includes a 50-50 split between single family and multifamily units. This rule favors the construction of apartments and the ample supply keeps rents low.¹¹¹ Abbott notes that in 1999, the average rent for a one-room apartment in Portland was \$746, which is less than the U.S. average of \$858. Also, average apartment rents increased by only 33% during the 1990s, an increase of only 5% when adjusted for inflation.

B. What would happen without the UGB?

The array of statistics presented above seems to indicate that Oregon's state mandated UGBs have played a role in containing some of the characteristics of suburban sprawl, but there is no statistic that demonstrates it definitively. Interestingly enough, for all of Measure 37's shortcomings, it does provide the opportunity to evaluate what would happen in Oregon without its land use regulations. The measure was fully in effect for only less than three years, but it still truly threatened to undermine all of Oregon's land use regulations.

By the end of the two-year statute of limitations included in the measure, there were 7717 claims that covered 792,327 acres (1,238 square miles).¹¹² The compensation numbers are staggering as well; demands for all claims totaled \$20 billion, with lumber companies leading the way.¹¹³ Over 92 percent of the claims were for residential subdivision development, with 40 percent requesting 1 to 3 lots, 30 percent for 4 to 9 lots, and 20 percent requesting developments of over 500 lots.¹¹⁴ The location of the claims is significant as well; 63 percent of the claims were filed in the Willamette Valley (Portland area). Carter notes, "Approximately 90 percent of the claims were within five miles of an urban growth boundary, while 51 percent were within two miles of an urban growth boundary."¹¹⁵

These statistics offer the strongest proof that Oregon's UGB has limited the sprawling nature of development that is common today. It might be argued that these claims were driven by restraining the private market outside the UGB for over 30 years, but the sheer numbers are evidence that without land use regulations in Oregon, development would have taken a path that was similar to that of most other cities, with aggressive lower density development at the fringes of the urban area. It may also be argued that the claims near the UGB will be included within the boundary in a couple of years, after it is inevitably expanded. This argument is also faulty. In 1998 after much debate and public hearings, the Metro decided to add only 3500 acres within the UGB with 1900 acres to be added in the future.¹¹⁶ This combined number (5400 acres) pales in comparison to the 290,000 acres in Measure 37 claims in the Willamette Valley alone.

The Measure 37 claims for subdivision and development may also have negative effects on neighbors intending to use their land for rural uses. If many property owners in one area submitted claims, the municipality would most likely waive the offending legislation, which would clear the way for urban development. If a commercial farm were suddenly surrounded by higher density residential or commercial development, it might no longer be able to function as such. Either the farm would not be an appropriate use due to the adjacent properties, or it may even be considered a nuisance as the area develops into an increasingly urban form.¹¹⁷

It is clear that Oregon's land use regulations fulfill their primary legislative intent, which is to prevent "uncoordinated use of lands within this state" that threatens "the orderly development, the environment of this state and the health, safety, order, convenience, prosperity and welfare of the people of this state."¹¹⁸ Land use occurs at roughly the same rate as population growth, and the economic inequalities between central cities and their suburbs are much less pronounced than those of metropolitan areas in other states. Is it also clear that without these regulations, Portland's metropolitan development would be strikingly similar to that of other areas experiencing suburban sprawl.

C. What is the best choice for a government?

Having reviewed the legal issues and relevant statistics, I will now consider the wisdom of urban growth boundaries from a policy perspective. On the one hand, the courts have affirmed Oregon's strict land use regulations, and takings claims related to the limitations imposed by UGBs appear to likely to fail under the takings doctrine currently articulated by the Supreme Court. And on the other hand, the Oregon Supreme Court has affirmed the constitutionality of Measure 37, which gave landowners more protection against government regulations than does the Constitution. Since the courts have validated these two wide-ranging approaches to land use regulation, they leave the decision of what Oregon's land use regulations should be to the legislature and voters. As with all land use regulations, the relevant question to be answered is: Are the limitations on the property rights of citizens a reasonable price to pay for the general welfare of the public?

I believe that when in taking into consideration the limitations imposed on landowners and the general welfare of the public, Oregon's state mandated planning goals, especially the UGB, are sound policies. While some may see the regulation of property for "rural uses" outside the UGB as a limitation, others may see it as an opportunity.

One of the best features of the UGB is that it creates a dual land market. No matter what one may argue about suburban sprawl, its most fundamental feature is that

development pressure is centrifugal. This creates both higher property values on the fringes of development and creates a speculative land market even further from the fringes (this is referred to as leap frog development). Suburban sprawl always blurs the line between urban and rural, but the UGB literally defines it. Outside of the UGB a farmer may use his or her land without worrying that the taxes may soon rise to unaffordable levels because of impending development in the area. The benefit for him or her is an opportunity to continue using the land for its proposed use.¹¹⁹ If it were possible to build large housing subdivisions, commercial strips, or multiuse projects outside the UGB, the land would certainly command a higher value than it does as being limited to “rural uses.” Oregon is home to some of the most productive commercial farmland and forestlands in the nation, and the UGB protects these economic engines that are vital to the state’s prosperity. Inside of the UGB, development is expected to occur on all of the land, and the growth area inside the boundary includes ample vacant land to provide for anticipated residential and commercial development and, also, the chance to perform infill development.¹²⁰ It is important to mention that the UGB is expandable. Thus, if there were a land shortage and housing costs were to rise as a result, the boundary would be expanded to accommodate the growth of the area. The process for expansion happens in a more responsible fashion than the private market can replicate, because ORS 197 requires that UGBs expand in light of policies that protect the most vital lands in the state.

Measure 49 can be seen as an equitable give and take between those who believe that Oregon’s landscape should be preserved, no matter how much regulations tread on private property rights, and those who believe that landowners should not bear the costs of maintaining the public good through undue restrictions on the use of their properties. The measure gives private landowners more control over their properties, but does not allow them to completely avoid the efforts of the state to protect Oregon’s natural resources. Abbott notes that in Oregon, “the consensus (of voters) is nourished by an array of ‘good planning’ and environmental organizations that benefit from the high level of public awareness and approach growth management with a regional perspective.”¹²¹ This opinion is validated in the case of the Measure 37 and 49 proceedings. Measure 37 was promoted as a bill that would give private property owners more rights to use and sell their land. This is a moderate position in theory, but the reality of Measure 37 threatened to lay waste any land use regulation that adversely affected property values. The Oregon voters saw its potential detriments, and scaled back the measure with Measure 49. For now, Measure 49 seems to be a reasonable compromise that Oregon voters have settled on in order to provide landowners more freedom, while still preserving “Oregon’s status as an environmental model for the nation.”¹²²

It is also important to note that a UGB, or any land use regulation, is only as good as the planning and procedure behind it. The DLCDC and LCDC have a huge undertaking, but are assisted by the utter comprehensiveness of ORS 197, which specifically lays out the procedures for the creation of a local land use plan, its review and acknowledgement by the LCDC, and its subsequent implementation. The planning process allows local governments to formulate and implement plans that will best serve their residents and environment. The state merely takes on an administrative role by creating goals and reviewing local plans so that they meet these goals. For this reason, Oregon’s land use regulation system cannot be seen as a complete state intervention in local land use planning, which many would scoff at. The law is also flexible enough to allow the UGB to expand when necessary and to grant exceptions to certain lands

devoted to rural uses, but it always stays true to the legislative findings that serve as its backbone.

The urban growth boundary is a useful tool for curbing the effects of suburban sprawl. If a state or local government is up to the task of specifically laying out how the process will work, then by all means a government should consider the law. The general welfare of the public is undoubtedly benefited, as the statistics presented above have shown. Portland frequently stands out as an exception to national trends of sprawling development that occurs in many metropolitan areas. Clearly, the UGB is plays a role in this. While some property owners may view the limitations as too much to pay for this public benefit, others may welcome the limitations, as they allow them to use their lands in a way that would surely be impossible in the face of modern suburban development.

Endnotes

¹ Abbott, Carl “Planning a Sustainable City: The Promise and Performance of Portland’s Urban Growth Boundary.” In Greg Squires ed., *Urban Sprawl: Causes, Consequences, and Policy Responses*. Washington D.C.: Urban Institute, 2002 at 210

² *Id.* at 207

³ Codified into Oregon State Law as Oregon Statute 197

⁴ ORS 197.005, Section 1

⁵ ORS 197.005, Section 4

⁶ ORS 197.005, Section 2 and 3

⁷ See follow paragraph for an explanation of a “special service district”

⁸ ORS 197.005, Section 5.

⁹ Lewyn, Michael, *Sprawl, Growth Boundaries, and the Rehnquist Court*, Utah L.R. 1 (2002) at 8

¹⁰ *Landmark*. Winter 2007 at 6

¹¹ Goals 1-14, Oregon Administrative Rule (OAR) 660-015-0000; Goal 15, OAR 660-015-0005; Goals 16-19 OAR 660-015-0010

¹² OAR 660-015-0000(14)

¹³ *Id.*

¹⁴ Abbott at 221 notes “95 percent of the new housing in the three core counties of the metropolitan area (Portland) was built inside the UGB.”

¹⁵ *Landmark*, Winter 2007 at 6

¹⁶ Oregonians in Action website, <http://www.oia.org/index.php/about-us>

¹⁷ Carter, Charles C., *Oregon’s Experience with Property Rights Compensation Statutes*, 17 *Southeastern Env’tl L. J.* 137 (2008) at 150

¹⁸ Measure 37, Sections 1 and 2

¹⁹ Measure 37, Section 4

²⁰ Measure 37, Section 5

²¹ Measure 37, Section 3e

²² Carter at 150

²³ *Landmark*. Summer 2007 at 8

²⁴ Carter at 158

²⁵ 1000 Friends of Oregon Website, <http://www.friends.org/about>

²⁶ *MacPherson v. Department of Administrative Services* 130 P.3d 308, 340 Or. 117 (2006)

²⁷ *Id.* at 311

- ²⁸ O’Glasser, Benjamin, *Constitutional, Political, and Philosophical Struggle: Measure 37 and the Oregon Urban Growth Boundary Controversy*, 9 Univ. of Pa. J. Const. L. 595 (2007) at 613
- ²⁹ *MacPherson*, 130 P.3d 308 (2006) at 314
- ³⁰ *Id.* at 321
- ³¹ *Id.* at 322
- ³² Carter at 163
- ³³ Measure 49, section 6 (1)
- ³⁴ Measure 49, section 7 (1)
- ³⁵ Measure 49, section 7 (7)
- ³⁶ Carter at 164
- ³⁷ *1000 Friends of Oregon Guide to Measure 37 Vested Rights* at 1
- ³⁸ *Clackmas County v. Holmes*, 265 Or 193, 508 P.2d 190 (1973)
- ³⁹ *Id.* at 201
- ⁴⁰ *Village of Euclid v. Ambler Realty Co.*, 273 U.S. 365 (1926)
- ⁴¹ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)
- ⁴² *Id.* at 413
- ⁴³ *Id.* at 415
- ⁴⁴ Keene John C., *When Does a Regulation “Go Too Far”? – The Supreme Court’s Analytical Framework for Drawing the Line between an Exercise of the Police Power And an Exercise of the Power of Eminent Domain*, 14 Penn St. Envtl L. R. 397 (2006) at 398
- ⁴⁵ *Id.* at 398-9
- ⁴⁶ *Agins v. City of Tiburon*, 447 U.S. 255 (1980)
- ⁴⁷ *Id.* at 261
- ⁴⁸ Keene at 423
- ⁴⁹ *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005)
- ⁵⁰ *Id.* at 533
- ⁵¹ *Id.* at 542
- ⁵² *Id.* at 538
- ⁵³ *Loretto v. Teleprompter Manhattan CATV Corp.*, 450 U.S. 419 (1982)
- ⁵⁴ *Id.* at 436
- ⁵⁵ *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)
- ⁵⁶ *Id.* at 1007
- ⁵⁷ *Id.* at 1019
- ⁵⁸ *Lingle*, 544 U.S. 528 (2005) at 538. Brackets and the text within are added by author to clarify which type of taking that Justice O’Connor is referring to.
- ⁵⁹ *Penn Central Transportation Co. v. New York City*, 438 U.S. 1004 (1978)
- ⁶⁰ *Id.* at 123
- ⁶¹ *Id.* at 136-7
- ⁶² Keene at 428
- ⁶³ *Nollan v. Coastal California Commission*, 483 U.S. 825 (1987)
- ⁶⁴ *Id.* at 837
- ⁶⁵ *Dolan v. City of Tigard*, 512 U.S. 374 (1994)
- ⁶⁶ *Penn Central*, 438 U.S. 1004 (1978) at 129
- ⁶⁷ *Id.* at 130-1
- ⁶⁸ *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001)
- ⁶⁹ *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) at 331-2

⁷⁰ *Id.* at 331

⁷¹ *Palazzolo*, 533 U.S. 601 at 613-4

⁷² *Id.* at 614

⁷³ *Id.* at 615

⁷⁴ *Id.* at 616

⁷⁵ *Id.* at 631

⁷⁶ Lewyn at 17. The process of allowing rural lands to be used for urban uses will be discussed later.

⁷⁷ *Penn Central*, 438 U.S. 1004 (1978) at 124

⁷⁸ *Lucas*, 505 U.S. 1003 at 1019

⁷⁹ *Palazzolo*, 533 U.S. 606 (2001) at 635

⁸⁰ It is important to note that the Oregon laws have procedures for handling this type of situation without going to court.

⁸¹ Lewyn at 20

⁸² *Penn Central*, 438 U.S. 1004 (1978) at 1007

⁸³ *Id.* at 1007

⁸⁴ *Id.* at 1009

⁸⁵ ORS 197.005, section 1

⁸⁶ As we have seen in the *MacPherson* decision, both the voters and legislative bodies have “plenary power.”

⁸⁷ ORS 197.324

⁸⁸ Keene at 427

⁸⁹ Lewyn at 21

⁹⁰ *Buckles v. King County* 191 F.3d 1127, 508 P.2d 190 (1999)

⁹¹ *Id.* at 1139

⁹² OAR 660-015-0000 (Goals 3 and 4, respectively)

⁹³ ORS 197.732

⁹⁴ Lewyn at 26-7. Lewyn also gives the information for Washington D.C. The population of the metropolitan area has grown by 40%, but the central city declined from 638,000 to 572,000

⁹⁵ *Id.* Some argue that this proportionate gain was due Portland’s annexation of 39 square miles between 1950 and 1980. However, the author notes that when even though Portland annexed land before the UGB, the central city failed to gain population.

⁹⁶ *Population Growth and Suburban Sprawl*. Washington D.C.: Sierra Club, 2003.

⁹⁷ Abbott at 220

⁹⁸ Lewyn at 28

⁹⁹ *Id.*

¹⁰⁰ Abbott at 224

¹⁰¹ *Id.*

¹⁰² Lewyn at 31

¹⁰³ *Id.*

¹⁰⁴ ORS 197.298

¹⁰⁵ Lewyn at 32

¹⁰⁶ *Id.*

¹⁰⁷ See Bolick, Clint, *Subverting the American Dream: Government Dictated ‘Smart Growth’ is Unwise and Unconstitutional*, 148 U. Pa. L. Rev. 859 (2000); Sam Staley, *The Price of Urban Growth Controls*, San Diego Union-Trib., Aug. 9, 1998, at G-3.

¹⁰⁸ Lewyn at 42

¹⁰⁹ Abbott at 228

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Measure 37 Database. See Table 1: Summary of Claims by Current and Proposed use. 2877 of the claims were from lands zoned for exclusive farming use, 1021 were from forest use, 938 from forest farm use, and 628 were from rural residential use. 1238 square miles is 1.3% of the Oregon's entire land area.

¹¹³ Carter at 160. Stimson Lumber filed claims for 109,000 acres and Senaca Jones Timber Company filed for \$6.75 million in claims

¹¹⁴ Carter at 16

¹¹⁵ *Id.*

¹¹⁶ Abbott at 219

¹¹⁷ See *Spur Industries, Inc. v. Del E. Webb Development Co.*, 494 P.2d 700 (1972). Increased development in the area of Spur Industries feedlot caused the court to determine that the feedlot was a public nuisance, even though Spur did not actively contribute to the development of the nuisance. Spur Industries' operations were enjoined, and forced to move elsewhere, at the expense of Del Webb, the party who caused the existence of the nuisance.

¹¹⁸ ORS 197.005, Section 1

¹¹⁹ 1000 Friends of Oregon note that the UGB gives farmers "predictability" meaning that they will be able to continue use of their lands for agricultural purposes. See <http://www.friends.org/issues/reserves>.

¹²⁰ *Id.* Abbott notes that 25% of the new housing is being built on in-fill or re-development sites.

¹²¹ Abbott at 230

¹²² Excerpt from Governor McCall's speech, Abbott at 207

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***McCleskey v. Kemp*: The Death Nell for Racial Equality in Capital Sentencing**

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Abstract

When Justice Powell's biographer asked Powell whether, if given the opportunity, he would alter his vote, Justice Powell replied, "Yes. *McCleskey v. Kemp*."¹ The decision in *McCleskey v. Kemp*, one of the most notorious and controversial cases in Supreme Court history, has been likened to *Plessy v. Ferguson*.² Professor Anthony Amsterdam, a foremost scholar and leader of the capital defense community, declares, "It is a decision for which our children's children will reproach our generation and abhor the legal legacy we leave them Justice Powell's desire to change his vote offers interesting insight concerning the *McCleskey* decision. It suggests that the decision in *McCleskey* was an anomaly, a step backwards in a society moving towards the eradication of racial prejudice. Moreover, it implies Powell's recognition of the negative impact of *McCleskey v. Kemp* on the State Supreme Court cases that followed it. Warren McCleskey, an African American man convicted of murdering a white police officer, contested his death sentence on the basis that it was imposed in an arbitrary and racially discriminatory manner. He used the Baldus study, a comprehensive statistical analysis concerning the impact of race in criminal cases, to support his claim that there existed a constitutionally impermissible risk that race affected his sentence. More precisely, McCleskey asserted that both his race and his victim's race contributed to his death sentence. Even though the Supreme Court assumed that the statistics presenting large racial disparities in capital sentencing were valid, the Court rejected McCleskey's claims and sustained his death sentence.

Even though some may say that the decision in McCleskey is consistent with the Supreme Court's prior rulings and thus should come as no surprise, I, in Part I, argue that McCleskey represents a deviation from the Supreme Court's previous efforts to eliminate racial discrimination in the criminal justice system. As a result, I will establish that the Supreme Court's decision in McCleskey was inconsistent with prior judgments. In Part II, I present a summary of both the majority opinion and the dissents in the case. In Part III, I provide an analysis of the majority's primary arguments. My examination will demonstrate that the case the majority used to found its opinion upon was inappropriate and did not accurately relate to the issues presented by McCleskey. In Part IV, I will address the possible options the Supreme Court could have used to eradicate racial discrimination in capital sentencing if they had ruled in favor of McCleskey. Moreover, I will address how a few state governments are presently attempting to remedy similar racial discrimination in the administration of the death penalty.

Part I

The Supreme Court's endeavor to eliminate racial influences in the criminal justice system is exemplified by cases such as *Castaneda v. Partida*.³ In that case, Rodrigo Partida, a Mexican-American, was convicted of burglary with intent to rape in the Texas District Court. Afterwards, he filed a habeas corpus petition alleging a denial of equal protection due to the blatant under representation of Mexican-Americans on the

county grand juries. Partida used statistics from the 1970 census and the Hidalgo County grand jury records to reveal statistical disparities in the selection of grand juries. The statistics demonstrated that even though the population of the county was 79% Mexican-American, only 39% of those chosen for grand jury service over an eleven year period were Mexican-American.⁴ In *Castaneda* the Court held for Partida because the majority concluded he made a prima facie case for purposeful discrimination in grand jury selection. According to the majority, Partida succeeded in doing this by fulfilling each component of the test essential in claiming an equal protection violation concerning jury selection. The Supreme Court explained it in three parts: First, the claimant must be a member of a visually recognizable group that is treated differently either in written law or in its application. Second, the plaintiff must provide evidence that indicates significant discrepancies between the percentage of racial minorities picked for jury service and the population of eligible minorities in a given jurisdiction. Third, the plaintiff must demonstrate that the selection procedure employed is susceptible to abuse.⁵ Writing for the Court, Justice Blackmun noted: "If a disparity is sufficiently large, then it is unlikely that it is due solely to chance or accident and, in the absence of evidence to the contrary, one must conclude that racial or other class-related factors entered into the selection process."⁶ By lowering the burden of proving discriminatory intent, and by challenging the jury commissioners' discretion, the Court advanced the eradication of the influence of racial prejudice in the criminal justice system.

Batson v. Kentucky is another prime example in which the Supreme Court attempted to eliminate racial discrimination in the criminal justice system.⁷ It endeavored to do so by rectifying a prior decision that unintentionally allowed racial discrimination to permeate prosecutors' preemptory challenges.⁸

James Batson was a black defendant convicted of burglary and receipt of stolen goods. His jury pool included 4 blacks, and the prosecutor utilized his preemptory challenges to eliminate all four blacks from the jury. In an opinion written by Justice Powell, the Court held, contrary to what it had previously ruled that the equal protection clause prohibits all racially discriminatory preemptory challenges by prosecutors.¹⁰ As a result, the Court lessened the burden of proof for demonstrating racial discrimination in a prosecutor's preemptory challenges. Quoting Justice Marshall, the Court maintained, "for evidentiary requirements to dictate that several must suffer discrimination before one could object... would be inconsistent with the promise of equal protection for all."⁹ In other words, governmental racial discrimination is not only unacceptable when used to consistently deprive potential black jurors of their rights, but is also unacceptable when used as a trial tactic in a particular case.

In addition, *Batson v. Kentucky* created a method to bring about its new ban on racially discriminatory preemptory challenges. Firstly, the defendant must establish a prima facie case that the prosecution is exercising its preemptory challenges in a racially prejudiced manner. The prosecutor's statements and questions during voir dire, or consistent strikes against jurors of a particular race, are examples of the information necessary to establish a prima facie case.¹⁰ Secondly, after the defendant has formulated a prima facie case, the burden shifts to the prosecution to present race neutral justifications for its challenges. If the prosecutor is able to provide a 'non-racial explanation', the defendant has the option of demonstrating that the allegedly non-racial reason is a ploy.

With this new procedure, the heavy evidentiary burden placed on prior defendants is lifted, while the prosecutor's burden is seemingly augmented.¹¹ By replacing the previously instituted "crippling burden of proof" with a burden more easily

satisfied, the Court made an effort to prevent racial discrimination from playing a role in the criminal justice system.¹² Moreover, the Court subjected prosecutorial preemptory challenges to constitutional scrutiny, which partially addressed the issue of allowing undue discretion in the criminal justice system.

In addition to the cases just discussed, it is relevant to address one other significant case: *Yick Wo v. Hopkins*.¹³ Although it does not concern the topic of racial bias in the criminal justice system, the case does use a statistical pattern of racial discrimination to establish a violation of equal protection. Yick Wo, a Chinese Laundromat owner, alleged that the discriminatory enforcement of the city ordinance violated the equal protection clause of the Fourteenth Amendment.¹⁴ The ordinance obliged those who operated laundries in wooden buildings to obtain a permit before resuming business.¹⁵ Under the ordinance, approximately 79 of the 80 white applicants were granted permits. However, zero of the over 200 Chinese applicants were able to secure a permit.¹⁶ In an opinion written by Justice Matthews, the Court unanimously held that:

The facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that whatever may have been the intent of the ordinances as adopted, they are applied... with a mind so unequally and oppressive as to amount to a practical denial by the State of that equal protection of the laws...¹⁷

Therefore, regardless of whether the law was impartial on its face, its prejudicial enforcement, as demonstrated by the stark statistical disparities, constituted a violation of equal protection.

Part II

Based on the findings of the Baldus study, McCleskey argued that race permeated the administration of Georgia's capital punishment statute in two ways: people whose victims are white are more likely to receive the death penalty than people whose victims are black, and murderers who are black are more likely to receive the death penalty than murderers who are white.¹⁸

Opinion of the Court

The majority opinion addressed the issue of whether a statistical study demonstrating a risk that racial considerations have a hand in capital punishment decisions was adequate evidence to prove that the death penalty was unconstitutional under the fourteenth amendment. Justice Powell, writing for the majority, applied a traditional equal protection analysis by arguing that McCleskey needs to prove the existence of "purposeful discrimination."¹⁹ Additionally, McCleskey must demonstrate that the discrimination had a direct effect on him. According to the majority, McCleskey failed to meet this burden.

The Court also noted that McCleskey "challenges decisions at the heart of the State's criminal justice system."²⁰ Additionally, the Court asserted the importance of prosecutorial and jury discretion in capital punishment cases and as a result it explained "we would demand exceptionally clear proof before we would infer that the discretion has been abused."²¹ Consequently, the Court examined the Georgia statute with significant deference and concluded that the Baldus study was insufficient proof to maintain that any of the decision makers in McCleskey's case operated with discriminatory intent. Subsequently, the majority addressed McCleskey's charge that the state of Georgia violated equal protection by instituting and sustaining the capital

punishment statute despite its discriminatory application. Using *Personnel Administrator of Massachusetts v. Feeney* as precedent, the court asserted that “discriminatory purpose”... implies more than intent as volition or intent as awareness of consequences. It implies that the decision-maker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part “because of” not merely “in spite of,” its adverse effects upon an identifiable group.²²

Specifically, McCleskey has the burden of proving that either the Georgia Legislature purposefully adopted and maintained the death penalty in order to discriminate against blacks, or that the prosecutors or the jury in his case acted with discriminatory intent. The majority determined that the justifiable reasons, for the Georgia legislature to enact and sustain the death penalty, coupled with the value of discretion in capital cases were enough for the Court to reject adopting an inference of discriminatory purpose from the racial disparities demonstrated by the Baldus study. As a result, the majority maintained that the statistical analyses provided inadequate evidence to prove discriminatory intent.

Lastly, the Court articulated two other issues concerning the case. Firstly, if McCleskey’s claim is accepted, the Court could be confronted with a multitude of similar claims regarding other types of criminal penalties or involving other minority groups.²³ Secondly, the Court asserted that McCleskey’s claims fall more in the realm of the legislature because they have the ability to respond to the existing moral values of society.

The conclusion reached by the Court vis-à-vis the Baldus study, along with the Court limiting its own role in the McCleskey case, resulted in a 5-4 decision, affirming the court of appeals. Therefore, the Court rejected McCleskey’s equal protection claims.

Dissents

Justices Brennan, Marshall, Blackmun and Stevens joined in the dissents.²⁴ Justice Blackmun condemned the majority’s refusal to view capital cases as different. In actuality, the majority used the fact that it is a capital punishment case as its rationale to apply a lesser standard of scrutiny. In Blackmun’s words, “the Court states that it will not infer a discriminatory purpose on the part of the state legislature because ‘there were legitimate reasons for the Georgia Legislature to adopt and maintain capital punishment.’”²⁵ Therefore, instead of using the statistics of the Baldus study to demonstrate a constitutionally impermissible risk of racial prejudice in the application of the death sentence, the Court chose to defer to the legislature. Countering the majority, Blackmun contended that capital punishment decisions require a greater degree of scrutiny. Blackmun noted that because McCleskey’s conviction was determined by a jury it failed to demonstrate that discrimination did not affect earlier phases of the prosecution,²⁶ “such as the prosecutor’s decision to seek the death penalty.”²⁷ Moreover, Blackmun argued that because this case does not involve a facial challenge to the constitutionality of a statute, the Court’s dependence on Georgia’s legitimate reasons for enacting its capital punishment statute is irrelevant in McCleskey’s case.

Subsequently, Blackmun maintained that McCleskey’s case fits within the same framework used in *Castaneda v. Partida*. He contended that because McCleskey’s claim of equal protection violation “extends to every actor in the Georgia capital sentencing process, from the prosecutor who sought the death penalty and the jury that imposed the sentence, to the State itself that enacted the capital punishment statute...”²⁸ the Court should concentrate on the phases of criminal justice influenced by racial discrimination. In his dissent, he deemed the prosecutor the fundamental state actor in

criminal trials. Additionally, based on the evidence presented by the Baldus study, he concluded that the discretion of the prosecutor is greatly influenced by racial factors. According to the study, Georgia prosecutors sought the death penalty in 70 percent of cases involving black defendants and white victims but only 19 percent of cases involving white defendants and black victims.²⁹

Due to Blackmun's assumption that the venire-selection and preemptory challenge cases were analogous to McCleskey's, Blackmun employed the three-prong test established in *Castaneda v. Partida*. After concluding that McCleskey satisfied each prong of the test, and after addressing the history of racial discrimination in Georgia's justice system, Blackmun decided that a prima facie case of discrimination had been established.³⁰ It must be noted that with regards to the second prong, Justice Blackmun, similar to the majority, maintained that McCleskey must prove that there is a substantial possibility that *his* death sentence was due to racial factors.³¹ However, unlike the majority, Blackmun asserted that McCleskey did in fact demonstrate that his death sentence was most likely influenced by race.³² As a result, the burden of proof shifted to the prosecution. Since Georgia's rebuttal was comprised of the unproven theory of an expert witness and state officials' general denials of using racial bias, the dissent held that the prosecution did not meet its burden and, therefore, McCleskey had demonstrated that the racial disparity demonstrated by the Baldus study were unexplainable on any basis other than race.³³ Lastly, Justice Blackmun maintained that the Court's justifications for not applying the *Castaneda* test were "unpersuasive" and disagreed with the majority's claim that jury selection and employment decisions concern fewer entities than capital punishment cases.³⁴ By suggesting that jury selection and employment cases have just as many entities as capital punishment cases, Justice Blackmun asserted that the *Castaneda* test is the most suitable for McCleskey's case.

Part III

Inference of discrimination

To begin, McCleskey's statistical racial disparities should have established an inference of discrimination, which would have required the state to show that its capital sentencing was not affected by race. While, the court has allowed statistics to demonstrate an inference of discrimination in venire-selection and preemptory strikes, the court declined to adopt such a rule in McCleskey. Instead, the majority insisted that McCleskey's evidence be exceptionally persuasive because he was challenging discretionary decisions central to Georgia's criminal justice system. Therefore, the Court created "an impossible burden of proof" that called for direct evidence, relating specifically to the case, demonstrating that either the jury or the prosecutor practiced purposeful discrimination.³⁵ According to the Court, the stark disparities demonstrated by the Baldus study were "clearly insufficient to support an inference that any of the decision makers in McCleskey's case acted with discriminatory purpose."³⁶

The Court concluded that the Baldus study, one of the most exhaustive statistical analyses for examining the influence of race in capital sentencing, was insufficient to establish an equal protection violation. This conclusion was illogical for three distinct reasons. First, Justice Scalia, who joined in the decision of the majority, declared that the issue had nothing to do with lack of evidence. Justice Scalia, during the time the case was pending, wrote a memo to the entire court stating:

Since it is my view that the unconscious operation of the irrational sympathies and antipathies, including racial, upon jury decisions and prosecutorial decisions is real, acknowledged in the decisions of this court, and ineradicable, I cannot say that all I need is more proof.³⁷

Second, the Baldus study's factual basis withstands the most critical analysis.³⁸ Professor Baldus and his associates analyzed over 2000 defendants who had been convicted of murder or involuntary manslaughter in Georgia between 1973 and 1979.³⁹ The data showed that defendants who murdered whites were 11 times more likely to receive the death sentence than defendants who murdered blacks.⁴⁰ Professor Baldus and his team then subjected this correlation to extensive statistical analysis to test whether the ostensibly racial nature of this discrepancy could be explained by hidden factors. He took into account 230 race neutral variables that could have impacted the pattern of sentencing.⁴¹ Even after allowing for the non-racial variables, race of the victim continued to have a statistically significant correlation with capital sentencing. After applying a statistical model that included 39 nonracial factors deemed most likely to influence capital punishment in Georgia, the Baldus study concluded that the chances of being condemned were 4.3 times greater for defendants who killed whites than for defendants who killed blacks.⁴² The study also suggested that the race-of-the victim effects were primarily the product of prosecutorial decisions to seek the death penalty more often in cases involving white victims.⁴³

Third, the Court has previously inferred discriminatory purpose from stark statistical disparities in other cases.⁴⁴ For example, the Court did so in the aforementioned case *Yick Wo v. Hopkins*.⁴⁵ Although the Court deemed *Yick Wo*'s case distinct from *McCleskey*'s, both cases challenged a law that was administered in a racially prejudicial manner by people empowered with a great deal of discretion.⁴⁶ In *Yick Wo*, the court held:

if (the law) is applied and administered by public authority with an evil eye and an unequal hand, so as *practically* to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.⁴⁷

The Court never imposed upon *Yick Wo* the burden of establishing that the state actors administering the ordinances acted with illicit purpose, because the statistical disparities presented by *Yick Wo* were sufficient to imply discriminatory purpose.

Even though the statistics presented by the Baldus study are not as extraordinary as those demonstrated in *Yick Wo*, they are indisputably significant. The gravity of *McCleskey*'s situation, accompanied by the Baldus study's implication that race is a determining factor in life or death decisions, should have compensated for the statistical differences between *Yick Wo* and the Baldus study. Regrettably, the Court declined to reach such a conclusion.

Moreover, in *Booth v. Maryland*, a case decided 3 weeks after *McCleskey v. Kemp*, the Court invalidated a state statute that permitted the introduction of victim impact statements in capital proceedings.⁴⁸ According to the Court, allowing the content of a victim impact statement into trial could influence the jury into choosing the death penalty for reasons that "were irrelevant to the [defendant's] decision to kill."⁴⁹ Therefore, this case is similar to *McCleskey*'s in that they both challenged the administration of juror discretion. However, rather than demanding direct or empirical

evidence illustrating the influence victim impact statements had on juries, the Court based its decision on “conditional propositions.”⁵⁰

Justice Powell stated that, “we decline to assume what is unexplained is invidious.”⁵¹ However, the Baldus study effectively demonstrated that specific patterns in death sentencing could not reasonably be explained by any reason other than race.⁵² Moreover, the Court’s failure to acknowledge the similarities between Yick Wo and McCleskey, coupled with the Court’s subsequent decision in *Booth v. Maryland*, reveals the Court’s neglect to treat “death as different” in McCleskey’s case as it had done in others.⁵³

The History of Racial Discrimination in Georgia: an Indication of Discriminatory Intent.

In *Arlington Heights v. Metropolitan Housing Development Corp.*, the Court explained that discriminatory intent or purpose must be evident in order to show a violation of equal protection.⁵⁴ The Court later identified various ways in which a plaintiff could prove purposeful discrimination, one of them being the historical background of the statute.⁵⁵ One need only open up a history book to see the expansive history of institutionalized racial prejudice in Georgia’s criminal justice system. Even after the abolition of slavery, the criminal justice system persisted to administer a dual system of punishment, which provided for the enforcement of considerably harsher penalties on blacks indicted for committing crimes against whites.⁵⁶ The Court responded to this evidence by stating, unless historical evidence is reasonably contemporaneous with the challenged decision, it has little probative value. Although the history of racial discrimination in this country is undeniable, we cannot accept official actions taken long ago as evidence of current intent.⁵⁷

Such an assertion completely disregards the contemporaneous historical evidence implying that the institutionalized racism of the past continues to endure. Within the fifteen years prior to McCleskey, the U.S Supreme Court ruled against Georgia’s capital sentencing system on three occasions.⁵⁸ In each of these cases, a number of Justices recognized that there was credible evidence suggesting the continued existence of institutionalized racism in capital sentencing.⁵⁹ While it is true that the history of racial discrimination within Georgia’s criminal justice system is by itself inadequate evidence to support McCleskey’s claim of racial discrimination, the history was combined with three contemporaneous cases.⁶⁰ These cases demonstrated that the Georgia criminal justice system continued to be contaminated by racial discrimination. The racist history of Georgia’s criminal justice system simply strengthened and clarified the empirical data of the Baldus study. Regardless of the egregious historical and contemporary evidence, the majority declined to consider those facts in its examination of an equal protection violation. In refusing to do so, the Court discounted McCleskey’s most credible evidentiary source and contradicted its holding in *Arlington Heights*.

Discretion of Jurors and Prosecutors

As already established, one of the many reasons compelling the Court to rule against McCleskey was the need to allow juries and prosecutors discretion in capital punishment cases. In fact, the Court demanded “exceptionally clear proof” because *McCleskey* challenged the discretionary decisions of the prosecution.⁶¹ The Court defended prosecutorial discretion by declaring, “the capacity of prosecutorial discretion to provide individualized justice is ‘firmly entrenched in American law.’”⁶² By demanding direct evidence of purposeful discrimination, the Court ignored the

possibility of subtle or unconscious racism in the decisions of prosecutors and juries.⁶³ For example, “racially selective empathy,” which is the inadvertent tendency to sympathize with whites more than with blacks, could have played a role in the prosecutor’s decision to seek the death penalty or in the jury’s verdict.⁶⁴ It is possible that judges, prosecutors, and jurors, who are primarily white, have a less severe disposition towards crimes in which the victims are black.⁶⁵ Due to the fact that juries remain predominantly white, their sympathies tend to lie more strongly with white victims than black victims.⁶⁶ Moreover, although officials in the criminal justice system may not intentionally discriminate against blacks, they do so by punishing people who murder blacks less harshly than people who murder whites.⁶⁷ One theory suggests that prosecutors concentrate their abilities in a way that enables them to get reelected.⁶⁸ As a result, prosecutors in particular jurisdictions are generally less devoted to cases with black victims because in their jurisdiction blacks are both destitute and politically weak.⁶⁹ The Court’s requirement of discriminatory intent, demonstrates its failure to acknowledge the existence of subtle or unconscious racism in the decisions of Georgia’s criminal justice officials. By declining to address the possibility of various forms of discrimination, the Court provided for an environment of unbridled racism in the criminal justice system.

The Legislatures

The Court deferred the responsibility of deciding policy regarding capital punishment to the legislature because it deemed the legislatures to be better equipped to assess state based statistical disparities and to assign a moral significance to their findings.⁷⁰ In so doing, the Court forsook its role of protecting the interests of “insular minorities” otherwise unprotected in the political processes of federal and local governments.⁷¹ Furthermore, legislators generally have little interest in protecting the rights of criminals.⁷² According to David Cole, the accused are the only people more unpopular than blacks.⁷³ In other words, by instructing *McCleskey* to seek a solution through the majoritarian process, the Court effectively offered him no remedy at all. Additionally, the Court’s decision indicates that it was more concerned with the consequences of openly admitting that race largely influenced the administration of the death penalty in Georgia than with remedying racial discrimination in capital cases. The Court preferred to avoid a decision that would prompt similar challenges or call into question the racial fairness of capital sentencing.⁷⁴ The Court’s preoccupation with an unwelcome outcome, rather than with the evidence of institutionalized discrimination, suggests to outsiders that no real racial discrimination existed in Georgia’s administration of the death penalty.⁷⁵ Moreover, it was unreasonable for the Court to expect that state courts would address the complex issues presented by racial discrimination claims, when the Court itself was unwilling to. As a result, the decision in *McCleskey* has undercut the motivation of state courts to address the issue of racial discrimination in the administration of capital punishment and has supplied them with a legal basis for neglecting the matter.⁷⁶ Since *McCleskey*, the state courts have denied relief based on racial discrimination in the application of the death penalty in almost every case.⁷⁷ The fact that the decision in *McCleskey* continues to provide a justification for racial discrimination in capital sentencing speaks volumes about our society’s unwillingness to address racism.

The Appropriate Standard

Batson and *Castaneda* serve as precedents to address the potential existence of racism, deliberate or not, in a states criminal justice. By demanding that McCleskey prove discriminatory intent, the Court was invoking *Washington v. Davis* and *Arlington Heights*.⁷⁸ These cases dealt with employment discrimination and housing discrimination, and as a result, have little in common with the concerns present in McCleskey's case. Therefore, the majority should have applied the *Castaneda* test to establish an equal protection violation.⁷⁹ As asserted by Justice Blackmun, *Castaneda* and *Batson* more closely resembled McCleskey's case because they addressed the issue of racial discrimination in criminal law, specifically the selection of juries and the use of preemptory challenges.⁸⁰ In *Arlington Heights*, the Court maintained that in particular cases "a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."⁸¹ In other words, in such cases, the intent standard is relaxed and purposeful discrimination need not be proven. The Court referenced *Yick Wo* as one of those rare examples. However, hidden in a footnote in *Arlington Heights*, the Court asserted two crucial points. First, jury-selection cases are also considered to be among those cases that call for a relaxed intent standard. Second, due to the great deal of discretion associated with jury selection, the Court has allowed an equal protection violation to be established even when the statistical pattern of discrimination is not as stark as those presented in cases similar to *Yick Wo*.⁸² It logically follows that *McCleskey* should have fallen into this category if the Court had applied the same line of reasoning it held in *Arlington Heights*. For the discretion present in jury selection is similar to the discretion awarded to prosecutors in the criminal justice system.⁸³ The prosecutor in McCleskey's case, having no guidelines or restrictions, had complete discretion in deciding whether to seek the death penalty or not. Such discretion, coupled with the statistical disparities demonstrated by the Baldus study, should have prompted the Court to apply the test established in *Castaneda*.⁸⁴ If the Court had done so, it would have found that McCleskey satisfied all three prongs of the test, and the burden would have shifted to the prosecution.⁸⁵ Because Georgia lacked a persuasive rebuttal, the Court should have been compelled to decide that the statistical disparities, combined with the vast history of institutionalized racism in Georgia, demonstrated a violation of equal protection in Georgia's administration of the death penalty.

Part IV

There are various alternatives the Supreme Court could have employed in order to eliminate racial discrimination in capital cases had they ruled in favor of McCleskey. One alternative, advocated by Justice Blackmun, would be to establish and impose guidelines upon prosecutorial decisions in homicide cases. However, he fails to suggest any examples of appropriate guidelines that would successfully rein in discrimination in prosecutors' decisions.⁸⁶

Another alternative, embraced by Justice Stevens and Blackmun is to limit the kinds of cases that qualify for the death sentence, for instance, restricting the death penalty only for cases that involve the most aggravated homicides.⁸⁷ Such an option could decrease the influence of race in capital sentencing because "there exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim."⁸⁸ While such a limitation would save money, it ignores the fact that "the task of selecting

in some objective way those persons who should be condemned to die...remains beyond the capacities of the criminal justice system.”⁸⁹ What makes one crime more “aggravated” than another and who decides? The enactment of such a law would raise challenging questions whose answers would rest on the slippery slope of discretion.

A different option would be to completely abolish capital punishment. Such an alternative stems from the idea, raised by Justice Scalia, that racial prejudice is inherent and unavoidable in the administration of the death penalty. Although this would clearly prevent racial discrimination in capital sentencing, it is currently an unrealistic solution. According to the most recent poll, 69% of Americans are in favor of the death penalty for a person committed of murder.⁹⁰ Until the majority of Americans view the death penalty as a public evil, it will continue to hold a place in the administration of justice.

The “level-up solution,” as termed by Kennedy, is another alternative.⁹¹ It entails increasing the number of people executed for murdering blacks. In Kennedy’s opinion, the allegation that such a measure would cause the imposition of the death penalty on even more blacks is irrelevant.⁹² This solution primarily has to do with eradicating the message conveyed by race-of-victim discrimination: that a white life is worth more than a black life. One way the level-up solution could be achieved today is through the families of black victims. For instance, families could bring a lawsuit seeking damages against the officials of the state that employed prosecutors who discriminated based on the race of the victim.⁹³ Another way to realize the level-up solution would be to have the Courts order a moratorium until the states with racial disparities in sentencing, like Georgia, implement policies to insure that death penalty cases are administered fairly and impartially. Regardless of the proclaimed reasons some may use to justify their opposition to such a solution, at its core level-up compels one to decide what is more important: death and justice, or no death at all.

*How Certain States Have Confronted the Reality of *McCleskey v. Kemp**

Even though there are those who turn to the courts because they view legislatures as unresponsive, a couple of states are trying to avoid mistakes made by the Supreme Court regarding *McCleskey*. Although Congress’ failure to pass the Racial Justice Act could be viewed as a discouraging precedent for individual states, some state governments have declined to follow Congress’ example.⁹⁴ For instance, in 1998, Kentucky passed the Kentucky Racial Justice Act.⁹⁵ (KRJA) Under the Act, a defendant may establish that race influenced a prosecutor’s decision to seek the death penalty by providing either statistical evidence or other evidence. The evidence must demonstrate that the death penalty was sought significantly more frequently for cases involving a perpetrator of a specific race or a victim of a specific race.⁹⁶ Even though opponents of the KRJA and similar acts argue that the passage of such acts would abolish the death penalty, since the KRJA’s enactment, the number of death sentences in Kentucky has increased.⁹⁷ Since the ratification of the KRJA, there is evidence that the system has become more impartial in its treatment of white and black victim cases in the state’s urban centers. For example, the first time, black-victim cases are proceeding to penalty trials and resulting in death sentences for black murderers.⁹⁸ The Act has also had a positive impact on prosecutorial behavior.⁹⁹ Furthermore, in August of 2009, North Carolina passed the Racial Justice Act into law.¹⁰⁰ Similar to KRJA, the North Carolina RJA allows a defendant facing a capital trial or a death-row inmate to challenge racial injustice in capital sentencing through the use of statistical evidence that demonstrates a pattern of racial disparity.¹⁰¹ Although the U.S. still has a long way before eliminating

racial prejudice in capital cases, Kentucky and North Carolina are current beacons of hope for the future of the criminal justice system.

Conclusion

The decision in *McCleskey v. Kemp* was a break from the Court's previous dicta and decisions. The Court declined to see the similarities between *McCleskey* and other cases that addressed the issue of racial discrimination in the discretionary decisions of criminal justice officials. According to the Court, the necessity for unbridled discretion by juries and prosecutors in capital punishment cases, discounted the Baldus study's overwhelming evidence that race affected sentencing in capital cases. Regardless of Justice Scalia's affirmation that racial prejudice was indeed a factor in sentencing, the Court reached the illogical conclusion that the Baldus study was insufficient to prove discriminatory intent. In forcing *McCleskey* to provide direct evidence to demonstrate that either the jury or the prosecutor purposefully discriminated, the Court failed to apply a more appropriate test established by *Castaneda*. Moreover, in deferring the issue to the legislators, the Court neglected to live up to its responsibility to protect insular minorities, forgotten or oppressed by the majority, and significantly reduced judicial oversight of the discretion of prosecutors and jurors concerning the administration of the death penalty.¹⁰² Regardless of the many alternatives the Court could have employed after recognizing a violation of equal protection in *McCleskey's* case, the reality is that the Court held against *McCleskey*. Although *McCleskey* appeared to be the death knell for the fight for racial equality in capital sentencing, some state governments have recently accepted the responsibility the Supreme Court placed on them in *McCleskey*. While the decision in *McCleskey* was a major setback, some states continue to bravely and justly advancing along the path towards equality in the criminal justice system.

Endnotes

¹ Liptak, Adam. "A New Look at Race When Death is Sought." *The New York Times* 29 Apr. 2008, Late Edition ed., Final sec. Print.

² Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Rev. 1388 (1988)

³ 430 U.S. 482 (1977) See similar cases e.g., *Turner v. Fouche*, 396 U.S. 346 (1970); *Whitus v. Georgia*, 385 U.S. 545 (1967)

⁴ *Id.* at 494

⁵ *Id.* at 501 Partida proved the last prong by demonstrating that the jury commissioners were granted considerable discretion in the selection of grand jurors.

⁶ *Id.*

⁷ 476 U.S. 79 (1986). It must be noted that *Batson v. Kentucky* has failed to completely eradicate racially discriminatory peremptory challenges. According to Kennedy, judges have discovered violations of *Batson* in multiple cases, and prosecutors still use racially motivated peremptory challenges, though they may not openly admit it. See Kennedy, Randall. *Race, Crime, and the Law*. New York: Vintage Books, 1998. Print. However, this section only addresses the Court's *attempts* to eliminate racial prejudice, not the Court's successes or failures in achieving that end.

⁸ See *Swain v. Alabama*, 380 U.S. 202 (1964) A black man alleged that he was denied equal protection when the state prosecutor used his peremptory challenges to prevent every potential black juror from serving as a jury member. Acting under the presumption that a prosecutor properly exercises each peremptory challenge, the Supreme Court ruled against the petitioner and refused to analyze a prosecutor's actions in any particular case. As a result of the decision, lower courts required proof that members of a certain race were continuously excluded from petit juries in order to demonstrate an equal protection violation with regards to peremptory challenges. See 20 Conn. L. Rev. (1987). at 1038

⁹ *McCray v. New York*, 461 U.S. at 965 (Marshall, J., dissenting from denial of certiorari)

¹⁰ Kennedy, Randall. *Race, Crime, and the Law*. New York: Vintage Books, 1998. Print. 205.

¹¹ In this test, simply the prosecution's denial of racial discrimination in its decisions is an insufficient rebuttal. The prosecution must provide a non-racial explanation related to the particular case at hand. Holland, *McCleskey v. Kemp: Racism and the Death Penalty*, 20 Conn. L. Rev. 1039 (1987)

¹² 476 U.S. 79, 92 (1986)

¹³ 118 U.S. 365 (1886)

¹⁴ *Id.*

¹⁵ *Id.* at 366

¹⁶ Although people of Chinese descent operated 89 percent of the city's laundry businesses, not a single Chinese owner was granted a permit. *Id.*

¹⁷ *Id.* at 373

¹⁸ *McCleskey*, 107 S. Ct. 1756 (1987)

¹⁹ *McCleskey*, 107 S. Ct. 1766 (1987)

²⁰ *Id.* at 1769

²¹ *Id.*

²² 442 U.S. 256, 279 (1979)

²³ The court further postulates that, "such a claim could – at least in theory—be based upon any arbitrary variable, such as the defendant's facial characteristics, or the physical attractiveness of the defendant or victim."

²⁴ Justice Marshall, the lone black judge on the Supreme Court, was the only Supreme Court dissenter who did not write an opinion. According to Randall Kennedy, his unusual silence could be inferred as an expression of his sense of alienation from the Court. Moreover, Kennedy concluded that perhaps Justice Marshall had felt that the Court had administered a contemptible opinion unsuitable for discussion. 101 Harv. L. Rev. 1417 (1987)

²⁵ *McCleskey* 107 S. Ct. at 1796 (Blackmun, J. dissenting)

²⁶ *Id.* See *Vasquez v. Hillery*, 474 U.S. 254 (Supreme Court asserted that conviction "in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently the nature or very existence of the proceedings to come.)

²⁷ *Id.* at 1797

²⁸ *Id.* at 1780

²⁹ *Id.* at 1800

³⁰ According to Blackmun the statistics presented by the Baldus study effectively demonstrate that blacks, a recognizable and distinct group, were being treated differently under the Georgia capital system. These facts fulfilled the first part of the test. In dealing with the second requirement, Blackmun contended that the Baldus study established a constitutionally impermissible racial disparity in Georgia's capital sentencing system by

revealing that a victim's race impacts a prosecutor's decision to seek the death penalty. Justice Blackmun noted that the Baldus study's "statewide statistics indicated that black defendant/white victim cases advanced to the penalty trial at nearly five times the rate of black defendant/black victim cases (70% vs. 15%), and over three times the rate of white defendant/black victim cases (70% vs. 19%). *Id.* Lastly, Blackmun asserted that McCleskey established that the process by which the prosecution decided to seek and pursue the death penalty in his case was susceptible to abuse. Blackmun particularly focused on the unbridled discretion given to each prosecutor due to the State's lack of guidelines regarding specific criminal procedures, such as charges, plea-bargaining, or sentencing. Moreover, Blackmun pointed out how McCleskey presented an "evidentiary source" by introducing evidence of the history of racial discrimination in Georgia's criminal justice system. *Id.* at 1800-1804

³¹ *Id.* (italicization added)

³² *Id.* (McCleskey did so in three ways: First, "McCleskey demonstrated the degree to which his death sentence was affected by racial factors by introducing a multiple regression analyses...McCleskey established that, because he was charged with killing a white person, he was 4.3 times as likely to be sentenced to death as he would have been had he been charged with killing a black person." Second, McCleskey demonstrated that it was "more likely than not" the fact that his victim was white which influenced his death sentence because 20 out of ever 34 defendants in McCleskey's mid-range category would not have received the death sentence if their victims had been black. In addition, he also proved that race of the victim was more important in explaining a person receiving the death penalty than whether or not the defendant was a "prime mover" in the homicide. Third, McCleskey established that the race of the victim is a particularly significant factor in a prosecutor's decision to seek the death penalty or life imprisonment, and demonstrated this effect at both the statewide level, and in Fulton County where he was tried and sentenced.)

³³ *Id.* at 1803

³⁴ Justice Blackmun argued that an employer's decision to hire, fire or promote employees, in addition to a prosecutor's decision to select one potential juror over another, "involve a number of factors, some rational and some irrational." *Id.* Blackmun further asserted that venire-selection and employment decisions are made by a number of individual entities. For instance, personnel decisions in employment are usually the result of numerous stages of decision making within the business. *Id.*

³⁵ David C. Baldus, George Woodworth, Catherine M. Grosso, *Race and Proportionality Since McCleskey v. Kemp (1987): Different Actors with Mixed Strategies of Denial and Avoidance*, 39 Colum. Hum. Rts. L. Rev. 1444 (2007).

³⁶ *McCleskey v. Kemp*, 481 U.S. 279, 279 (1987).

³⁷ David C. Baldus et al., *Reflections on the 'Inevitability' of Racial Discrimination in Capital Sentencing and the 'Impossibility' of its Prevention, Detection and Correction*, 51 Wash. & Lee L. Rev. 371 (1994)

³⁸ 481 U.S. 279, 1846 (1987) (Brennan, J., dissenting). "(the Baldus study) presents evidence that is far and away the most refined data ever assembled on any system of punishment...(it) depicts not merely arguable tendencies, but striking correlations, all the more powerful because nonracial explanations have been eliminated."

³⁹ 481 U.S. 279, 286 (1987).

⁴⁰ *Id.* at 286

⁴¹ *Id.*

⁴² *Id.* at 287

⁴³ See footnote 23

⁴⁴ *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (The Court invalidated an ordinance that redefined Tuskegee's boundaries to include all of the white voters and exclude 395 of the 400 black voters from the city). *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion) (The Court invalidated mandatory death sentences based partly on the decisions made by Congress and most states to approve discretionary jury sentencing)

⁴⁵ 118 U.S. 356 (1885)

⁴⁶ Holland, *McCleskey v. Kemp; Racism and the Death Penalty*, 20 Conn. L. Rev. 1067 (1988).

⁴⁷ 118 U.S. 356, 374 (1886)

⁴⁸ 482 U.S. 496 (1987)

⁴⁹ *Booth v. Maryland*, 107 S. Ct. 2529, 2534 (1987).

⁵⁰ Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Rev. 1411 (1988)

⁵¹ *McCleskey v. Kemp* 107 S. Ct. at 1778

⁵² Due to Baldus' extensive analysis and his inclusion of 39 of the most pertinent non-racial variables concerning capital punishment cases, I have concluded that race of the victim is the main factor influencing the prosecutor's decision to seek the death penalty and/or the jury's decision to sentence the defendant to death.

⁵³ For instance, in *Booth v. Maryland* the Court acknowledged the distinction between cases involving capital punishment and cases that did not by disregarding the issue of permitting victim impact statements in non-capital cases. 101 Harv. L. Rev. 1409 (1987) In addition see *Reid v. Covert*, 354 U.S. 1,77 (1957) (Harlan, J., concurring) ("So far as capital cases are concerned, I think they stand on quite a different footing than other offenses. In such cases the law is especially sensitive to demands for . . . procedural fairness."); and *Stein v. New York*, 346 U.S. 156, 196 (1953) ("When the penalty is death, we, like state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance.").

⁵⁴ 429 U.S. at 265

⁵⁵ Other evidentiary sources include, the specific sequence of events leading up to the decision, deviations from the normal procedure, and the statute's legislative or administrative history. *Id.* at 267-68.

⁵⁶ *McCleskey*, 107 S. Ct. at 1783 (Brennan, J., dissenting); Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Rev. 1412 (1988)

⁵⁷ *Id.* at 1770 n.20

⁵⁸ *Godfrey v. Georgia*, 446 U.S. at 420 (1980) (invalidated a statute that allowed the death sentence to be imposed on grounds that the murder was considered horrible and inhumane); *Coker v. Georgia*, 433 U.S. 584 (1977) (prohibited Georgia, and other states, from punishing rape with death); *Furman v. Georgia*, 408 U.S. 238 (1972) (The Court struck down the Georgia capital sentencing statute that imposed the death sentence on murders committed during a commission of a felony, whether accidental or not)

⁵⁹ *McCleskey*, 107 S. Ct. at 1783 (Brennan, J., dissenting) and 408 U.S. 238, 256-57 (1972) (Douglas, J., concurring)

⁶⁰ Holland, *McCleskey v. Kemp; Racism and the Death Penalty*, 20 Conn. L. Rev. 1063 (1988).

⁶¹ *McCleskey*, 107 S. Ct. at 1769

⁶² *Id.* at 1806 (Blaukman, J., dissenting)

⁶³ Kennedy, Randall. *Race, Crime, and the Law*. New York: Vintage Books, 1998. Print.

⁶⁴ *Id.*

⁶⁵ A study by Professor Jeffrey Pokorak found that the key decision makers in death penalty cases throughout the U.S are almost exclusively white men. J. Pokorak, Probing the Capital Prosecutor's Perspective: Race and Gender of the Discretionary Actors, 83 Cornell L. Rev. 1812 (1998).

⁶⁶ Cole, David. *No Equal Justice Race and Class in the American Criminal Justice System*. New York: New, 2000. Print. It is also interesting to note that a jury composed of eleven whites and one black convicted McCleskey.

⁶⁷ Kennedy, Randall. *Race, Crime, and the Law*. New York: Vintage Books, 1998. Print.

⁶⁸ Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Rev. 1419 (1988)

⁶⁹ Dieter, Richard, *The Death Penalty in Black and White: Who Lives, Who Dies, Who Decides*. 1998. (For example, Atlanta prosecutors met with the victim's family to discuss whether to seek the death penalty in white-victim cases, however, prosecutors failed to meet with black-victims' families to determine an appropriate sentence.)

⁷⁰ *McCleskey*, 107 S. Ct. at 1781

⁷¹ Carolina products 304 U.S. 144 (1938) "prejudice against *discrete and insular minorities* may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." (emphasis added) *Id.* at n.4

⁷² Cole, David. *No Equal Justice Race and Class in the American Criminal Justice System*. New York: New, 2000. Print. Pg. 110

⁷³ *Id.*

⁷⁴ Kennedy, Randall. *Race, Crime, and the Law*. New York: Vintage Books, 1998. Print.

⁷⁵ David C. Baldus et al., *Reflections on the 'Inevitability' of Racial Discrimination in Capital Sentencing and the 'Impossibility' of its Prevention, Detection and Correction*, 51 Wash. & Lee L. Rev. 371 (1994)

(Legislatures have maintained that the Supreme Court had concluded there was no evidence of race discrimination in capital sentencing, for if there was a problem, the Supreme Court would have remedied it.)

⁷⁶ David C. Baldus, George Woodworth, Catherine M. Grosso, *Race and Proportionality Since McCleskey v. Kemp (1987): Different Actors with Mixed Strategies of Denial and Avoidance*, 39 Colum. Hum. Rts. L. Rev. 144 (2007).

⁷⁷ *Id.* at 152. (The New Jersey Supreme Court is the exception because they unanimously rejected the *McCleskey* burden of proof.)

⁷⁸ The Court also inappropriately applied the standard developed in *Personnel Administrator v. Feeney* to *McCleskey*'s case. Although *Feeney*'s case also included a stark statistical disparity to prove the existence of discrimination, the case concerned the issue of gender discrimination. While cases regarding racial prejudice are subjected to strict scrutiny, gender discriminations are subjected to a lesser standard of scrutiny. 20 Conn. L. Rev. 1064 (1987).

⁷⁹ *Washington* was a case about employment discrimination, while *Arlington Heights* dealt with housing discrimination: neither case concerned the unique matters present in criminal law.

⁸⁰ *McCleskey* 107 S. Ct. at 1796 (Blackmun, J. dissenting)

⁸¹ 426 U.S. 252, 266 (1976)

⁸² *Id.* at n.13 "Several of our jury-selection cases fall into this category. Because of the nature of the jury selection task, however, we have permitted a finding of constitutional

violation even when the statistical pattern does not approach the extremes of *Yick Wo* or *Gomillion*”

⁸³ Holland, *McCleskey v. Kemp: Racism and the Death Penalty*, 20 Conn. L. Rev. 1065 (1987).

⁸⁴ Although the majority attempted to distinguish between the two, their arguments were unpersuasive. For instance, the Court argued that the decision to impose the death penalty was made by a properly constituted petit jury. However, such a fact does not prevent jurors from making life or death decisions based on racial sympathies. The Court also claimed that *McCleskey* was different from venire-selection or preemptory challenge cases because each jury’s composition is unique and because the jury’s decision involves countless factors. Even though *McCleskey*’s case does involve more variables than a jury discrimination case, the innumerable factors should demand a relaxation of the strict evidentiary standard. 101 Harv. L. Rev. 1428-1429 (1987). Moreover, Justice Scalia essentially rejected the Courts reasoning by stating, “I disagree with the argument that the inferences that can be drawn from the Baldus study are weakened by the fact that each jury and each trial is unique, or by the large number of variables at issue.” 51 Wash. & Lee. L. Rev. 371 n. 46 (1994).

⁸⁵ see endnote 23

⁸⁶ *McCleskey* 107 S. Ct. at 1802 (Blackmun, J. dissenting)

⁸⁷ *Id.*

⁸⁸ *Id.* at 1806 (Stevens, J., dissenting)

⁸⁹ *Godfrey v. Georgia*, 446 U.S. 420, 442 (1980) (Marshall, J., concurring).

⁹⁰ "Public Opinion and the Death Penalty." *Gallup Poll*. Web. 17 Dec. 2009.

<<http://www.clarkprosecutor.org/html/death/opinion.htm>>.

⁹¹ Kennedy, Randall. *Race, Crime, and the Law*. New York: Vintage Books, 1998. Print.

⁹² David C. Baldus et al., *Reflections on the 'Inevitability' of Racial Discrimination in Capital Sentencing and the 'Impossibility' of its Prevention, Detection and Correction*, 51 Wash. & Lee L. Rev. 384 (1994)

(Senator Hatch read the following statement by Professor Richard Lempert of the University of Michigan:

“If prosecutors seek to resolve those racial disparities that turn on the victim’s race by consciously suppressing this factor in deciding whether to seek death, the overwhelming number of those who suffer for it will be blacks. The reason is that most killers with black victims are themselves black, so any increase in the death penalty rate for those who kill blacks will fall disproportionately on black defendants”)

⁹³ Evan Tsen Lee and Ashutosh Bhagwat *The McCleskey Puzzle: Remediating Prosecutorial Discrimination Against Black Victims in Capital Sentencing* Sup. Ct. Rev. 145 (1998)

⁹⁴ The RJA would have allowed a defendant to establish an inference of racial discrimination in capital sentencing using statistical evidence of disparate impact.

⁹⁵ See Gerald Neal, *Not Soft on Crime, But Strong on Justice: The Kentucky Racial Justice Act*, 26 The Advocate: J. Crim. Just. & Educ. 2 (2004). Section 1 of KRJA:

(1) No person shall be subject to or given a sentence of death that was sought on the basis of race.

(2) A finding that race was the basis of the decision to seek a death sentence may be established if the court finds that race was a significant factor in decisions to seek the sentence of death in the Commonwealth at the time the death sentence was sought.

(3) Evidence relevant to establish a finding that race was the basis of the decision to seek a death sentence may include statistical evidence or other evidence, or both, that death

sentences were sought significantly more frequently:

(a) Upon persons of one race than upon persons of another race; or

(b) As punishment for capital offenses against persons of one race than as punishment for capital offenses against persons of another race.

(4) The defendant shall state with particularity how the evidence supports a claim that racial considerations played a significant part in the decision to seek a death sentence in his or her case. The claim shall be raised by the defendant at the pre-trial conference. The court shall schedule a hearing on the claim and shall prescribe a time for the submission of evidence by both parties. If the court finds that race was the basis of the decision to seek the death sentence, the court shall order that a death sentence shall not be sought.

(5) The defendant has the burden of proving by clear and convincing evidence that race was the basis of the decision to seek the death penalty. The Commonwealth may offer evidence in rebuttal of the claims or evidence of the defendant.

⁹⁶ Goodman, *Death Penalty Wake-up Call: Reducing the Risk of Racial Discrimination in Capital Punishment* 12 Berkeley J. Crim. Law. 59 (2007)

⁹⁷ *Id.*

⁹⁸ David C. Baldus, George Woodworth, Catherine M. Grosso, *Race and Proportionality Since McCleskey v. Kemp (1987): Different Actors with Mixed Strategies of Denial and Avoidance*, 39 Colum. Hum. Rts. L. Rev. 147 (2007).

⁹⁹ See Gerald Neal, *Not Soft on Crime, But Strong on Justice: The Kentucky Racial Justice Act*, 26 The Advocate: J. Crim. Just. & Educ. 18 (2004). (Neal documented public defenders' observations that the Act encourages prosecutors to modify their procedures and he described instances where prosecutors either withdrew the death penalty or were required to provide an explanation for their decisions to seek it.)

¹⁰⁰ "Gov. Perdue Signs North Carolina Racial Justice Act--NAACP Commends Passage." *Death Penalty Information Center*. Web. 17 Dec. 2009.

<<http://www.deathpenaltyinfo.org/gov-perdue-signs-north-carolinas-racial-justice-act-naacp-commends-passage>>.

¹⁰¹ *Id.*

¹⁰² David C. Baldus et al., *Reflections on the 'Inevitability' of Racial Discrimination in Capital Sentencing and the 'Impossibility' of its Prevention, Detection and Correction*, 51 Wash. & Lee L. Rev. 376 (1994)

