



THE COLUMBIA UNDERGRADUATE
LAW REVIEW

VOLUME V ISSUE 1 • FALL 2010

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Dear Reader,

We are happy to present the Fall 2010 issue of the *Columbia Undergraduate Law Review*. Our Fall 2010 issue features five exciting papers.

Brent Beckert's article "Surviving the Storm: The Implications of Hurricane Katrina for the New Orleans Criminal Justice System and Public Defense" examines how the natural disaster impacted this Gulf city's criminal justice and public defense systems.

Daniel Guenther's "An 'Unprecedented Debate': The Real Foundations of the Argument in Favor of and Against the Citation of Foreign Precedents" explores the ongoing debate concerning the consideration of foreign precedents in adjudicating domestic cases.

In "Judicial Decentralization: Institutional Interactions in Public Law Litigation," Scott Maxfield considers public law litigation and posits that it is not the independent creation of the judiciary.

Teresa A. Teng's paper, entitled "A Comparative Study: Judicial Review in the United States and France" examines the U.S. case of *Marbury v Madison*, which set the precedent of judicial review in that country, and compares the process to that in France.

Alex Treiger's article "Measuring Backlash: Understanding the Diverse Outcomes of Same-Sex Marriage Decisions" analyzes the disparate and often controversial decisions surrounding the issue of same-sex marriage.

We hope you enjoy the articles.

Sincerely,

Solomon Kim

Scott Levi

Editors-in-Chief

Surviving the Storm: The Implications of Hurricane Katrina for the New Orleans Criminal Justice System and Public Defense

Brent Beckert
Duke University

Abstract

In 1963, the United States Supreme Court ruled in *Gideon v. Wainwright* that defendants are entitled to legal representation, regardless of their income or ability to afford a lawyer. The Justices ruled that “lawyers were not mere trappings for the rich, but an essential component of our justice system.”¹ The Louisiana State Constitution has followed these guidelines, declaring that the state legislature must provide assistance of counsel to indigent defendants. Scholars have agreed that a citizen’s “right to counsel is not satisfied by the mere presence of a warm body wearing a business suit and holding a copy of the criminal code. Rather the right to counsel is the right to effective assistance of counsel, free from any conflict of interest.”² However, despite this clear mandate, criminal defendants in New Orleans have long been denied equal treatment under the law.³

In the summer of 2009, I worked at the Orleans Public Defender’s office as an investigative intern. As part of my internship, I conducted client interviews, took statements from complainants and witnesses, photographed and mapped crime scenes, reviewed evidence, served subpoenas, and helped defense attorneys prepare for trial. The experience allowed me to see first-hand the importance and progress of indigent defense in New Orleans after Hurricane Katrina while illustrating the areas still in need of improvement.⁴ I seek in this paper to fuse personal experiences with scholarly research in order to trace the evolution of the Orleans Public Defender’s office since the progress of the Public Defender’s office in New Orleans directly correlates to increased public safety and the reduction of crime over time as citizens learn to trust the police department and become more comfortable with the criminal justice process.

Contrary to conventional wisdom, a strong public defense will actually improve community safety. In addition to keeping innocent people out of jail, it will build citizens’ faith in the courts, police force, and the District Attorney by holding them accountable and keeping their power in check. Without indigent defense lawyers, the government can simply lock suspects up and forget about them, which is exactly what happened after Hurricane Katrina.⁵ A competent defense structure also keeps the court system moving at a faster pace by reducing jail overcrowding and meeting the mandates implemented by the Constitution and subsequent Supreme Court cases.

When the levees broke in 2005, the court system came to an abrupt halt. Prisoners were lost in the system and detained for months without access to a lawyer. In a column for *The New York Times*, David Brooks wrote that the storm “washed away the surface of society, [and] expose[d] the underlying power structures, the injustices, the patterns of corruption, and the unacknowledged inequalities.”⁶ The justice system was corrupt long before Hurricane Katrina. Systemic problems, corruption, a lack of funding, and a culture of drugs and violence made the city one of the most dangerous in the nation. The storm forced the parish’s indigent defense advocates to reexamine the

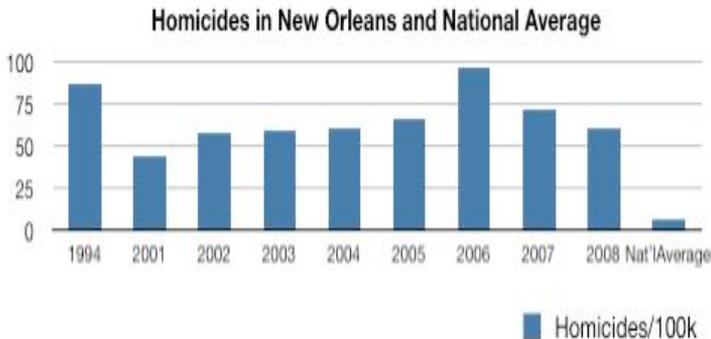
organization and shift strategy to better represent destitute clients, who constitute over 90 percent of criminal defendants in the state.⁷

A Culture of Violence and Corruption

New Orleans suffered from distinct problems that led to a notorious murder rate and high incarceration rate far before Hurricane Katrina. Compared to other cities in America, the city's residents are undereducated, underemployed, and surrounded by crime. In 2006, only 53.7 percent of high school seniors earned a diploma, compared to the 70 percent graduation rate nation-wide.⁸ This has a direct impact on the job market, as the 2004 unemployment rate of 12 percent was over twice the national rate. African-Americans, who comprise 67 percent of the population, suffered disproportionately, as rates of unemployment in the city were 20 percent higher than the national unemployment rate of African-Americans in that year.⁹ With 28 percent of the population living below the poverty line and 22 percent unable to afford a car, scholars note that the typical family in New Orleans is weak, female-headed, lower-class, and supplying generation after generation of "lightly parented" young men that fuel a cycle of violence.¹⁰

Despite having one of the nation's highest incarceration rates and strictest sentencing guidelines, district attorneys and police officers have been unable to keep streets safe.¹¹ Since 2001, the homicide rate per 100,000 residents has been at least eight times the national average. The murders are overwhelmingly concentrated in low-income, racially segregated neighborhoods that offer little escape. The New Orleans Police Department (NOPD) commissioned a study in 2003, which discovered that the city witnessed 274 murders, or fifty-nine homicides for every 100,000 residents. The investigation found that 92 percent of murder victims had criminal records. One hundred and four victims, nearly a third of the total slain, were killed within three months of their last arrest.

New Orleans is not just struggling with murder. The city experiences twice the national average for robbery and 1.62 times the national average for aggravated assault.¹² The graph below illustrates the stark difference between homicides in New Orleans and on a national level.¹³



The crime rate has taken a toll on New Orleans citizens, resulting in a plummet in citizen confidence after the chaos of Hurricane Katrina, when 69 percent of the population reported feeling unsafe.¹⁴

Structural Problems with the Criminal Justice System

Inherent features of the courthouse, state legislature, police force, and district attorney's office have created an inefficient, ineffective, and often corrupt process for criminal defendants. Without addressing these problems, the community cannot begin to recover and secure itself from a culture of murder and drugs. A strong indigent defense organization can help point out inadequacies in these departments, but it will take an internal, honest review of policies to adequately cure these problems.

In Orleans Parish, criminal and magistrate judges are elected officials that face pressure from their constituents. They often feel a mandate to be tough, not necessarily smart, on crime. Criminal judges are not rewarded for being easy on defendants, so they must decide between electoral pressure, constitutional protections and notions of justice. Bond levels are set inordinately high because election pressure prevents magistrate judges from being neutral and detached. Tulane Law Professor Pamela Metzger claims judges "are in constant fear of seeing the headline: 'Suspect strikes again Only Days After the Release by Judge X.'"¹⁵

The NOPD has struggled before and after Katrina to maintain control over the population, but the force has a reputation of harboring corrupt and uneducated officers. Distrust towards the police is high among many residents, despite hiring an increasing number of African-Americans from New Orleans communities since the mid-1990s that was intended to quell racial profiling and tensions.¹⁶ For years, the department has been overwhelmed by the amount of violence. Before Hurricane Katrina, there were 1,700 officers for 500,000 residents. Despite a high number of arrests, sloppy police work and poor cooperation with the District Attorney's office meant that only 10 percent of arrests were ever prosecuted.¹⁷ Generally, crimes committed against tourists were investigated aggressively because they impacted the city's reputation and economy, while violent crimes in poor neighborhoods received less attention and investigation. Police and prosecutorial conduct was reported to be fiercer in minority neighborhoods, fostering a sense of inequality and hypocrisy.¹⁷

Many of the inequalities in the criminal justice system could be addressed by the Louisiana State Legislature but are often ignored. The majority of legislators represent a vastly more conservative, rural, and Caucasian constituency than New Orleans, which reduces the incentive to repair an already costly indigent defense system. One legislator said that his constituents did not believe that indigent defendants had a right to a lawyer. They generally viewed attorneys as "a perk" for criminals that should not be guaranteed.¹⁸ In fact, much of current New Orleans Public Defender Chief Derwyn Bunton's job description focuses on attaining funds for the eternally cash-strapped office. Facing a projected budget shortfall of millions, Bunton acknowledges that "no politician makes a career by strengthening public defense."¹⁹

Bunton's assessment is correct, as the majority of politicians' approaches to crime involve boosting funding for police and prosecutor offices, but make little mention of the concerns of the state's indigent defense advocates.²⁰ The resulting effect is a system of mandatory minimums that give judges little discretion in fitting criminal defendants with a sentence that takes their individual case into account. Judges must give the death penalty for first degree murder, and mandatory life sentences for second degree murder, aggravated rape, aggravated kidnapping, regardless of the circumstances. They must also give a minimum of ten years for any armed robbery, with an additional five years for the use of a firearm.²¹ In addition, under the Habitual Offender Act, a person convicted for a second felony must be sentenced to a minimum of 50 percent of

the statutory maximum, and the maximum allowable sentence is doubled. A third offense involves additional sentencing guidelines, and a fourth offense requires judges to sentence a defendant in the range of twenty years to life imprisonment. Under this law, someone can be convicted for life for non-violent crimes such as repeated drug possession.²²

Whereas most local jails are funded directly from the city budget annually, the Orleans Parish Prison operates like a private, for-profit jail and collects a per diem allocation per prisoner.²³ Sheriffs are paid \$22.39 per night for each prisoner, creating a perverse incentive to delay court dates and keep clients in jail in order to meet an annual budget shortfall.²⁴ The injustice of this funding structure became evident during my summer in New Orleans. James Bee²⁵ was arrested for murder after Hurricane Katrina. According to prosecutors, Bee fired an automatic weapon at two drug dealers on the corner, killing one and seriously wounding the other. The District Attorney was unable to get witnesses to come forward, and, therefore, could not find adequate physical evidence to tie our client to the crime. She subsequently lost the trial. Upon hearing a jury affirm his innocence, our client jumped up, hugged his attorney and family, and broke into tears. Moments after the jury handed down its verdict of innocence, Bee was placed back into handcuffs and taken into prison, where he would spend the night. Despite winning his freedom in court, he was ordered to an extra night in prison, most likely so that the Orleans Sheriff's office could collect an extra \$22.39 for keeping him.²⁶ These factors create a huge prison population for the state to subsidize, as 1 percent of Louisiana's residents are currently incarcerated. The state boasts the tenth largest prison population, despite having only the twenty-fourth highest population in the nation. In 2003, the state paid sheriffs almost \$154 million to house approximately 17,000 people in local jails.²⁷

Nonetheless, state legislators, district attorneys, police, and criminal justice advocates have been unable to punish criminals and prevent violence effectively and transparently so citizens have taken the law into their own hands. Many of the Orleans homicides are cyclical, which means that murder is meant to avenge prior assault or homicide, and few examples illustrate the ineffectiveness of the criminal justice system better than the case involving Telly Hankton and his family. Telly's cousin, George Hankton III was gunned down in 2007. Police arrested Darnell Stewart and Jesse Reed for the murder, but could not get sufficient evidence to bring either suspect to trial. Soon after their release, Telly Hankton allegedly ran over Darnell Stewart and shot him several times. Hankton made bail after being arrested in 2008, and a month later, Jesse Reed was murdered with fifty-nine bullets and evidence tying Telly Hankton to the scene.²⁸ Reverend John C. Raphael, a former police officer himself, lamented the state of retaliatory murder: "Last week I buried one on Tuesday, and the one who killed him was buried on Wednesday. And I buried another one on Friday. And the one I buried Friday, somebody shot part of the family later that night."²⁹

Frustrated with the weaknesses in the criminal justice system, citizens have taken matters into their own hands, throwing caution and due process to the wind. While many may argue that criminal defense attorneys directly enable the criminal culture in New Orleans, this is not true. A resurgent and improved public defender office will enhance other aspects of the criminal justice system by keeping governmental powers in check. Effective indigent defense provides oversight to judges, prosecutors, and legislators, restoring faith in the system and eliminating the ease with which government officials can use shortcuts in carrying out criminal justice.³⁰

Public Defense before Katrina: Ineffective and Unconstitutional

Long before the levees broke in August 2005, New Orleans was unable to guarantee indigent criminal defendants zealous and effective representation. The volatile funding situation led attorney Rick Tessier to sue Louisiana in *State v. Peart* in 1991. Tessier filed a motion that demanded the courts provide “Constitutionally Mandated Protection and Resources” for his clients.³¹ Through the course of the lawsuit, the local courts held a series of hearings to examine the defense services provided to Tessier’s client, Leonard Peart, along with other defendants in Section E of Criminal District Court. The court found that between January and August 1991, Rick Tessier represented 418 defendants. 130 of these clients entered guilty pleas before or during arraignment.³² Pleading guilty before requiring prosecutors to prove guilt beyond a reasonable doubt or even probable cause for the client’s initial arrest illustrates the pressure that Tessier and other public defenders were under to clear their docket, despite the best interests of their clients. The court also found that Tessier had at least one trial date for every day during that time period and rarely received investigative support. In addition, the office received no funds for a law library, expert witnesses, or technology to aide in case tracking. The Louisiana Supreme Court ruled in favor of Tessier and the plaintiff, declaring that the state legislature created an inherently “unstable and unpredictable approach” to indigent defense funding.³³ The judges further ruled that the structure of public defense was “so lacking that defendants who must depend on it are not likely to be receiving the reasonably effective assistance of counsel that the constitution guarantees.”³⁴ Despite this clear ruling, the legislature drafted only a few meaningful reforms to indigent defense in the state.

The combination of a high workload, long hours, and low pay made it difficult for public defenders to provide a zealous defense for their clients. In 2004, the Orleans Public Defender office had forty-two lawyers, six investigators, and six administrative staffers. The office was responsible for over 7,000 cases annually. The caseload in the office was four to five times larger than the national public defender professional standard, as each attorney represented approximately 233 new clients per year.³⁵ Starting Orleans public defenders made only \$29,000 per year, compared to a starting salary of \$30,000 for district attorneys in the parish. According to a survey of 102 indigent clients, the average defendant never spoke to his attorney outside of the courtroom. The majority of poor defendants waited sixty days in jail before ever seeing a lawyer and were detained for 385 days pre-trial.³⁶ The inordinately slow process made it difficult for attorneys and investigators to visit crime scenes, investigate alibis, review evidence, or establish a trustworthy relationship with their clients.

The problem begins in the state legislature, where politicians have been reluctant and unable to provide indigent defense offices with consistent and adequate funding. After *Gideon v. Wainwright* made publicly-provided counsel a federal Constitutional right, Louisiana created a network of local indigent defender boards to administer the right of counsel in state courts for misdemeanor and felony cases.³⁷ These boards were appointed by local judges in each judicial district and were given the power to manage their assignments. The legislature guaranteed the board \$10,000 annually.³⁸ To raise additional funds, politicians enacted a \$35 court fee in 1994 for defendants who are convicted, plead guilty or no contest, or forfeit bond.³⁹ Though exact funding has been inconsistent, this system translated to approximately \$2.2 million in annual funding for the Orleans Public Defender before Hurricane Katrina. Prior to Katrina, approximately 75 percent of the indigent defense budget was financed through traffic fines.⁴⁰

This system of indigent defense created an incredible conflict of interest. The public defense budget is funded by convictions, not total representation. If a public defender fights aggressively against a judge's imposition and collection of fines, he or she forsakes funds necessary to represent other clients. Individual clients, however, are entitled to challenge these fees and deserve zealous legal counsel to help them in this endeavor. Professor Metzger stated that in this funding scheme, "A public defender with a perfect 'no losses' record can rapidly become a public defender with a perfect 'no paycheck' record."⁴¹ This conflict was not limited to New Orleans, but was a problem across Louisiana. In one parish, a public defender's office sued to force local judges to increase fees imposed upon convicted clients, and to more aggressively collect the assessments in order to fund the under-resourced public defender office. Besides the obvious conflict of interest inherent in a case wherein an indigent defense attorney is fighting to increase financial hardship on his or her clients, the tension does little to promote the good relationship between public defenders and their clients.⁴²

One of the unfortunate consequences of these budget shortfalls is that the Orleans Public Defender could not afford to represent a client until they were formally charged and arraigned. The Sixth Amendment of the United States Constitution guarantees criminal defendants the right to a "speedy and public trial,"⁴³ but Louisiana has a less-than-swift pace of criminal justice. Defendants in Orleans Parish can be imprisoned for sixty days before being formally charged, and can remain in jail for an additional thirty days before being arraigned. While police and prosecutors conduct investigations immediately after an alleged crime, public defenders are seldom assigned a case until after the arraignment. Clients often spend ninety days in jail without having access to a lawyer.⁴⁴ The slow pace of the courts is detrimental to the defendant and the community, as clients often lose their jobs, are unable to pay rent, and cannot support their families. Without access to a lawyer immediately after arrest, there is no one to find exculpatory evidence and release innocent defendants before arraignment. After three months, cases are much harder to investigate and defend. Witnesses have a finite memory, and often forget key details after a few months, if not weeks. Physical evidence such as blood splatters, fingerprints, or DNA samples can be washed away or cleaned before defense investigators approach the scene.⁴⁵ Perhaps most alarming is that prosecutors have an incentive to delay formally charging a client. By delaying the process and keeping a client unrepresented, law enforcement and prosecutors are free to interrogate defendants and convince them to plead guilty or cooperate in other investigations.⁴⁶

Apart from budgetary concerns, the Orleans Public Defender faced several other obstacles before Hurricane Katrina that made it difficult to provide a zealous defense for its clients. Public defenders were assigned to specific courtrooms, not individual clients. If a client was transferred to a new courtroom, a new lawyer was assigned to him or her, even if the case was in trial. The office wanted to foster good relationships with judges, who wanted attorneys that were used to their style of judging. The policy created a staff of court-centered public defenders who often worked more to appease the judge than fight for their clients.⁴⁷ Under the system, attorneys did not even maintain case files on clients who had been formally charged. Instead, most lawyers appeared at their assigned section of court each day and handled the cases listed on their docket, with little investigation, preparation, or knowledge about the individual case. In addition, the public defenders in Orleans Parish worked part-time, allowing them to simultaneously represent paying clients from their private practice as well. This created another conflict of interest by creating an incentive for lawyers to do a minimum amount

of work for indigent defendants in order to maximize their income from paying clients. Further, lawyers would often abstain from objecting and arguing vehemently for indigent clients, out of fear that they would damage their relationship with the judge and hurt their private clients.

The criminal justice and indigent defense system in New Orleans was chaotic, inefficient, and unconstitutional long before Hurricane Katrina. A volatile funding structure forced indigent defense attorneys to represent several hundred clients each year, without giving them access to investigative support or expert witnesses. In addition, there were considerable problems inherent in the legal culture itself. An office policy assigning attorneys to specific courtrooms, as opposed to a list of clients, created an impersonal, ineffective league of court-centered attorneys. By allowing the lawyers to work part-time, the office often neglected to provide a zealous indigent defense in the interest of protecting the interests of an attorney's paying clients. Despite outcries from the legal community, criminal defendants, and the Louisiana Supreme Court, few meaningful reforms occurred until Hurricane Katrina broke the levees and swept the city underwater.⁴⁸

Hurricane Katrina: An Impetus for Reform

On August 29, 2005, Hurricane Katrina hit New Orleans, cutting off power, communications, and inflicting serious wind damage on the city. City officials declared the following morning that the worst part of the hurricane largely spared New Orleans, and that the damage was not as devastating as previously forecasted. Within a few hours though, several canal levees broke and flooded 80 percent of the city. The violent waters engulfed homes, forced families onto their roofs, and killed over 1,600 citizens in the region.⁴⁹ Poor, predominately African-American communities like the Ninth Ward were destroyed. Over 30,000 citizens who did not evacuate took refuge in the Louisiana Superdome, braving health concerns and food shortages to wait for help.

As the plight of New Orleans' citizens captivated the country, the experiences of prisoners and the criminal justice system largely escaped media attention. For several months, judges, prosecutors, and police were scattered, unprepared, and unfunded. Prosecutions came to a halt as witnesses were scattered across the country. The evidence room in the basement of the courthouse completely flooded. Guns, ammunition, and other pieces of physical evidence were separated from identifying tags. Seized cash, letters, fingerprints, and other pieces of evidence were completely ruined and unusable. The District Attorney's office lost most of its funding after the tax base collapse. The office laid off its investigators and could not even pay its phone bill. Twenty of the office's ninety attorneys quit, many citing an unwillingness to return to New Orleans.⁵⁰ The prosecutors that remained in New Orleans had to work from home or at three reserved tables in a downtown hotel. From December 2005 until May 2006, the office worked out of a former nightclub under disco balls. The court system had no backup of files, as many police reports, records, dockets, and testimonies were lost.⁵¹ Even when then-District Attorney Eddie Jordan could match a prisoner to a crime, corral witnesses, and find sufficient evidence to try defendants, he ran into another problem; no juries. After the city lost nearly 80 percent of its residents, it became impossible to find a suitable jury pool, or even issue summons to residents living in temporary housing.

The New Orleans Police Department (NOPD) was caught unprepared by the storm, leading to an escalation of community-police tensions. The department was given no training for floods and had no boats or adequate flood supplies. Governor Kathleen

Blanco and President George W. Bush sent National Guard troops on September 2, 2005 to help maintain order, even though they had no law enforcement training. The Posse Comitatus Act, designed to separate military from civil law enforcement, prevented guards from arresting subjects or even carrying loaded guns.⁵² Without a working jail, police officers stopped making arrests all together. They simply released suspects after apprehending them. Stories of tensions between police and citizens reached national audiences after photographers caught NOPD officers carrying TVs and electronics through the floodwaters from the Wal-Mart on Tchopitoulas Avenue.⁵³ The friction escalated on September 4th, when seven police officers responded to a police dispatch reporting an officer down on the Danziger Bridge. According to official reports, at least four people fired weapons at responding officers, who then returned fire. Two people, including a mentally-retarded man shot in the back, were killed and four other civilians were severely wounded. Seven indictments were filed against the officers, but were dismissed in August 2008 due to prosecutorial misconduct.⁵⁴ Federal charges against the officers have been filed, and the case is expected to go to trial in 2011.

Without a formal evacuation plan in place, Sheriff Marlin Gusman and his staff were responsible for the safety and security of an estimated 8000 inmates inside the Orleans Parish Prison, the nation's seventh largest penal institution.⁵⁵ When the levees broke, water flooded the emergency generators and bottom floors of the prison, cutting off lights and air circulation and stopping the flow of sewage. Instead of moving prisoners to other jails in the state, Sheriff Gusman decided to enact a "vertical evacuation," and simply moved prisoners and staff to higher floors of the prison. Many of the incarcerated were initially arrested for petty, non-violent crimes.⁵⁶ Prisoners who were arrested for traffic tickets were placed in cells with men serving for manslaughter.

According to one defense lawyer present in the aftermath, "[the prisoners] were afraid of each other; they were afraid of dying; they were afraid no one would ever come back for them."⁵⁷ Many prisoners locked in electronic cells remained there for days, as the doors could not open. Few prisoners had access to food, water, toilet facilities or fresh air for the first half of the week.⁵⁸ Three days after the levees broke, the Louisiana Department of Corrections arrived with boats to carry prisoners to the Broad Street Bridge, where they were packed into buses and sent to other jails around the state.⁵⁹

Many prisoners were brought to the Elayn Hunt Correctional Facility in Gabriel, Louisiana, where they were locked inside the prison football field. Once again, prisoners were grouped together, regardless of their sex or incarcerating offense. Guards, fearing for their safety, threw peanut butter and jelly sandwiches over the fence once a day. Prisoners had no bathrooms, hot food, cold water, or any place to sleep.⁶⁰ Judges from New Orleans traveled to Hunt Correctional to establish makeshift court hearings but were unsuccessful in locating individual inmates, evacuated lawyers, and scattered witnesses.⁶¹ From Hunt, thousands of prisoners were then transferred to different prisons across the state. Many were subsequently lost in the system, with reports estimating that up to 4,000 prisoners served more than sixth months without access to an attorney or to constitutionally granted or protected judicial proceedings.⁶²

The public defense office and the city's criminal defense structure collapsed as funding dissolved and lawyers evacuated the city. Without the revenue generated by traffic tickets and convictions, the office could not afford to pay its already-small staff. Within weeks, the office had only six lawyers and one investigator, down from forty-two lawyers and six investigators prior to the storm.⁶³ The office kept no case management system, no client files, and had a backlog of 6,000 cases with defendants

that were scattered in jails across the state.⁶⁴ Phyllis Mann, former president of the Louisiana Association of Criminal Defense Lawyers sent letters to lawyers across the state, asking them to call their local sheriffs and get a list of inmates. Often, sheriffs could not provide proper records, as many prisoners were dumped in their jails with no documentation.

Without a strong indigent defense system, the criminal justice process came to a grinding, unconstitutional halt. No prisoners were given the chance to make bond until October, over two months after the storm.⁶⁵ Even if a prisoner were released from a jail in the state, problems remained. State and local prison officials were hesitant to release prisoners into surrounding communities, so many waited for Sheriff Gusman to send biweekly buses to pick them up. This defied the judge's orders, as defendants often had to wait several days after their release.⁶⁶ The first criminal bench trial after the storm was not until March 26, 2006, and the first jury trial was not until a month after that. For the next four months, there were only fifteen jury trials despite 3000 pending cases.⁶⁷

Eager to reduce the crime rate, police and prosecutors increased pressure on the poorest neighborhoods in New Orleans that fostered "crazed drug addicts" and "violent gang members" according to Mayor Ray Nagin.⁶⁸ This pressure correlated with a decreased prosecution of crimes by visiting tourists who brought money into the city. The collapse of the public defender's funding came at a tragic time, as increased attention on the city's poor often meant sidestepping constitutional protections and procedures.

Rebuilding After the Storm

Hurricane Katrina completely stripped the Orleans Public Defender of its funding, employees, and support network. Facing a growing case backlog despite little financial support, the organization undertook a series of reforms. In April 2006, local judges appointed a new board that included Tulane professor Pamela Metzger and Loyola professor Dane Ciolino. The board hired Ronald Sullivan from Yale Law School as a consultant, and Loyola professor Steve Singer to be the Chief of Trials.⁶⁹ Sullivan, the former director of the Public Defender Service in Washington D.C., commented that even eight months after Katrina, drastic change was needed:

"Poor citizens accused of a crime are not receiving anything close to constitutionally adequate representation. Even more, Hurricane Katrina is not the cause of the criminal justice system's problems; Katrina merely exposed long-standing problems in the delivery of representation to poor citizens. While I am advising the relevant political actors on reform, such reform is met with resistance from all quarters – even from so-called people [with] good will."⁷⁰

Immediately after joining, Sullivan enacted several reforms. He required attorneys to work full-time, barring them from taking cases from private clients. Starting salaries of public defenders were raised to \$40,000 as Sullivan lobbied furiously for additional funds. The office also transitioned to a client-focused practice, as it began to assign lawyers to clients, not specific courtrooms. These shifts met heavy initial resistances from the office, as six public defenders resigned in protest. Judges also disliked the changes, saying that their dockets moved slower and public defenders were not always familiar with their courtroom procedures and idiosyncrasies.⁷¹

When Singer and Sullivan began work, the office had four computers and two telephones. The lack of funding became so bad that judges threatened to release criminal defendants unless the state increased funding to indigent defense programs. In February 2006, the Department of Justice commissioned a study on the Orleans Public Defender office, estimating a necessary annual budget of \$8.2 million, with \$10.7 in initial startup costs.⁷² Before Hurricane Katrina, the office operated on about \$2.5 million per year.⁷³ Six months after the hurricane, the state responded by allocating some additional money to the office, amounting to what Justice Hunter described as a temporary “band-aid” that would not solve the problem.⁷⁴ The Department of Justice stepped in to give the office \$2.8 million in grants out of a \$58 million state-wide initiative, but long-term funding problems remained.⁷⁵ In June 2006, Judge Hunter issued a subpoena for Governor Blanco to appear in court and discuss funding for indigent defense in the state budget.⁷⁶ The governor declined to attend the hearings, reasoning that the legislature was directly in charge of criminal defense funding and that she should not be held responsible. In response, Judge Hunter blasted the state government’s incompetence, and continued his threat of releasing prisoners who have not been given adequate legal counsel. He declared a state of emergency, reasoning, “After eleven months of waiting, eleven months of meetings, eleven months of idle talk, eleven months without a sensible recovery plan and eleven months of tolerating those who have the authority to solve, correct and fix the problem but either refuse, fail or are just inept, then necessary action must be taken to protect the constitutional rights of people.”⁷⁷ By November, the majority of judges in criminal district court ordered the public defender office to hire more attorneys or face contempt charges. But without funds, the judges and attorneys were unable to fix the situation until further legislative intervention.⁷⁸ In January 2007, Chief Juvenile Court Judge David Bell threw Singer in jail for contempt of court because the office was not prepared to defend a case, presumably on account of a lack of resources.⁷⁹ When it became clear that the state would continue to give a deaf ear to indigent defense, Judge Hunter decided to release forty-two defendants from jail that had received inadequate representation and halt their prosecutions until the state would provide additional financing.⁸⁰ In an angry order from the bench, the judge declared, “Indigent defense in New Orleans is unbelievable, unconstitutional, totally lacking in basic professional standards of legal representation and a mockery of what a criminal justice system should be in a Western, civilized nation.”⁸¹

The pressure had an impact, as the Louisiana State Legislature passed several reforms during the summer of 2007 in what became the Louisiana Public Defender Act.⁸² The act dissolved the system of local indigent defender boards and created the Louisiana Public Defender Board (LPDB), an independent agency in the state’s executive branch, to oversee the state’s public defender obligations.⁸³ It also provided a statewide funding system for public defenders with an additional \$7 million appropriation, or \$28 million for the state in 2008.⁸⁴ As an independent agency, the new board was given the authority to impose standards and intervene if local offices became dysfunctional.⁸⁵ Perhaps the most important aspect of the law is the appointment process for selecting members of the board. In the original system, local board members were appointed by district judges, causing potential conflicts of interest. The new LPDB board, however, bars active judges, prosecutors, law enforcement personnel, and public defenders from being members and requires that four of the appointees are from one of the state’s four law schools.⁸⁶

Under the direction of Sullivan, Singer, and then Chief Public Defender Christine Lehmann, the office made considerable improvements. The staff soon had an

office to meet clients, with each attorney given a desk, telephone, and laptop. The office also began using a case management system donated by the District of Columbia Public Defender Service (PDS) to track cases.⁸⁷ As Singer quipped, “These seemingly ordinary aspects of any modern, functioning law office are nothing short of revolutionary for the New Orleans public defenders.”⁸⁸ By September 2007, the office had forty-five full-time lawyers, nine investigators, and six administrative staffers.⁸⁹ To help with the backlog of pre-Katrina cases, the office created partnerships with indigent defense offices in Minnesota, Philadelphia, and Washington, D.C. Each office sent several attorneys for six-month sabbaticals. An emergency *pro hac vice* rule passed by the state allowed them to practice in Louisiana, provided that they were accompanied by lawyers from the state.⁹⁰

The program allowed undergraduate and graduate school students to investigate cases to help attorneys and investigators with their growing caseload. During my tenure as an investigative intern, for example, I worked on over twenty-three cases, with charges ranging from drug possession to murder and rape.⁹¹ The program has also been successful in attracting candidates for full-time employment, as five former interns currently work for the organization as full time investigators.⁹²

However, the Orleans Public Defender’s reforms have met considerable resistance from local judges and prosecutors. In the past two years, at least seven OPD staff have been arrested or detained for contempt of court. In one case, a judge held recently hired investigator Emily Beasley of contempt of court and simple kidnapping for taking a 12-year-old alleged rape victim and her 8-year-old sister across the street for an interview without their mother’s consent.⁹³ In his remarks, the prosecutor scolded investigators and attorneys for their aggressive practices, but Steve Singer, who acted as counsel for Beasley, said that no laws were broken and that prosecutors were only prosecuting the case to scare investigators and attorneys from completing vigorous, zealous representation. Despite only a one-day sentence, the public defense office took the ruling as a sign that prosecutors and judges were trying to stop the rapidly shifting agency’s recent successes in the courtroom.⁹⁴

Importance of a Zealous Public Defense

Hurricane Katrina shook the New Orleans criminal justice system to its core, exposing an underlying culture of corruption, neglect, and incompetence. In the years prior to the storm, public defense was court-centered, underfunded, and unconstitutional. During the course of its rebuilding, the Orleans Public Defender office has defended and freed hundreds of innocent people. But perhaps equally as important, it has illustrated the vital economic, social, and security benefits that a strong indigent defense system can bring to a city.

An effective office saves the city money by reducing wrongful-conviction lawsuits, which result when prosecutors are able to take shortcuts in preparing a case without a zealous adversary to challenge them. In addition, strong indigent defense can make a city safer by increasing confidence in the justice system, thus enhancing cooperation. By exposing misconduct in a public courtroom, the public defender can put pressure on the Police Chief to terminate corrupt officers. If citizens know that police and prosecutors can be held accountable for their actions, over time they should be more likely to testify, give tips, cooperate with investigations, and accept the verdicts of a case. Otherwise, the formal criminal justice system can give way to a culture of “street justice”; as Loyola University criminologist Dee Harper argues, when people don’t agree

with or “trust the conventional justice system, they come up with their own form of social controls.”⁹⁵ While public defenders’ primary mission is to maximize the liberty interests of their clients, indigent defense lawyers are in a unique position to help clients better their lives, even if their work reaches further than the case at hand. When a client is arrested, he often loses his job, abandons a family, and is thrust into a legal world with which he rarely has any understanding. In conversations with the defendant, attorneys can give important information and even offer counseling. They can discuss how a client can manage relationships with his family and who may depend on him for rent, food, and clothing. Attorneys can also advise how to avoid future charges and how to take advantages of alternative dispositions like drug treatment programs that can beneficially impact the client’s life.⁹⁶ Since Hurricane Katrina, the office has employed several social workers who help clients stabilize their lives, improve relationships, and expunge prior convictions that may hinder employment opportunities. Part of the whole-client representation model that the Orleans Public Defender Office embodies involves working with prosecutors, judges, and politicians to reduce crime overall by advocating sentencing alternatives that are more effective. While politicians and district attorneys are under a perceived political pressure to advocate a “tough on crime approach” that focuses primarily on deterrence and incapacitation through long sentences, indigent defense attorneys can advocate holistic approaches to reduce the culture of crime. While not technically part of an indigent defender’s job description, an emphasis on whole-client representation helps reduce recidivism and improves city safety.

Indigent defense is a difficult, politically unpopular career. But, as the case of New Orleans illustrates, effective public defenders are vital to the operations of the criminal justice system. A competent public defense office can free the wrongfully accused, save taxpayer dollars, expose public corruption, advocate for smarter adjudication, and restore faith in police and prosecutors. Despite a horrific past of incompetence and inadequacies, the Orleans Public Defender has become a model for other indigent defense offices to study and emulate.

Endnotes

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- ²³ Jeffrey A. Schwartz and Rod Miller, "An Operational Review of the Orleans Parish Jails," NIC TA Report (2008): 32.
- ²⁴ Metzger, 1210.
- ²⁵ Name has been changed to protect attorney-client privilege.
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An “Unprecedented Debate”: The *Real* Foundations of the Arguments in Favor of and Against the Citation of Foreign Precedents

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Abstract

Lawrence v. Texas was not the first time the United States Supreme Court cited a foreign precedent in an opinion on a question of domestic affairs, but the seemingly innocuous citation to the European Court of Human Rights catalyzed a national debate complete with fierce rhetoric from politicians, justices, and academics alike. This paper analyzes the underpinnings of each side of the foreign precedent debate, as well as three other theories in the subject’s literature.

The general conclusion was that a person in favor of foreign precedent would most likely be a political liberal, espouse a fairly dynamic view of statutory and Constitutional interpretation, believe in the globalization of law, and stress the fact that, statistically speaking, citation to foreign precedent is hardly taking over American jurisprudence. In contrast, someone who feared the loss of sovereignty to foreign nations, would be wary of opening up a large body of law from which justices could cherry-pick laws that agreed with them, have a strict and limited view of interpreting law, and be politically conservative would almost assuredly be against foreign precedent citation.

Besides being a relevant legal question, citations to foreign precedents are a very timely issue, especially in the context of the selection and confirmation of the next Justice of the United States Supreme Court. Given the emphasis Senate confirmation hearings have put on prospective Justices’ opinions on citing foreign precedents, it is clear that the debate will remain pertinent in the foreseeable future, demanding attention and continued scholarship.

Introduction

Could the nineteen judges sitting in the chambers of the European Court of Human Rights located in Strasbourg, France have had any idea that twenty-two years later a single citation to their decision would catalyze a national debate complete with fierce rhetoric from politicians, justices, and academics alike? Moreover, it is unlikely that they imagined that this disagreement over legal philosophy would occur, not in Europe, but overseas in the law journals of American universities, as well as the floor of the United States House of Representatives.

It is not so much the outcome of the case previously alluded to, *Dudgeon v. the United Kingdom*¹, that has captured national attention, but more so the majority in the 2003 Supreme Court case *Lawrence v. Texas*² citing it as an authority. *Lawrence* is neither the only, nor the first case with a citation to a foreign precedent or foreign statute, but it acts as a good launching point from which to investigate the issue. It is useful because it is frequently analyzed in the literature, contains a citation to a foreign precedent which had a relatively large significance to the decision, and concerns a

highly controversial issue (homosexual rights) without even considering the significance of the foreign law citation.

Once the foreign precedent citation was added to the analysis of *Lawrence* by members of academic and the political realm, the issue became more muddled and the debate more heated. Numerous theories were proposed as to why citations to foreign precedents are either helpful or hurtful, depending on the author's opinion, as well as theories that reevaluate the debate and attempt to reveal the foundation for the pro and con sides of the issue.

In Section II, I preface the explanation of the two sides of the argument with definitions of the important terms used by all of the authors, as well statistics on the use of foreign precedent. The bulk of the paper begins in Section III, where both sides of the debate are articulated, as well as three scholars' view on the subject. Part A of that section is a look at Dr. Austin Parrish's paper "Tempest in a Teacup"³ which articulates the general premises behind the pro precedent thesis. Part B is House Resolutions 372⁴ and 468⁵, Dr. John O. McGinnis' remarks to the 2006 Albany Law Review Symposium,⁶ and the comments of Justice Antonin Scalia⁷, which compose the bulk of the critique of citing foreign precedents. The remainder of Section III is composed of three additional theories, which all in some way further explicate the positions of both sides of debate: one proposed by Osmar Benevuto in his paper "Reevaluating the Debate"⁸, another by Dr. Nicholas Zeppos in his statutory interpretation study, and finally a forthcoming paper by Dr. Michael Rosenfeld⁹ on the subject of law and politics.

In this paper, I will first set the framework for understanding the citations to foreign precedents debate by articulating the principles of *stare decisis* and the role citations to authority play in general in Section II. Next, Section III, will explain and analyze the five aforementioned theories in the current literature regarding the citation to foreign precedents. Finally, Section IV concludes the paper by looking at the Senate confirmation hearings of recent Supreme Court Justices and presenting the use of foreign citations as a great example of the intersection of law, politics, and society.

Definitions and Statistics

Stare Decisis

As the Congressional Quarterly's Guide to the Supreme Court explains, "The doctrine of *stare decisis*—let the decision stand—binds the Court to adhere to the decisions of an earlier day."¹⁰ Meant to have an effect of making the law more predictable, *stare decisis* reduces the appearance of arbitrariness and as Justice William O. Douglas commented, "[it gives] stability to society. It is a strong tie which the future has to the past."¹¹ While predictability in law is usually desired, it is clear that *stare decisis* is not a hard and fast rule in all instances. Although lower courts do not have the privilege of overturning Supreme Court decisions, the Supreme Court itself is not bound by *stare decisis*. In fact, from 1810 to 2003 the Court made at least 230 exceptions to *stare decisis* in more than 170 situations, thereby expressly overturning earlier decisions.¹²

Precedent and Legitimacy

Stare decisis plays no small role in how the Supreme Court is able to legitimize its decisions to the public. For instance, take this excerpt from Justices Sandra Day

O'Connor, Anthony Kennedy and David Souter's plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*:

The Court's power lies, rather, in its legitimacy...the underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions and our contemporary understanding is such that a decision without principled justification would be no judicial act at all.¹³

The legitimizing forces that the Justices allude to are, of course, citations to authority. As I will soon present, the types of authority the Supreme Court has cited in its history are actually quite vast and varied. It must be made clear that it is the variation in *types* that the following data exhibits; the frequency of each type's use is dramatically different. From the United States Constitution to poetry to law journal articles, majority as well as minority opinion writers have referenced all sorts of sources that are meant to persuade the reader of the opinion. Section III will deal with theories of whether or not foreign precedents ought to be a source cited in Court opinions.

Foreign Precedents

Osmar Benvenuto makes an excellent point in his paper, "Reevaluating the Debate" on the necessity of authors to clearly define exactly what they mean by a "foreign precedent."¹⁴ This paper will adopt his definitions which distinguish between "broad" and "narrow" conceptions of foreign precedents. A broad view of foreign precedents acts as an umbrella term including international treaties, interpretation(s) of treaties, and international laws applied directly to international issues.¹⁵ The narrow view of foreign precedents is "the legal judgments of other nations, not interpreting or dealing with international issues."¹⁶ When the Court cited *Dudgeon v. United Kingdom* (a decision by a foreign supranational court) in *Lawrence v. Texas* (a decision of domestic policy by the United States Supreme Court), it was a clear case of the use of *narrowly defined* foreign precedent.

Although it is not always clearly stated, most authors mean foreign precedents narrowly defined when referring to foreign precedents.¹⁷ This paper adopts this narrow interpretation of foreign precedent unless otherwise indicated.

Citations and Authority

After understanding what a foreign precedent means exactly, fully framing discussion of the theories requires knowing just how often they are used. Some sources, such as the Constitution, are cited more than others, such as state regulations. The following data will show that the prevalence of foreign precedents is low.

Christopher Roberts of the University of Washington conducted an analysis of all of the sources of citations in the Supreme Court's October 2002 term.¹⁸ His findings generally concur that the Supreme Court often cites many different sources of authority. Here are some of his data tables¹⁹ along with this paper's analysis of them:

Table 1: Citations of Authority in the October 2002 Term of the United States Supreme Court²⁰

| Total | U.S. Constitution | U.S. Supreme Court | Federal Statute | State Statute | Federal Regulation | State Regulation | Federal Court | State Court | Other |
|-------|-------------------|--------------------|-----------------|---------------|--------------------|------------------|---------------|-------------|-------|
| 4045 | 161 | 1682 | 501 | 346 | 102 | 55 | 353 | 217 | 628 |
| | 4.0% | 41.6% | 12.4% | 8.6% | 2.5% | 1.4% | 8.7% | 5.4% | 15.5% |

The numbers in this table show what kinds of authorities were cited in Supreme Court opinions as well as how often they were cited for the October 2002 term during which *Lawrence* was heard. For instance, the Supreme Court cited itself 1682 (41.6 percent) times out of the total 4045 citations, the clear majority of the time. Of more interest to the scope of this paper, is the following table which shows the details of the 628 citations categorized as ‘other.’

Table 2: ‘Other’ Secondary Authorities²¹

| | Congressional Reports | Federalist Papers | Federal Reports | Law Reviews | Legal Treatise | Court Rules | Dictionary |
|--------------------------------|-----------------------|-------------------|-----------------|-------------|----------------|-------------|------------|
| | 112 | 4 | 24 | 77 | 86 | 4 | 29 |
| Percent of Total Citations | 2.77% | .10% | .59% | 1.90% | 2.13% | .10% | .71% |
| Percent of Secondary Authority | 17.8% | .6% | 3.8% | 12.3% | 13.7% | .6% | 4.6% |

| | Newspaper Articles | Statistics | Artistic | Foreign Court | Foreign Law | Other |
|--------------------------------|--------------------|------------|----------|---------------|-------------|-------|
| | 24 | 9 | 27 | 9 | 19 | 206 |
| Percent of Total Citations | .59% | .22% | .67% | .22% | .47% | 5.09% |
| Percent of Secondary Authority | 3.8% | 1.4% | 4.3% | 1.4% | 3.3% | 32.8% |

The data here suggest the October 2003 Supreme Court session was by no means dominated by citations to foreign authorities. In fact, citations to both foreign law and courts only amounted to 0.69 percent of all citations, and 4.7 percent of all secondary source citations. With such a low rate of occurrence it might seem that there is a lot of heated argument over statistically speaking, almost nothing. That idea is in fact part of the argument Austen L. Parrish makes in his paper, “Storm in a Teacup: The U.S. Supreme Court’s Use of Foreign Law.”²² This next section begins the discussion of five major theories of the use of foreign precedents, starting with “Storm in a Teacup.”

Five Analytical Theories

A) *The General Pro-Precedent Position*

Parrish's paper embodies the body of literature that is generally supportive of citations to foreign precedents. His main argument can be divided into three premises: 1) citing foreign precedents can be useful when taken from countries with similar legal structures and values, which means valuable empirical data can be ascertained by examining how laws in controversy in the United States have been applied and received in other countries, 2) if Supreme Court Justices are going to implicitly or explicitly incorporate foreign precedents into their decision, they ought to be forthright and transparent, and finally 3) there is value in embracing the theory of the globalization of law.

1) Citations from Similar Countries

Parrish's first argument rests on the idea that the United States legal system is not so unique as to prevent it from being comparable to others in the world.²³ He quotes Harold Hongju Koh in support of the idea that the distinctions between the judicial system of the United States and that of other countries are often overlapped:

The United States has never been a hermetically sealed legal system. It shares a common legal heritage, tradition, and history with many foreign constitutional systems. For that reason, constitutional concepts like liberty, equal protection, due process of law, and privacy have never been exclusive U.S. property, but have a long carried global meaning.²⁴

If there is this level of similarity between the United States and other countries, then Parrish argues that there are many pragmatic opportunities available to those who will look to foreign precedents.²⁵ He cites Daniel Bodansky as saying that foreign law may "be a source of good ideas" and can provide "empirical evidence about how a prospective legal rule operates in practice."²⁶ Both Parrish and Bodansky mean that if the United States Supreme Court were deciding a case about a universally common issue such as tax evasion or free speech, not only *could* it look at the precedents of, say, Canada if the same issue was addressed, but *should* in the interest of making the most informed decision.

2) Transparency

Beyond empirical value, Parrish acknowledges citations to all of the authorities that a decision is based on leads to a desirable level of transparency. Realistically, Justices can use all the available thoughts and ideas in their head to make their personal decision; they cannot be prevented from reading or considering whatever material they like. If Justice Stephen Breyer wants to read the rulings of the Federal Constitutional Court of Germany at home and Justice Antonin Scalia prefers instead to read the Yale Law Journal in his free time, no one will be able to prevent them from directly or indirectly considering these materials. Parrish and several other authors he cites explain that written justification for a particular decision in the form of citations is not only desirable, but a necessity for the United States justice system.²⁷

In a hypothetical situation, certiorari is granted for a case and it is delivered to the Supreme Court Building on a Friday. That Monday, the Court stamps a two word

“We Agree” or “We Disagree” decision that the lower courts are expected to follow. The court would suffer for being perceived as arbitrary and unfounded; with no citations there are effectively no precedents, and with no precedents the preconditions for *stare decisis* do not exist. The ratio decidendi should be available to public scrutiny, argues Parrish, in order to elucidate the judicial methodology behind the decision as well as contribute to lower courts’ ability to predict its decisions.

3) Globalization of Law

If one is not receptive to the first two arguments, Parrish offers a third: law is trending towards globalism. He quotes David Fontana as saying, “The judge of the future, and the lawyer of today, has practiced law or taught law in the era of globalization, when a lawyer must be familiar with some aspects of foreign law.”²⁸ The argument here is that contemporary times have shrunk the world to the extent that foreign law and domestic law are no longer fully distinct and separate spheres. As such, the United States Supreme Court ought to consider structurally and legally different judicial practices around the world.

B) The General Anti-Precedent Position

“Now, therefore, be it *Resolved*, that the House of Representatives—(1) reminds the Justices of the Supreme Court of the United States of the judicial oath they took as a precondition to assuming their responsibilities;...(4) expresses its disapproval of the consideration of foreign laws and opinions in the decisions of the Court; (5) advises the Justices not to incorporate foreign laws or opinions in future decisions of the Court...”²⁹

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“Americans should not have to look for guidance on how to live their lives from the often contradictory decisions of any number of other foreign organizations...”³⁰

--

The decision in *Lawrence v. Texas* (and to a lesser degree the decisions of *Atkins v. Virginia*³¹ and *Knight v. Florida*³²) did not go under the political radar. If the above quotes from Resolution 468 and Resolution 372, respectively, are any indicator of the sentiment held by the anti foreign precedent camp, there is intense opposition to the pro-foreign precedent argument articulated earlier. But, what is this opposition based on? A preliminary observation is that all of the sponsors and cosponsors of Resolutions 468 and 372 were Republican³³, which could be evidence that this debate is merely partisan or ideological (section III (e) explores this theory), but this section will take the most charitable view of the opposition to citations to foreign precedents.

The anti foreign citation philosophy is constructed from three premises: 1) citations to foreign courts and foreign law will undermine United States sovereignty, 2) expanding the body of law and precedent from which judges may cite could lead to dangerous judicial “cherry-picking” and, 3) the American Constitution and its legal history is such that no foreign laws can be sufficiently similar as to make them applicable to a matter in the United States Supreme Court.

Loss of Sovereignty

The thirteenth “fact” submitted to a candid world by way of the Declaration of Independence reports how the King of Great Britain, “combined with others to subject us to a jurisdiction foreign to our constitution.” The anti precedent camp has used this as a rallying point on a number of occasions.³⁴ Anti precedent mentality holds that foreign

countries would have an undue amount of influence on the American judicial, legal, and domestic policies, should American Justices cite these foreign court rulings.

For example, it could be beneficial to Germany (or perhaps German hand gun companies) if the United States had different Second Amendment gun control laws. Conceivably the German government or courts could change its own laws or interpretation of its laws in the hopes that a United States Supreme Court Justice might cite a “changing trend” in international consensus when ruling on that issue. That is the argument of those who feel American sovereignty is vulnerable to undue influence by foreign courts or governments.

Cherry-picking

The introduction to this paper claimed that this debate on foreign precedents included positions from not only politicians (such as the House Republicans) and academics (like Benvenuto and McGinnis) but also Justices. Chief Justice John Roberts has not shied away from offering an opinion:

Foreign precedent allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent - - because they're finding precedent in foreign law -- and use that to determine the meaning of the Constitution. And I think that's a misuse of precedent, not a correct use of precedent.³⁵

The problem that Roberts is articulating is one of “cherry-picking” or stacking the cards in favor of one side while purposefully “ignoring” the opposing evidence. Justice Antonin Scalia, though, makes Chief Justice Roberts seem extremely tame on the issue of foreign precedents when one considers Scalia’s very verbal rail against the practice. This excerpt from a CSPAN debate on the subject of foreign precedents with Justice Stephen Breyer in 2005 where he called these precedents, among other things, “dangerous”:

Now, should we say, "Oh my, we're out of step," so, you know -- or, take our abortion jurisprudence, we are one of only six countries in the world that allows abortion on demand at any time prior to viability. Should we change that because other countries feel differently? Do we just use foreign law selectively? When it agrees with what, you know, what the justice would like the case to say, you use the foreign law, and when it doesn't agree you don't use it...I doubt whether anybody would say, "Yes, we want to be governed by the views of foreigners." Well if you don't want it to be authoritative, then what is the criterion for citing it or not? That it agrees with you? I don't know any other criterion to bring forward.³⁶

Scalia puts forth the case that using foreign precedents opens up the realm of possible authorities to so many that a Justice can find what he wants anywhere.³⁷ He critiques the fact that in cases where foreign precedents are cited, they tend to only be considered when they help the majority.

Constitutional Exceptionalism

McGinnis argues the antithesis of Parrish's claim that the legal culture of the United States is not sufficiently different from other countries. He claims that there is a fundamental problem with the application of foreign law in the United States, even if that country has a "flourishing political system."³⁸ In other words, a law passed in the United Kingdom might in fact be a good law for the United Kingdom, but there are too many variables that allow it to be successfully applied to the United States. It could be that the other country is not a democratic one, has different social norms, different economies, different notions of justice, etc—it could be any variable that make application of foreign precedents to issues of American domestic policy a task of comparing apples to oranges.

Additionally, McGinnis said that,

If one believes in American exceptionalism, one will think it a loss to [the] entire world to have our distinctive norms prematurely extinguished through the operation of a constitutional law constructed the lines of international and foreign law...if Thomas Jefferson had looked at the law of Louis XIV's France or indeed most European nations at the time he would have found support for a regime antithetical to the principles of the Declaration [of Independence], but none for the self-evident truths which he proclaimed and which eventually diffused throughout the world.³⁹

His lengthy quotes amount to saying that the United States Constitution is not only different, but has historically been claimed to be *better* than others in many respects. It follows from that argument that foreign precedents are not only irrelevant, but would often be detrimental to the current sources of authority the Court uses. John Yoo, professor of law at University of California-Berkeley, eloquently sums up this final premise of the anti precedent theory, "If foreign decisions were to become, in close cases, outcome determinative, or even were to trigger some type of deference, then they would effectively transfer federal authority outside the control of the national government."⁴⁰

C) Osmar Benvenuto, "Citations are Rhetorical or Trivial"

"It seems that scholars, in their enthusiastic support for, or condemnation of, this use of foreign precedent, have failed to notice that the Court's usage is more rhetorical than substantive and is still in its infancy."⁴¹

Benvenuto's claim here is twofold: 1) the academic community has become impassioned to the point that they have missed a vital part of this debate, and 2) not all citations are equal in terms of their persuasive value. While the first part of the claim merely signals that passion has caused some to lose sight of reason, the second part of the claim could have great implications for the foreign precedent literature.

If the second part of his claim is correct, the vast amount of literature, especially that of the anti foreign precedent theory, is making much ado about nothing. How can foreign precedents be dangerous or antithetical to American democracy when they are merely rhetorical? If a justice or all of the justices of the majority were *really* only using a citation to give their opinion a little flair or stylistic "oomph," or to demonstrate an extremely minor point, there would be no difference in the substantive

content behind the opinion whether a poem or the European Court of Human Rights was cited as “precedent.”

The problem lies in evaluating the weight each citation to precedent had in a decision. This very problem is addressed in Dr. Nicholas Zeppos’ work, “The Use of Authority in Statutory Interpretation: An Empirical Analysis.”⁴² His work is worth mentioning because he conducted a study similar to Christopher Roberts⁴³, in which he picked a random number of Supreme Court cases and analyzed all of sources of authority they used.⁴⁴ In the notes to the section discussing his methodology for conducting his empirical research, he commented on the difficulty of assigning a weight to any given precedent:

An alternative method of studying the sources cited would not just count [the number of] citations but would instead weigh them based on how the Court actually used them in the particular case. This method would avoid a number of problems. [...] While a weighted scheme offers some advantages it still has shortcomings. It too is quite subjective, depending upon the reader’s bias in evaluating what was or was not important to the court.⁴⁵

Can we know exactly how much weight the majority placed on the citation to *Dudgeon v. United Kingdom* in the decision of *Lawrence v. Texas*? We may be able to say it was small, medium or large, but it would be difficult to assign it specific weight, although pro and anti foreign precedent persons would probably venture to guess. It seems reasonable that an anti foreign precedent believer would claim the judgment of *Lawrence* rested significantly on the citation to *Dudgeon*, whereas a proponent of foreign precedents would be inclined to say it was merely rhetorical or symbolic.

To return to Benvenuto’s quote at the beginning of this subsection, foreign precedents are in their infancy. But, every infant grows up. It will be extremely interesting to see how citations to foreign precedents evolve over time. It could be a trend that dies off due to the scrutiny placed on it by the anti foreign precedent camp, or it could be the precursor of an emerging trend towards a more globalized and international concept of legal interpretation.

D) Zeppos, “Statutory Interpretation”

While not explicitly about foreign precedent, Dr. Nicholas Zeppos’ paper, mentioned above for its usefulness in understanding the difficulty of weighing citations, also offers theories on how judges approach statutory interpretation. Zeppos describes the two “classic” types of statutory interpretation: 1) originalism and textualism⁴⁶, which directs the judge to look at the intent of the author of the law, and examine carefully what the text of the law means, and 2) a dynamic theory invites the judge to employ norms and make value judgments when deciding matters.⁴⁷

Textualism and originalism are decidedly more “strict” and theoretically give a judge less leeway to decide a case. If the law says X,Y,Z one must see what X,Y,Z meant to the author(s) (whether Congress or the framers of the Constitution) and what the exact words of X,Y, and Z are. Originalism is decidedly an attempt to curb “policymaking by an unelected life-tenured judiciary.”⁴⁸ Textualism simply believes that the text of the enacted law or Constitution is the “best source of statutory interpretation.”⁴⁹

The dynamic theory of interpretation contrast starkly with those ideals and envisions “an active role for the judiciary in furthering virtue in the body politic.”⁵⁰ This is essentially the epitome of so called judicial activism. The logic of this position can be seen when, for instance, one tries to interpret the Fourteenth Amendment’s “due process”. What does it entail with regards to the Eighth Amendment’s “cruel or unusual punishment” clause? A dynamic theorist would argue that a good judge should take into account current perceptions of morality, values, and justice.

What does this have to do with foreign precedents? I argue that the textualist/originalist position is closely aligned to the anti foreign precedent camp while the dynamic theory of statutory interpretation side is comparable to that of the pro-foreign precedent theorists. Consider that Zeppos describes Justice Scalia as a great representative of the textualist position.⁵¹ As stated above, he is also one of the staunchest anti foreign precedent believers. This is not likely coincidental. His interpretation of the Constitution is much more restrictive than a dynamic theorist. If we return to *Lawrence* we can note that the majority who were criticized for using the citation to *Dudgeon* definitely felt not only were contemporary values relevant, but even more “global”⁵² conceptions of fairness and morality were relevant in deciding the application of the due process and equal protection clauses to *Lawrence*.⁵³

E) Rosenfeld, “Principle or Ideology?”

The final theory is expressed in Michael Rosenfeld’s paper, “Principle or Ideology.”⁵⁴ Section III(b), in the discussion of House Resolutions 468 and 372, asserts the significance of the sponsors for both resolutions being Republicans.⁵⁵ The fact that no Democrats signed onto the resolutions seems to indicate that the issue of foreign precedents is divided across party or ideological lines. Rosenfeld writes to that end, “Since the 1960’s, American originalists have by and large been politically conservative.”⁵⁶

This argument is fairly clear and simple: political conservatives tend to be originalists, who are more likely to disregard foreign precedents, whereas political liberals or progressives would be more “universalist”⁵⁷ and claim value in foreign precedents. This premise is supported by the fact that the Republican Party is considered to be the conservative party in the United States, and it was all Republicans who signed the resolutions condemning the use of foreign precedents.

Conclusions and Implications

In this contentious debate, many have claimed that either the pro-citation or the anti-citation position has merit. This paper has shown that claim to be false- neither side is without merit. Instead, the issue is better understood as I have described above: a complex set of philosophical, political, and social beliefs underlying both of the positions. While complex, the issue is not beyond drawing some conclusions about the sides of this debate, which is what this paper set out to do. We can reasonably conclude that a pro-foreign precedent person would be a political liberal, believe in a fairly dynamic view of statutory and Constitutional interpretation, believe in the globalization of law, and stress the fact that statistically speaking, citation to foreign precedent is hardly taking over American jurisprudence. Furthermore, someone who feared the loss of sovereignty to foreign nations, was wary of opening up a large body of law from which justices would cherry-pick laws that agreed with them, had a strict and limited

view of interpreting law, and was politically conservative would almost assuredly be against foreign precedent citation.

The Next Supreme Court Justice

As Robert Guest suggests in an article in *The Economist*, the Senate confirmation hearings for whomever a President nominates as a Supreme Court Justice will probably include the subject of citations to foreign precedents.⁵⁸ Guest writes of the hearings, “[In the hearings] Conservatives add that, on the contrary, some judges use devious tricks to nudge the law leftward, such as citing foreign precedents, which can be cherry-picked from Europe.”⁵⁹ There should be no doubt the question will be raised with whomever nominates.

It was a part, arguably a fairly significant part, of the confirmation hearing for Justice Sonia Sotomayor, a recent addition to the Court. For example, here is part of the transcript of her hearing, when she was being questioned by Senator Tom Coburn (R-OK) about foreign precedents:

Coburn: Can you cite for me the authority either given in your oath or in the Constitution that allows you to utilize laws outside of the country?”

Sotomayor: My view is that there is none.

Coburn: So today do you stand by this statement that there is no authority to utilize foreign law in making decisions under the constitution?

Sotomayor: Foreign law cannot be used as a holding or a precedent or to bind an outcome of a legal decision interpreting the constitution.⁶⁰

As the citation to foreign precedents debate grows more topical, we can certainly expect it to remain a feature of Supreme Court confirmation hearings. Given this paper’s conclusion, we can reasonably assume that it will be Republicans who will continue to interrogate nominees on their stance on foreign law. But, as long as there is no other controversy surrounding a confirmation hearing, a potential Supreme Court Justice is not going to be rejected for their belief on foreign law.⁶¹

Since foreign law would probably never be a decisive issue, of what use is it to press a nominee on their stance? One reason is that by merely asking the question, one can heighten awareness of such an issue and bring it into the realm of fierce political and academic debate. This debate over foreign law is not likely to end unless there is a dramatic change, such as a Constitutional amendment barring citations to foreign precedent. Until then, a thorough understanding of this timely and important complex issue, which this paper attempts to provide, is needed.

The foreign precedent debate is a perfect example of the intersection of law, politics, and society. Returning to the introduction of this paper, *Lawrence v. Texas* was clearly a social issue; the gay community was certainly affected by the decision. The adjudication of the case was a prime example of different philosophies on law and, more specifically, what kinds of precedents belong in a decision of the United States Supreme Court. Resolutions by members of Congress explain how politics was also inextricably linked to this entire issue. Finally, while the debate is fierce and at times unclear, there are specific philosophical elements that can be good predictors of whether someone will be open or closed to foreign precedent citation.

Endnotes

¹ *Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R. (1981) ¶ 52

Dudgeon was a case with similar facts to *Lawrence v. Texas*, namely the arrest and prosecution of a man caught having consensual homosexual sex. The European Court of Human Rights ruled the law broken was an invalid law based on the European Convention on Human Rights.

² *Lawrence v. Texas*, 539 U.S. 558 (2003).

Briefly, *Lawrence* was an appeal of a Texas Supreme Court case involving John Geddes Lawrence, who was arrested by Houston police officers for violating a Texas state statute prohibiting “deviate sexual intercourse with a man.” Lawrence asked the Supreme Court to consider whether the Texas law violated the substantive due process clause, or the equal protection clause of the Fourteenth Amendment. Lawrence won, and the Texas law was invalidated.

³ Austen L. Parrish. “Storm in a Teacup: The U.S. Supreme Court’s Use of Foreign Law.” *University of Illinois Law Review* (2007): 637-80. Web.

⁴ H.R. Res. 372, 110th Cong. (2007).

⁵ H.R. Res. 468, 108th Cong. (2003).

⁶ John O. McGinnis. “Symposium: “Outsourcing Authority?” Citation to Foreign Court Precedent in Domestic Jurisprudence: Contemporary Foreign and International Law in Constitutional Construction.” *Albany Law Review* 2006. Web.

⁷ For quotes on Scalia, see generally his comments during his debate with Stephen Breyer:

American University. “Transcript of Discussion between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer.” AU News. Web. 27 Apr. 2010; and Sec. III(c) of this paper

⁸ Osmar J. Benvenuto. “Reevaluating the Debate Surrounding the Supreme Court’s Use of Foreign Precedent Note.” *Fordham Law Review* 74 (2005-2006): 2695-760. Web.

⁹ Michael Rosenfeld. “Principle or Ideology? A Comparativist Perspective on the U.S. Controversy over Supreme Court Citations to Foreign Authorities” (2008). Cardozo Legal Studies Research Paper No. 213. Available at SSRN:

<http://ssrn.com/abstract=1081854>

¹⁰ Michael Ed. Nelson, “*Restraints on Judicial Power.*” 2 Vol. Washington, D.C., United States: CQ Press, 2008. Web. 3/18/2010. 320.

¹¹ *Qtd.* in *Id.* at 320.

¹² *Id.*

¹³ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

¹⁴ Benvenuto, *supra* note 8, at 2701.

¹⁵ *Id.* at 2702.

There are times when everyone is in agreement that an international law or ruling should be applied—mainly when an issue of international concern is present. *Eastern Airlines, Inc v. Floyd* 499 U.S. 530 (1991) is the example Benvenuto gives.

¹⁶ *Id.*

¹⁷ *Id.* at 2701.

¹⁸ Christopher Roberts, “*Going beyond Stare Decisis: The Use of Foreign Courts, Statistics, Journal Articles, and Other Secondary Authorities in Supreme Court Opinions.*” 2005. Web.

¹⁹ For other interesting tables with data broken out, for instance, by each Justice, the minority versus majority. See *Id* at 39-44, Appendices C and D.

²⁰ *Id* at 19, Table 1.

²¹ *Id* at 38, Appendix B.

²² Parrish, *supra* note 3.

²³ *Id* at 673.

²⁴ Harold Hongju Koh, *International Law as Part of Our Law*, 98 Am. J. Int'l L. 43,44 (2004). *Qtd.* in Parrish, *supra*, note 3, at 673.

²⁵ Parrish, *supra* note 3, at 678.

²⁶ Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 Ga. J. Int'l & Comp. L. 421, 423-24 (2004). *Qtd.* in Parrish, *supra* note 3, at 678.

²⁷ Parrish, *supra* note 3, at 674 and his footnotes 260-262.

²⁸ David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. Rev. 539, 620 (2001). *Qtd.* in Parrish, *supra* note 3, at 659.

²⁹ H.R. Res. 468, *supra* note 5.

³⁰ H.R. Res. 372, *supra* note 4.

This resolution was introduced by Representative Tom Feeney (R-FL) with 49 Republican co-sponsors.

³¹ *Atkins v. Virginia*, 536 U.S. 304 (2002).

³² *Knight v. Florida*, 528 U.S. 990 (1999).

³³ See HRes 468, *supra* note 5, and HRes 372, *supra* note 4.

³⁴ See McGinnis, *supra* note 6, and HRes 372, *supra* note 30, in general.

³⁵ NewsHour, Online. "Chief Justice John Roberts Online NewsHour." PBS. Web. 27 Apr. 2010.

<http://www.pbs.org/newshour/indepth_coverage/law/supreme_court/justices/index.htm>

³⁶ American University, *supra* note 7.

³⁷ An examination of whether or not enough authority sources exist within "regular" American sources should be conducted in order to validate Scalia's claim. One can imagine that the same thing can be said of the current state of things. A judge can cite many different things beyond case law, it could be the case that a judge can justify rulings based on his or her whim, without even going to the realm of foreign opinions.

³⁸ McGinnis, *supra* note 6.

³⁹ *Id.*

⁴⁰ Washington Times Editors. "Danger from Foreign Legal Precedent." *Washington Times* [Washington, D.C.] 25 Mar. 2004, Editorials sec.: A20. Web.

⁴¹ Benvenuto, *supra* note 8, at 2697.

⁴² Nicholas Zeppos. "The Use of Authority in Statutory Interpretation: An Empirical Analysis." *Texas Law Review* 70.5 (1992): 1073. *ARTICLEFIRST*. Web.

⁴³ Roberts, *supra* note 18.

⁴⁴ Zeppos' paper is extremely interesting for its theories of statutory interpretation, discussed at Section III(d), but also in this section because of his methodological notes. His overall data conclusions are not dissimilar to that of Roberts, *supra* note 18.

⁴⁵ Zeppos, *supra* note 18, at 1089, footnote 76.

Zeppos, in his footnote 76, also offers a few others authors who have tried to develop more objective methodologies for weighing the value of a precedent.

⁴⁶ It is important to note that these two theories are very different from each other. This paper is partly oversimplifying the intricacies of each theory. They are grouped together

because they are both meant to be restrictive of judicial “activism”, whereas the dynamic theories allow for more value judgments.

⁴⁷ Zeppos, *supra* note 18, at 1079, 1081.

⁴⁸ *Id.*, at 1079.

⁴⁹ *Id.*, at 1081.

⁵⁰ *Id.*, at 1082.

⁵¹ *Id.*, at 1080.

⁵² This is considered a controversial claim. Some feel that American democratic capitalism is inherently different than most European democracies. See McGinnis, *supra* note 6, in general.

⁵³ *Lawrence v. Texas*, *supra* note 2.

⁵⁴ Rosenfeld, *supra* note 9.

⁵⁵ HRes 372 and 468, *supra* notes 29, 30.

⁵⁶ Rosenfeld, *supra* note 9, at 31.

⁵⁷ *Id.*

⁵⁸ Guest, Robert. "Lexington: The next Supreme Court Justice." *Economist* 10 Apr. 2010. *Economist.com*. Web. 27 Apr. 2010. <http://www.economist.com/world/united-states/displaystory.cfm?story_id=15908197>.

⁵⁹ *Id.*

⁶⁰ Eviatar, Daphne. "GOPers Hit Sotomayor on Foreign Law." *Washington Independent*. 16 July 2009. Web. 27 Apr. 2010. <<http://washingtonindependent.com/51293/gopers-hit-sotomayor-on-foreign-law>>.

⁶¹ A simple majority is needed to confirm a candidate, but a supermajority would be needed to stop a filibuster.

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Judicial Decentralization: Institutional Interactions in Public Law Litigation

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Abstract

Beginning in the 1950s, the United States federal courts began adjudicating public law litigation cases, wherein activist judges restructured state and local institutions such as prisons, schools, and mental hospitals. Despite the judiciary's success in reforming these institutions, critics have viewed public law litigation as an inappropriate expansion of judicial power that undermines the federalist structure in the United States. In this article, I will reposition the public law litigation movement within a decentralized framework that views historical developments, institutional interactions, and judicial constraints as critical components of the judicial decision-making process. Specifically, I will examine how justices are influenced by public opinion, the plaintiff's counsel, and judicial precedent. Through this analysis, I will demonstrate that public law litigation resulted from an otherwise restrained judiciary compelled to action by a largely intransigent group of administrators unwilling to reform their Constitutionally deficient institutions. By studying these interactions, therefore, I will aim to shift the emphasis away from a view that public law litigation is the independent creation of the judiciary.

I. Introduction

"They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases."

— Earl Warren, delivering the opinion of the Court in *Brown v Board of Education*.¹

Beginning with *Brown v Board of Education*, the federal courts entered into a period of unprecedented judicial activism characterized by significant intrusion into state and local institutions. Through the comprehensive restructuring of institutions such as prisons, schools, and mental hospitals, the judiciary was able to interpret the Constitution to extend rights to all citizens, including the previously disenfranchised.² Termed "public law litigation" by legal scholar Abram Chayes, this judicial activism typically only arose in response to guilty defendants' reluctance to reform the relevant institutions consistent with Constitutional expectations.³ Despite the judiciary's success in reforming these institutions, though, critics argue that public law litigation represents an inappropriate expansion of judicial power and a blatant disregard for the federalist and separation of powers principles.⁴ Furthermore, opponents question the legislative competence of the federal judiciary and the seemingly unchecked authority of the justices.⁵

The aim of this paper is to demonstrate that public law litigation is not, as these critics have asserted, an independent creation of the judiciary, but rather that its

emergence is more easily understood by considering a decentralized judicial framework that views historical developments, institutional interactions, and judicial constraints as critical components of the judicial decision-making process. I will examine how justices are influenced by public opinion, the plaintiff's counsel, and judicial precedent. First, I will consider the shifting public attitudes toward the conditions in institutions such as prisons, schools, and mental hospitals in the mid-twentieth century, and the extent to which judicial decisions reflected these changing attitudes. Second, I will examine whether increased federal funding for public interest lawyers—also known as the plaintiff's counsel—coincided with the rise in the public law litigation movement. Third, I will reflect on how judges are constrained by the judicial hierarchy. To this end, I will examine three indirect Supreme Court signals and the extent to which they succeeded in limiting the discretion of the federal district courts. By considering these interactions, I will prove that public law litigation—and the positive injunctive relief that is commonly associated with these cases—resulted not from unprovoked judicial activism, but rather from an otherwise restrained judiciary compelled to activism by a largely intransigent group of administrators unwilling to reform their Constitutionally deficient institutions.

II. Public Opinion

In the early 1960s, there was a growing public awareness that the conditions in Southern prisons, schools, and mental hospitals were intolerably destitute. Unlike the relatively modern Northern prisons, for example, Southern prisons were outdated both in practice and design and maintained many of the distinctive features of their pre-Civil War predecessors. In fact, the mid-twentieth century Southern prison was “modeled on the slave plantation,” which emphasized productivity over rehabilitation and utilized excessive violence to enforce compliance.⁶ However, the prison was not the only Southern institution to generate criticism. As Malcolm Feeley and Edward Rubin remark, “the prison reform cases were part of a wide-ranging, nationally initiated attack on Southern institutions that took place in the decades following World War II”.⁷ Although this assault on Southern institutions was waged predominately by the judiciary, it was not until public awareness for the conditions in Southern institutions grew, Feeley and Rubin argue, that the judiciary was compelled to take action. As they explain, “judges tend to engage in policymaking when confronted with a practice that violates a widely held principle of social morality...they perceive such values as a source of both content and legitimacy; in their view, social morality possesses a particular, definitive content, and reliance on it serves as an independent and possibly sufficient justification for judicial activism.”⁸ Feeley and Rubin thus develop a model of behavior, which posits that the judiciary, insofar as it is fundamentally motivated by a desire for legitimacy, is constrained by public opinion, particularly on values-based issues.

This model of judicial behavior can be intuitively applied to public law litigation. Assuming the judiciary does decide cases consistent with public opinion, as Feeley and Rubin's model hypothesizes, the empirical records should indicate widespread conformism to judicial decisions. Thus, Feeley and Rubin's model predicts that the noted dissatisfaction with Southern institutions in the mid-twentieth century should have been met with public tolerance towards judicial activism to correct such institutions. In reality, however, public law litigation was initially met with considerable resistance—in desegregation cases⁹, prison reform cases¹⁰, and mental health institutional reform cases.¹¹ This result also introduces the notion that, in public

litigation cases such as these, the judiciary displayed an initial deference to state authorities, only to be replaced by judicial activism once these state authorities—including prison, school, and mental hospital administrators—failed to make improvements that passed Constitutional muster.¹²

Ostensibly, therefore, judicial activism seems to be compelled not by growing public support, as Feeley and Rubin suggest, but rather by growing public resistance to the relevant court's recommendations. However, the recalcitrant defendants in public law litigation cases do not necessarily represent the public whose attitudes Feeley and Rubin theorized as a judicial constraint. In fact, the uncooperative defendants in the aforementioned public law litigation cases all administered Southern institutions, and they thus represented a Southern ideology which, during the civil rights movement, was hardly characteristic of the overall public attitude in the United States regarding public institutions.

This is particularly supported by desegregation cases, during which the public was conspicuously outspoken against "separate but equal" doctrine, while administrators remained steadfastly opposed to desegregation. In prison and mental hospital cases, administrators were similarly opposed to restructuring, but the resistance was less motivated by a moral aversion to these reforms. As Alfred Mamlet explains, "with prisons and mental hospitals...state opposition is usually based on considerations of time and money rather than strong moral disagreement over the desirability of improving the conditions."¹³ The motivation for this resistance notwithstanding, it is evident that in public law litigation cases Southern administrators under scrutiny exhibited an underlying tolerance of the conditions in these institutions, in stark contrast to public attitudes at this time. This distinction helps to resolve the threat to Feeley and Rubin's argument, illuminating that the judiciary's decisions can reflect overall public attitudes while simultaneously eliciting resentment and resistance by the defendants in public law litigation cases.

However, other threats to Feeley and Rubin's argument do exist. First, Feeley and Rubin's claim that "judges...engage in policymaking when confronted with a practice that violates a widely held principle of social morality" undermines the notion that the judiciary defines morally acceptable actions, thus inverting the proactive and reactive spheres traditionally occupied by the judge and the people, respectively. Second, as Feeley and Rubin note, social morality is inherently vague and thus structuring judicial behavior to accurately reflect social morality is difficult.¹⁴ Third, as University of Michigan Law School professor Margo Schlanger notes in her review of Feeley and Rubin's work, prison-specific public law litigation cases "happened concurrent with, not earlier than, prison and jail cases all over the nation in which courts ordered remedies for unconstitutional conditions." Furthermore, Schlanger explains that, "although scholarly case studies written more recently almost all concern the South, this should not hide the very real impact of the non-Southern cases in shaping the litigation as a national movement."¹⁵ Assuming that public discontent was disproportionately targeted at Southern institutions, Schlanger's observation that judicial intervention occurred concurrently in Northern and Southern institutions is particularly damaging to Feeley and Rubin's argument because it demonstrates a lack of judicial adherence to public attitudes. However, Schlanger's study is limited to prisons, and thus it hardly rejects Feeley and Rubin's argument that the judiciary is constrained by public opinion.

III. Plaintiff's Counsel

Similar to public opinion, the plaintiff's counsel poses a constraint on the judiciary. Traditionally, injured parties in public law litigation cases organize a class-action lawsuit, through which they accuse various institutions of denying them their Constitutional rights.¹⁶ With numerous plaintiffs, however, the counsel is naturally incapable of perfectly representing the interests of every injured party. In fact, class-action lawsuits have been compared to "Burkean notions of representation," in that "the label 'representative' removes the burden of inquiry into the true interests of the represented."¹⁷ With this autonomy, the plaintiff's counsel has considerable influence, such that "the identities, priorities, litigating strategies, and resources of plaintiff's counsel have been of great importance to the shape and success of litigated prison reform."¹⁸

In acknowledgement of the public law litigator's autonomy and influence, federally funded public interest groups began sending highly skilled attorneys to represent institutionally detained individuals. This trend was a critical component of the civil rights movement as the American Civil Liberties Union (ACLU), the National Association for the Advancement of Colored People (NAACP) Legal Defense Fund, and the Department of Justice's Civil Rights Division were extensively involved in these cases.¹⁹ In these settings, the plaintiff's counsel was incredibly powerful. As Schlanger notes, rather than "inventing legal theories...[district judges] generally acted by following a path proposed by plaintiff's counsel and by building on the foundation laid at trial."²⁰ Judge William Wayne Justice, who presided over *Ruiz v Estelle*,²¹ articulated this urge to establish the plaintiff's counsel as the most active agent, so that the case could be "in accord with the goals and aspirations of our adversarial system of justice."²²

Given their considerable influence, it should not be surprising that, as federal funding for these litigators subsided, the public law litigation movement lost momentum as well. Schlanger notes that "the inauguration of the Reagan administration halted Justice Department initiation of new lawsuits... and the Department even switched sides in a number of its ongoing litigations."²³ As a result of these Reagan budget cuts, which dramatically reduced the number of federally subsidized litigators, the public law litigation movement that peaked in the 1970s was considerably weakened in the 1980s.²⁴ This consequence reinforces the notion that the plaintiff's counsel was crucial to the development, and eventual demise, of public law litigation.

However, this correlation between the decline in public interest lawyers and the decline in public law litigation does not imply causation. One exogenous influence that may have contributed to the decline in public law litigation is the simple lack of conspicuous institutional injustices. As Theodore Eisenberg and Stephen Yeazell explain:

Once it is agreed that state-ordered segregation is unequal and that it is therefore acceptable for courts to enjoin the operation of segregated schools, there are still many ways to define educational inequality... [such that once] one moves beyond the core decision in *Brown v Board of Education*, acceptance declines.²⁵

Thus, once the federal courts remedied the glaring constitutional violations in prisons, schools, and mental hospitals, public support for public law litigation declined. As

Feeley and Rubin's argument would suggest, this led the federal courts to further distance themselves from public law litigation cases. As a result, although causation may not exist, the plaintiff's counsel strongly influences the judiciary, and consequently the rise and fall of federal funding for these litigators is correlated with the rise and fall of the public law litigation movement.

IV. Judicial Precedent

Similar to public opinion and the plaintiff's counsel, judicial precedent also poses a constraint on the judiciary. I will focus on three indirect Supreme Court techniques intended to limit the discretion of lower federal courts in public law litigation cases. First, in *Swann v Charlotte-Mecklenburg Board of Education*,²⁶ the Supreme Court communicated that the district courts should construct a remedy that is dependent on the liability. In *Dayton Board of Education v Brinkman*,²⁷ the Court explained how to construct this remedy, noting that it should only consider the "incremental segregative effect violations had on the racial distribution of the...school population as presently constituted, when that distribution is compared to what it would have been in the absence of such constitutional violations."²⁸ Second, the Court began to "impose stricter justiciability requirements on plaintiffs seeking equitable relief."²⁹ This technique, which was communicated by the Supreme Court to the district courts through its decision in *City of Los Angeles v Lyons*,³⁰ was intended to redirect judicial attention toward the remedy sought rather than the violation committed. Third, the Supreme Court attempted to "define narrowly the substantive constitutional right."³¹

However, these Supreme Court signals do not always restrict the autonomy of the lower federal courts. In *Youngsberg v Romeo*,³² the Supreme Court abandoned these ineffective signals and sought to control the lower courts directly. Responding to district judge Frank M. Johnson's ruling in *Wyatt v Stickney* to establish minimum standards for treatment and care in mental hospitals³³, the Court in *Youngsberg* refused to recognize a generalized "right to treatment". The lack of conformity by the lower courts is inconsistent with political science literature, which posits that—as a result of Supreme Court and *en banc* review, judicial competition, whistle blowing, and cultural norms—there is strong lower court adherence to Supreme Court rulings. It is theorized that only justices at the top of the judicial hierarchy—those with docket control and no further judicial ambition—would risk engaging in decision-making motivated by personal attitudes.

To explain this anomalous behavior, I have considered the combined role of public opinion, the plaintiff's counsel, and Supreme Court signals in influencing judicial behavior. Through the lower court justices' responsiveness to public opinion and deference to the plaintiff's counsel, these justices may have ignored the indirect Supreme Court signals that otherwise govern judicial behavior. Unlike Supreme Court justices, who are influenced by *personal* attitudes, lower court justices are influenced by external attitudes, namely, the attitudes of the public and the plaintiff's counsel.

V. Conclusion

By repositioning the public law litigation movement within a decentralized framework that incorporates public attitudes, the plaintiff's counsel, and judicial precedent into a holistic judicial decision-making model, the emergence of the public law litigation movement becomes more intuitive. Through this lens, I have proved that

public law litigation resulted from an otherwise restrained judiciary compelled to action by a largely intransigent group of administrators unwilling to reform their Constitutionally deficient prisons, schools, and mental hospitals. More importantly, however, the scholarly emphasis has shifted away from a view that public law litigation is the independent creation of the judiciary.

Endnotes

¹ 349 U.S. 294, 301 (1955).

² See, e.g., Levy, Robert M., and Leonard S. Rubenstein, *The Rights of People with Mental Disabilities* (1996)

³ Chayes, Abram. "The Role of the Judge in Public Law Litigation." *Harvard Law Review* 89 (1976): 1281.

⁴ Dunn, Joshua M. "The Perils of Judicial Policymaking: The Practical Case for Separation of Powers." *First Principles Series* 20 (2008): 3.

⁵ Horowitz, Donald L. "The Courts as Guardians of the Public Interest." *Public Administration Review* 37 (1977): 151.

⁶ Feeley, Malcolm. F., and Edward L. Rubin, *Judicial Policymaking and the Modern State: How the Courts Reformed America's Prisons*. Cambridge: Cambridge University Press, 1998. 156.

⁷ *Ibid.* 159.

⁸ *Ibid.* 161.

⁹ See, e.g., *Brown v Board of Education*, 347 U.S. 483 (1954); *Goss v Board of Education*, 373 U.S. 683 (1963); *St. Helena Parish School Bd. v Hall*, 368 U.S. 515 (1962); *Cooper v Aaron*, 358 U.S. 1 (1958), *Griffin v School Board of Prince Edward County.*, 377 U.S. 218 (1964); *Green v County School Bd.*, 391 U.S. 430 (1968); *Swann v Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971)

¹⁰ See, e.g., *Holt v Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969); *Battle v Anderson*, 376 F. Supp. 402 (E.D. Okla. 1974).

¹¹ See, e.g., *Wyatt v. Stickney*, 325 F. Supp. 781 (M.D. Ala.)

¹² Mamlet, Alfred M. "Reconsideration of Separation of Powers and the Bargaining Game: Limiting the Policy Discretion of Judges and Plaintiffs in Institutional Suits." *Emory Law Journal* 33 (1984): 688.

¹³ *Ibid.* 701.

¹⁴ Feeley, Malcolm. F., and Edward L. Rubin, *Judicial Policymaking and the Modern State: How the Courts Reformed America's Prisons*. Cambridge: Cambridge University Press, 1998. 162.

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¹⁶ Mamlet, Alfred M. "Reconsideration of Separation of Powers and the Bargaining Game: Limiting the Policy Discretion of Judges and Plaintiffs in Institutional Suits." *Emory Law Journal* 33 (1984): 717.

¹⁷ *Ibid.* 718.

¹⁸ Schlanger, Margo. "Beyond the Hero Judge: Institutional Reform Litigation As Litigation." *Michigan Law Review* 97 (1994): 2015.

¹⁹ *Ibid.* 2017.

²⁰ *Ibid.* 2016.

²¹ 503 F.Supp. 1265 (S.D. Tex. 1980)

²² Justice, William Wayne. The Origins of *Ruiz v Estelle*. *Stanford Law Review* 43 (1990): 3.

²³ Schlanger, Margo. "Beyond the Hero Judge: Institutional Reform Litigation As Litigation." *Michigan Law Review* 97 (1994): 2026.

²⁴ Sabel, Charles F., and William H. Simon. "Destabilization Rights: How Public Law Litigation Succeeds." *Harvard Law Review* 113 (2003): 1038.

²⁵ Eisenberg, Theodore, and Stephen C. Yeazell. "The Ordinary and the Extraordinary in Institutional Litigation." *Harvard Law Review* 93 (1980): 515.

²⁶ 402 U.S. 1, 15-16 (1971).

²⁷ 433 U.S. 406, 420 (1977).

²⁸ Mamlet, Alfred M. "Reconsideration of Separation of Powers and the Bargaining Game: Limiting the Policy Discretion of Judges and Plaintiffs in Institutional Suits." *Emory Law Journal* 33 (1984): 691.

²⁹ *Ibid.* 691.

³⁰ 103 S. Ct. 1660, 1665 (1983); see also *O'Shea v. Littleton*, 414 U.S. 488, 496-498 (1974), *Rizzo v. Goode*, 423 U.S. 362, 371-373 (1976).

³¹ Mamlet, Alfred M. "Reconsideration of Separation of Powers and the Bargaining Game: Limiting the Policy Discretion of Judges and Plaintiffs in Institutional Suits." *Emory Law Journal* 33 (1984): 692.

³² 457 U.S. 307 (1982).

³³ 325 F. Supp. 781 (M.D. Ala.). For a comprehensive explanation of Judge Johnson's decision, see Johnson, Frank M., *Defending Constitutional Rights* (2001).

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A Comparative Study: Judicial Review in the United States and France

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Abstract

In modern democratic nations, the protection of individual rights and liberties is paramount in safeguarding a nation's founding principles and the nation's ability to endure. In the United States, citizens maintain their "unalienable rights" of "life, liberty and the pursuit of happiness,"¹ and the right to abolish government lest any power should attempt to encroach on these fundamental rights.² In France, the first of the three ideals representing the Republic, "Liberté," is part of a national motto formed at the conclusion of the French Revolution, espousing the ideals that remain an underpinning of the French consciousness. Although both nations developed a three branch governmental system after oppressive regimes, and are dedicated to democracy and the rights of the individual, each nation's inherent view on judicial review – a vital instrument in protecting individual rights from the tyranny of government or the majority – is diametrically opposed to the other. This paper will explore the historical and cultural differences that separate two nations with similar recent political pasts. Part I discusses the historical roots of *Marbury v. Madison* and the counter-majoritarian period that followed the New Deal era, as well as the arguments for and against judicial review in the United States. Part II explores the French past of *le gouvernement des juges*, the creation of the *Conseil Constitutionnel*, the council's evolution, and the most recent attempts in France at creating a body to perform judicial review.

Introduction

Two very different systems of judicial review have evolved in the United States and France, and both have received praise, analysis, and criticism. The United States runs on a system of judicial review that includes an independent judicial branch with the power to overturn legislation *a posteriori* – or after the bill has come into force. In France, the *Conseil Constitutionnel*, created at the beginning of the Fifth Republic, is a body within Parliament that views legislation *a priori* or prior to the law's enactment. This means that legislation is reviewed preventatively, before it becomes an official law. This paper aims to compare the two systems of review. Part I, will examine the United States, the historical roots of judicial review stemming from the case *Marbury v. Madison*, and the counter-majoritarian post-New Deal period of the Supreme Court. Part I will conclude with a discussion of recent major arguments for and against the viability of judicial review. In part II, I will analyze the origins of the mistrust of judges in the French system, which led to the creation of the *Conseil Constitutionnel* and its ability for sufficient review, further analyzing the recent movement to grant the Council the power of *a posteriori* review.

Part I: History of Judicial Review in the United States

The inception of U.S. judicial review was marked by the political turmoil that encompassed the fledgling nation. The U.S. had recently gained independence from Great Britain and was struggling between two emergent political factions: the Federalists and the Anti-Federalists who emerged after the creation of the Articles of Confederation. In an attempt to calm the political turmoil, John Marshall, the Chief Justice of the Supreme Court, made a revolutionary decision in *Marbury vs. Madison*, by positioning the judicial branch as a stabilizing and deciding force. In the final hours of the Adams administration, William Marbury was appointed as Justice of the Peace. However, under the new Jefferson administration, the Secretary of State James Madison refused to hand over the commission, and Marbury subsequently sued.³ In delivering the Supreme Court's decision, Marshall admitted that Marbury had the constitutional right to have his commission delivered and should be remedied, but he also concluded that the Supreme Court could not issue a writ for this deliverance because Congress had unconstitutionally extended the powers of the Supreme Court in the 1789 Judicial Act.⁴ Thus, Marshall both diminished and extended the power of the Supreme Court. Although the powers from the 1789 Judicial Act were rescinded by this decision, the much broader and much more influential power of judicial review was instated.

Marshall set a precedent for how the powers of the Supreme Court should be governed: by itself. Marbury opened the door for judicial activism; however, his decision did not endorse judicial adventurism, which is defined as the liberal use of the judiciary as a legislative tool.⁵ Marshall recognized that this power should be wielded sparingly and by implying that the people were the source of constitutional and political authority, he implicitly excluded the right of the states to such authority. This reinforced the power of the Supreme Court in checking the lower state courts.⁶

Part Ia. The Post-New Deal Period

The possibility of counter-majoritarian principles in the Court's decision is one of the most persistent problems because justices have no established accountability to the people. Those opposed to such claim argue that certain policies should not derive directly from the people but rather from institutions such as the Supreme Court. Furthermore, Dahl in 1957 found that in the long run the Supreme Court was likely to conform to the policy preferences of the current dominant coalition. Even though the Court has the opportunity to rule in opposition to majority opinions among citizens, they do not often take this route.

When the Court voted against majoritarian views, it was often due to upholding minority rights. The most representative period of such rulings in favor of minorities and politically disempowered groups was in the post-New Deal period, as topics such as women's rights, segregation, abortion, interracial marriage, and access to birth control became highly controversial issues.⁷ The rulings on these issues and the available public polls published at the time demonstrate that support was growing in the direction of the Supreme Court's final decision. In cases where a tenuous majority already supported the Court's decision, the majority grew, whereas in cases that held less than a majority of popular opinion, support grew to an extent that a majority was gained.⁸

In this time period, the rulings in which the Supreme Court delivered an opinion contrary to majority opinion were in cases that dealt with racial issues. The most famous was *Brown v. Board of Education* (1954) where the Court declared segregation

in public schools unconstitutional and in *Loving v. Virginia* (1967) which involved the overturning of laws in the southern and border states that banned interracial marriage. The Supreme Court was clearly opposed by the majority of whites in these states, as national support was less than fifty percent. Another example of a controversial ruling occurred with the legalization of abortion in forty-seven states through *Roe v. Wade* (1973).⁹ Unlike the two cases dealing with race relations, there was evidence that popular support for abortion had been on the rise. In fact support had risen thirty percentage points in the eight years prior to the decision. Thus, in this case, the Court seems to have worked in tune with the trend of popular support though the actual amount of support at the time of the decision was again clearly not a majority.¹⁰

This era following the New Deal is often accredited to the “revolutionary” results of the Earl Warren Court that endured from 1953 until 1969, followed by the Warren Burger Court. The Court in these eras was best known for giving priority to the fulfillment of civil liberties and rights even in opposition to states’ claims.¹¹ Chief Justice Earl Warren was characterized by his preference to ignoring the political considerations and the possible uproar that would result from Supreme Court decisions and instead strictly interpreting the law based on the principles at stake. Warren indeed extended the power of the Supreme Court when he allowed the Court to interpret cases based on a “living Constitution” that must adapt and consider present conditions.¹²

This period of Supreme Court had a profound effect on judicial review. The courts were responsive to social and political changes and regarded the Constitution as a living document, and were also willing to hand down highly unfavorable rulings favoring minority rights guaranteed by the Constitution and the Bill of Rights. Whether the Court’s decisions are based on strict constructionist rulings that firmly adhere to the founding ideals set by the Constitution or whether it should respond to evolving moral sentiments remains a highly controversial topic.

Part Ib. In Favor of Judicial Review

According to Ronald Dworkin, a scholar who favors judicial review, legal positivism describes the nature of judicial review for hard cases. In cases where the texts do not give indications as to how a judge should rule, the judge has the discretion to create the law, justifying his position in his statement. Often, statutes will prove too vague and will require adjudication to define them, or cases arise which previously could not have been foreseen. The courts must then act as a “deputy” to the legislative branch by applying and creating laws in the manner that they believe would have best matched Congress’ views.¹³ Richard Fallon, a professor of Constitutional Law at Harvard Law School, elaborates on this theory by suggesting that fundamental rights need to be protected by both the legislature and the judiciary working in tandem rather than giving one branch more weight than the other. The goal is to use both branches in order to protect moral rights, not to determine which branch would do better should resolve and uphold them. When a court invalidates legislation, the sitting members’ motivations do not consist of trying to advocate for the dominance of the judiciary, but rather to check the government.

The balance between Congress and the Supreme Court is directly associated with the balance between the arguments of policy and arguments of principle. Policy is associated with the legislator’s current political agenda that strive to provide better services for the people. Principle is associated with the ideals of the Founding Fathers that were enumerated in the Constitution. The furtherance of both, better policy and strong principles needs to be adopted in order for any law to function. The role of

Congress is to pursue policy goals as the legislature's deputy while the role of the Court is to be an interpretive body that hands down decisions based on principles deriving from the U.S. Constitution. Even if the original text was created in the interest of policy, the continuation and defense of these ideas necessarily translates to principle when the Court upholds them since the role of the Court is to uphold principle rather than policy. When a policy becomes outdated, the principle generated from that policy is still upheld in the text. Thus, both policy and principle are vital parts to all types of legislation that pass through Congress and pertain to the people, and the legislature and the judiciary work together to uphold both ideals.

Judicial activism has served as an avenue to protect the rights of the minorities in the post-New Deal era. This adamant protection of rights can be analogized with the system of criminal trials. Because there must be a unanimous vote by a jury in order to convict the defendant on trial, one could argue that individual rights are preferred to absolute truth and accuracy.¹⁴ Because each juror is able to express any doubts with veto power, the government is required to prove beyond a true reasonable doubt that the defendant is guilty before convicting and sentencing.¹⁵

The third major argument favoring judicial review is that it helps establish political legitimacy of the U.S. government by protecting fundamental rights even if it may not establish democratic legitimacy. Many scholars who oppose judicial review do not accept such outcome-related arguments, dubbing them insufficient and improper.¹⁶ These scholars would dictate that democratic legitimacy should never be infringed upon in our society. If society collectively decided that in order to settle disputes, the will of the majority would be absolute, and judicial review would be rendered superfluous. However, the U.S. does not function without legal outcomes and is not solely based upon rigid principles. Furthermore, the Founding Fathers did not envision a society that would be ruled by a pure majority. In the *Federalist Papers*, James Madison clearly asserted the government would protect minority rights against the tyranny of the majority. The reality of the importance of good outcomes and the need to protect minority rights thus legitimizes the use of judicial review as a tool to protect against a tyrannous and oppressive majority.

Although judicial review does play an important role in legitimizing a nation's politics, a key principle in the character of the U.S. is democracy and the institution of judicial review cannot infringe upon this most basic principle. There are four main arguments demonstrating that judicial review does not infringe upon democratic legitimacy in the United States. First, judicial review does improve the protection of fundamental rights better than if the system of review were not in place. Second, the government that allows for judicial review has other democratic institutions such as the legislature, which has powers to enact legislation and to decide policy issues. Because the judicial branch makes up only one component of the complete democratic structure of government, its legitimacy can be inferred by the checks and balances derived from the separation of powers. Third, the institution of judicial review was created by a majority or supermajority in the writing of the Constitution.¹⁷ All of the thirteen states in a democratic process ratified the Constitution granting power to the judiciary to fulfill its duty in Article III Section 2: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."¹⁸ Because the judiciary is given the duty to uphold the law of the United States, judicial review was an obvious extension from this duty, and was implemented in *Marbury v. Madison*.

Part Ic. Against Judicial Review

The institution of judicial review has been polemical since *Marbury v Madison*. Yale Law School constitutional scholar Alexander Bickel acknowledges that there are many complexities in the American governmental and justice systems that cannot perfectly represent the will of the majority, but, nevertheless, these imperfections cannot overcome “the essential reality that judicial review is a deviant institution in the American democracy.”¹⁹ Legal philosopher Jeremy Waldron also argues against judicial review. He posits two major points outlining why the use of judicial review as a final decision-making mechanism is inappropriate in a democracy. First, Waldron points to the fact that the legislature is perfectly capable of making policy decisions corresponding to the will of the people. The argument that judges have access, from which legislatures are inevitably removed, to a sampling of how policy affects individuals is inaccurate.²⁰ Legislation can indeed be reactive to individual cases, as evidenced by Megan’s Law. In this case, a young girl, Megan Kanka, was abducted, raped and murdered by a repeat sex offender. Her parents responded to this atrocity with a petition resulting in state legislatures’ passing a law requiring law enforcement officials to reveal information on sex offenders.²¹ A year after the law was enacted in Megan’s home state of New Jersey, it was passed into federal law by Congress. The success of Megan’s Law shows that members of Congress, like the courts, have access to “flesh and blood” cases, or cases about whose possible effects judges are aware.

Secondly, although many argue that judicial review can be used to focus on principle issues when citizens disagree on rights and liberties, in actuality, judicial intervention distracts from the main conflict at hand by unduly concentrating on text, precedent, and interpretation. The Bill of Rights is often the central text regarding judicial review and, more often than not, rights cases use this reference.²² Often, the attorneys, judges, and legislators on both sides of an issue will obsessively study the document and manufacture catchphrases whose modern interpretations may not have been intended by the writers. Because the Bill of Rights cannot cover every detail regarding individual and minority rights, it cannot serve as the only definition of rights. On the other hand, the legislature is perfectly capable of taking moral arguments into account while adhering to the Bill of Rights primarily because it is made up of elected officials.

In understanding the political and legal system, Americans rely on the stated reason that accompanies a judge’s decision. Unlike the legislature’s debates, the Court must leaf through the limited permissible reference documentation to analogize and justify their opinions. In the decision of *Roe v. Wade*²³, there were a plethora of moral issues at stake, but the Court spared only a few paragraphs of the lengthy decision for the moral issues related to productive rights, privacy, and the rights of the fetus. The vast majority was allocated to the legally authorized facts to which the Court was allowed to refer. While judges tend to meander around written law and precedent in order to find a suitable way to apply the law and defend the decision, legislators are able to go to the heart of the matter through political deliberation. Since the Court has the ability to unilaterally impose decisions that affect the lives of many without the crucial political deliberation that would garner popular approval for the policy, the Supreme Court has a more difficult time handing down decisions that the American people accept. This is especially true for conflict-ridden issues like abortion.²⁴

Because the political process is deliberative and includes active participation by advocacy groups on both sides, legislative decisions are far more likely to hold legitimacy with dissenters. In a democracy, elections are intended to create bodies that

represent the people's interests, and policy is made through the majority decision of the elected representatives. Although an imperfect system, it is more representative of the constituency than a nine-member court that is not held accountable to the people. Further evidence in support of the Court's distance from the population is found in Justice Antonin Scalia's dissenting opinion in *Planned Parenthood v. Casey*²⁵, in which he made it clear that the duty of the Court was not to provide "social consensus" but to ascertain "objective law."

Prime examples in which Court decisions do not enjoy the public's approval include two cases concerning the display of the Ten Commandments in government buildings. In the first case, the Supreme Court declared the display of the Ten Commandments in two courthouses in Kentucky as unconstitutional in a five-four vote. In the second, the exhibition of the same document in front of the Texas State Capitol in Austin was upheld as constitutional, also in a five-four vote.²⁶ Due to this slight imbalance, the Court created an ambiguous situation regarding the Establishment Clause in the First Amendment, that is the separation of church and state. Another obstacle confronting the objective reading of the law is the ideologies of the justices, often correlated to the political leanings of the President and Senate that appointed them. If, as Justice Scalia claims, the justices are meant to only interpret the Constitution and hand down "objective law," then the divisive split in ideological leanings of the Court, is contrary to this objective ideal.

Arguments in favor of judicial review often advocate the legislative power to amend the Constitution if the judiciary makes an unsatisfactory ruling based on the document. However, a supermajority of three fourths of the states is necessary before any amendment can be passed, and it takes time to undo a judicial ruling by changing the supreme law of the land. Thus, judicial review when implemented against the will of the majority can hinder the democratic process by requiring a great expenditure of time and effort to reverse the contrary decisions of the Court.

The Supreme Court's ability to review federal and state legislation remains highly contested. Both sides use arguments regarding legitimacy. Those opposed to judicial review argue that democratic legitimacy is more important, whereas those in favor argue that democratic legitimacy is only one component of political legitimacy. It remains unclear whether the legislature is apt to prevent creating laws that violate fundamental and minority rights without higher oversight by a body empowered to invalidate unconstitutional laws. Although policy should be derived from the legislature rather than the Court under most circumstances, is the protection of fundamental rights crucial enough to warrant two bodies working together to uphold these rights, perhaps, at the expense of democracy?

Part II: A French Perspective on the Judiciary

France is one of the few democracies where the courts cannot exercise judicial review to judge whether acts of the Parliament impinge upon the civil rights and liberties of the people. Historically, the King first handed down judicial decisions to judges who were appointed to represent him. This system was highly corrupt, slow, and ineffective; however, Parliament vehemently opposed appeals for change in the 18th century.²⁷ Correspondingly, one of the central ideas entering the revolutionary period was the diminution of the judiciary's power. Since the French Revolution in 1789, the country's government has been characterized by a strict separation of powers and a weak judiciary. During the Revolution, judges lost a large amount of power since they could

not regulate, question, or examine the legality of the actions of the executive or of public officials. Additionally, they were deprived of the power to challenge legislation and to attempt to legislate by creating precedent. Initially, whenever a case brought before a court involved vague legislation, the judge had to refer the case to the legislature in what is called a *référé législatif*. Eventually, this approach of the *référé législatif* was viewed as unworkable and the power to interpret was conceded to the judges. In order to keep checks on judicial power, the *Tribunal de cassation* was created in order to review the interpretations and applications of the Court. Also, judges were required to reveal the source of law that had motivated their decision in order to ensure that no precedent or other means had prompted the conclusion. Thus, with the categorical rejection of the concept of referring precedent the legislature was ordained the task of creating law so comprehensive that judges would rarely, if ever, have to face a situation where they would be required to make law by interpretation. Judges became, in effect, civil servants referred to as an “authority” rather than a “power.”²⁸

The French, known for their devotion to the sovereignty of legislative acts, have come up with resistance to increasing judicial power and review. Since the time of the French Revolution, no court has declared an act of Parliament unconstitutional. This is grounded in Jean-Jacques Rousseau’s concept of *la volonté générale* (meaning “general will”), in which the legislature represents the will of the people. The 1789 *Declaration of the Rights of Man and of the Citizen* demoted the role of the judiciary so that judges could merely verify existence and applicability of laws, but not go further in examining legislative work.²⁹ The government had mutated from a liberal state into one centered on the legislature, which was entrusted with both civil liberties and judiciary functions.³⁰

Part IIa. Creation of the Conseil Constitutionnel

The only check available on legislative acts was written into the 1958 Constitution of the Fifth Republic establishing the Constitutional Council that could review such acts. The Constitutional Consultative Committee made clear that the Council was not meant to be an independent and impartial body, but would consist of government supporters tasked with checking the legislature and not the executive.³¹ The Constitutional Council consists of nine politically appointed members with nine-year non-renewable terms. These members do not undergo a confirmation process.³² Also, they are only permitted to review bills which are not yet law.

Striking a contrast with the United States’ *a posteriori* approach that addresses problems with the bill subsequent to its passage, this methodology is *a priori* or preventative. However, as Waldron points out, pre-passage review does not account for unforeseeable dilemmas that emerge after the bill’s passage, and so the priority and obligation to uphold the French Civil Code and avoid any rupture with its statutes could be diminished. In the first few years after its creation, the *Conseil’s* role was indeed trivialized for this very reason; the Council even refused, in 1962, to review referendum laws because it wished to remain subservient to the general will.³³

Things have changed since 1958, and France’s review process has developed some characteristics similar to the United States’ model. Nevertheless, some fundamental differences remain. In the United States, judicial review is praised for its accessibility to the public and its devotion to protecting minority rights. In France, on the other hand, only a select group of French politicians may refer bills to the Council, and so ordinary citizens do not have the power to challenge a law’s constitutionality. This select group of politicians is composed of the President of the Republic, the prime

minister, and the President of the National Assembly and the President of the Senate. Later, a provision was added where legislators could refer bills but there must be a majority in Parliament before the bill can be referred.

This council is quasi-judicial in comparison to judicial bodies in other countries. It must hold secret deliberations in formulating decisions and the final judgment must be published for the public record. In contrast to most judicial bodies though, the Council only considers legislative matters and has no other function. Unlike the U.S. Supreme Court, it cannot sort through and select preferred cases, but instead *must* discuss and decide all cases referred to it.³⁴

The *Conseil's* turnover arrangement engenders political dynamics distinct from those of the Supreme Court. Because Council members are appointed to nine-year terms with new appointments every three years, turnover ensures that the reigning government a hand in appointing judges of their own political philosophy and the ability to end stalemate caused by appointees from the current government. Unlike the Supreme Court, the *Conseil Constitutionnel* has real turnover quite often. This can help lessen the political tensions, dispute, and the overall deadlock that can harm a government whose politicians are not in tune. Tensions are also alleviated with other branches; the *Conseil* is a part of the legislative branch. However, as a consequence of the setup, the Council lacks any important form of judicial review. Since appointment is made by the current dominating party, it is more likely to be politically motivated.³⁵

Part IIb. Reform of the Conseil Constitutionnel

The role of the Constitutional Council has been ever-changing since its inception. From its origins in the 1950s until the 1970s, the Council only decided on issues pertaining to the separation of powers and disputed elections, thus helping to relieve some of the turmoil stirred up by the previous Fourth Republic. In the 1970s, the role of the Council became more prominent, as shown by the Council's recourse to the 1789 *Declaration of the Rights of Man* and the preamble to the Constitution of the Fourth Republic to disqualify a parliamentary bill. This decision paved the way for both for the practice of backing court decisions with French laws and documents and for liberal rights and freedoms.

The Council gained greater power in 1974 when Parliament was granted the right to send laws for review. By the late 1980s, eighty percent of decisions were referred from Parliament. Prior to the addition of Parliament's influence, there had been a total of nine references in sixteen years, but in the subsequent seven years following the reform, the number leaped to forty-seven.

In demonstration of the Council's increased importance, the question of judicial review has recently become a source for heated conflict between parties. Conflict erupted between the new socialist government of President Francois Mitterrand and the individualistic Constitutional Council, when the Socialist Party defeated the largely conservative government in power since the start of Fifth Republic in 1958, just a year before President Charles de Gaulle was elected. Within six months, the Council struck down five of ten social reforms stemming from Socialist Party policy. The deputy for the Socialist Party responded to the Council with "Vous avez juridiquement tort parce que vous êtes politiquement minoritaire," loosely translated as "You are legally wrong because you are in the political minority."³⁶

As a major departure from its humble beginnings, the Council can now subvert or halt unpopular legislation. Today, many major bills are challenged, and the more controversial or influential the bill, the more likely it will be referred to the Council.

Scholars often fear that the Council will attempt to re-invoke the period of “gouvernement des juges” which characterized the reign of corrupt judges prior to the revolution. Advocates for increased power of review compare the system to that of the United States and the Supreme Court, arguing that in order for the Supreme Court to gain prestige and public acceptance, time was necessary to strengthen its support. Because France confronts a history of great suspicion regarding courts and judges, the Court’s legitimacy may ultimately depend on how strongly it considers public opinion and the work of representative bodies.³⁷

In the 1990s, there were several attempts to create an *a posteriori*, or post-passage, form of judicial review, but all failed. As noted by Canadian politician F. L. Morton, judicial review in the United States can often fly under the radar in times of consensus, whereas when political and social turmoil are present and the decisions of the Supreme Court are more polemical, the public begins accusing the Court of being illegitimate and undemocratic.³⁸

Part IIc. A Posteriori Reform

In July of 2008, French President Nicolas Sarkozy announced a constitutional revision bill for the modernization of the government of the Fifth Republic. The bill introduces a *a posteriori* constitutional review of legislation. In Article 61 of the French Constitution of 1958, the *Conseil Constitutionnel* is given the power to review legislation. The added section of Article 61-1 entails that in the course of a case, if it is argued that the relevant statute is unconstitutional, then the judge on the case may then refer the issue to the Constitutional Council. It should be noted that only the *Conseil d’Etat* and the *Cour de cassation* – the highest court in the French judiciary – can refer cases. Should the Council find that the statute is indeed unconstitutional, the judge cannot use the statute in his decision and the statute is permanently repealed. But if the statute is deemed constitutional, the court proceeds with its application.

The ultimate question deals with whether the Constitutional Council can sufficiently check legislative power as it is or if a more *a posteriori* judgment is necessary. On one side, scholars, notably Louis Favoreu, believe that even if radical change is slowed by the decisions of the Council, eventually this legislation will be passed, regardless of whether it requires minor changes to the bill or changes to the Constitutional Council itself. Constitutional control is intended to be a counter-majoritarian check against certain defects of democracy that encourage the oppression of minority rights. Another concern supervening on constitutional control is the need for a constitution to adapt to political and social change—the need to be rigid in principles and flexible in its governance. In the case of comparing the *code Napoléon* (i.e. the French civil code) and the U.S. Constitution, the former is the more flexible because its interpretive body, the Constitutional Council, is more flexible. The Constitutional Council has been dubbed both *une auto-limitation de la majorité gouvernementale* as well as *l’authentification du changement* (i.e. an auto-limitation, or intergovernmental limitation, on the majority government, and an authentication of change).

Even if the judicial check on political legislation can be eventually affected by politics, its legitimacy derives from its distance from these political forces. In spite of the exceptions hinted at above, decisions are accepted as law in the United States because the Supreme Court derives its reasoning from constitutional principles rather than from political leanings. Many scholars believe that this formula will hold true for the *Conseil Constitutionnel*. If the body is perceived as a political body attached to

Parliament, its legitimacy will be thrown into question and its decisions rendered ambiguous.

Part III: Conclusion

Based on the principles of two different revolutions, the processes of review on legislation that formed in the United States and France diverge in practice and philosophy. Historical roots that brought mistrust of tyranny by the executive and the majority in the U.S. and mistrust of judicial oppression in France led to different philosophies on judicial review in each nation. A central question that scholars will continue to study is whether the *Conseil* will grow in the same fashion as did the Supreme Court. Supporters of the addition of *l'exception d'inconstitutionnalité* argue that this new procedure would grant citizens a new right in invoking Constitutional and fundamental rights. At the same time, this addition would require a change in attitude of the French people toward court systems and the vesting of power in judicial authorities. The newest constitutional reform proposed by Sarkozy, which passed legislative voting by one vote in 2008, called for a move of power toward the executive and *a posteriori* review for the Constitutional Council. These reforms are highly controversial and time must pass before it can be determined whether France is willing to accept and legitimate this shift in government power.

Americans remain divided over the issue of judicial power as well. The periods of judicial activism and restraint cycle from era to era with no long-term trend in either direction. One of the easiest trends to grasp onto regarding judicial activism in the United States is politics. In the New Deal period, advocates for and against judicial review were nearly evenly split along party lines. But now, when judicial activism can hand down either liberal or conservative measures, the correlation between party and viewpoint is less obvious. Judicial decisions are often swayed by politics and public involvement and scrutiny of these decisions motivates lobbying, protest, praise, and outrage. This environment, the French fear, may develop if the Constitutional Council becomes a court independent of democratic accountability. The politicization of the process may lead to controversial decisions based on moral beliefs rather than on a strict legal code. The history of France dictates that the civil code should be the supreme and only law, and should be sufficiently thorough so that the court does not need an opinion of its own; the court should merely follow and enunciate the principles created in a constitutional document.

The differences between the U.S. Supreme Court and the *Conseil Constitutionnel* can seem irreconcilable. Perhaps in two very distinct democracies, the common need to protect fundamental rights calls for distinct approaches. Either way, both systems have progressed and evolved, and one can only wait and see whether there shall be a convergence of attitudes and culture surrounding judicial review.

Endnotes

¹ U.S. Declaration of Independence, paragraph 2.

² U.S. Const Art 3.

³ Peter Schotten. "Marbury v. Madison, Rightly Understood." 33 *Perspectives on Political Science* 134, 136 (2004).

⁴ Id at 136.

⁵ Id at 135.

⁶ Id at 135.

⁷ David G. Barnum, "The Supreme Court and Public Opinion: Judicial Decision Making in the Post-New Deal Period," 47 *Journal of Politics* 652, 667 (1985).

<http://web.ebscohost.com.offcampus.lib.washington.edu/ehost/pdf?vid=3&hid=104&sid=5e1e1fe5-426a-46b5-adad-0f4995fe0c56%40sessionmgr102>.

⁸ Mark V. Tushnet, "Policy distortion and democratic debilitation: comparative illumination of the countermajoritarian difficulty," 94 *Michigan Law Review* 245-301 (1995).

⁹ Id at 248.

¹⁰ Id at 284.

¹¹ Harry N. Scheiber, *Earl Warren and the Warren Court* at 8-10 (Lexington Books 2007).

¹² Id at 2-9.

¹³ Ronald Dworkin, *Taking Rights Seriously* at 81 (Harvard UP 7th ed 1978).

¹⁴ Id at 133.

¹⁵ Id at 133.

¹⁶ Jeremy Waldron, "The Core of the Case Against Judicial Review," 115 *Yale Law Journal* 1346, 1348 (2006).

¹⁷ Id at 1377-1379.

¹⁸ U.S. Const Art 3.

¹⁹ Jeremy Waldron, "The Core of the Case Against Judicial Review," 115 *Yale Law Journal* 1346, 1349 (2006).

²⁰ Id at 1379.

²¹ Id at 1380.

²² Id at 1381.

²³ 410 U.S. 113 (1973).

²⁴ Jeremy Waldron, "The Core of the Case Against Judicial Review," 115 *Yale Law Journal* 1346, 1379-1385 (2006).

²⁵ 505 U.S. 833 (1992).

²⁶ "High court split on Ten Commandments", *CNN Law Center* (June 27, 2005), online at <http://articles.cnn.com/2005-06-27/justice/scotus.ten.commandments_1_kentucky-decision-displays-current-public-life?_s=PM:LAW>.

²⁷ "The Judiciary in France." Ministère de la Justice, online at <www.justice.gouv.fr/art_pix/plaquette_justiceenfrance_angl.pdf>

²⁸ John Henry Merryman, "The French Deviation", 44 *American Journal of Comparative Law* 109, 109-113 (1996).

²⁹ Federico Fabbrini, "Kelsen in Paris: France's Constitutional Reform and the Introduction of *A Posteriori* Constitutional Review of Legislation," 9 *German Law Journal* 1297, 1298-1302 (2008).

³⁰ Cyril Brami, *Des juges qui ne gouvernent pas* (Editions L'Harmattan 2005).

³¹ Alec Stone, *The Birth of Judicial Politics in France* at 47 (Oxford University Press 2nd ed 1992).

³² Marc V. Tushnet, "Policy distortion and democratic debilitation: comparative illumination of the countermajoritarian difficulty," 94 *Michigan Law Review* 245, 301 (1995).

³³ Federico Fabbrini, "Kelsen in Paris: France's Constitutional Reform and the Introduction of *A Posteriori* Constitutional Review of Legislation," 9 *German Law Journal* 1297, 1303 (2008).

³⁴ Alec Stone, *The Birth of Judicial Politics in France* at 47 (Oxford University Press 2nd ed 1992).

³⁵ F.L. Morton, "Judicial Review in France: A Comparative Analysis," 36 *The American Journal of Comparative Law* 89, 99-100 (1988).

³⁶ *Id* at 95-98.

³⁷ *Id* at 93-94.

³⁸ *Id* at 92.

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Measuring Backlash: Understanding the Diverse Outcomes of Same-Sex Marriage Decisions

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Introduction

In the last half-century, progressives have increasingly sought to bring about social change through litigation.¹ As a result, courts have been asked to adjudicate some of the most toxic social issues in recent American history. It is difficult to gauge whether activists have benefited from entering the courts. That *Brown v Board of Education*² stands as a “hallowed icon” of American equality while the future of *Roe v Wade*³ remains uncertain is testament to the mixed results of social-change litigation.⁴

Emulating the NAACP and the National Organization for Women (NOW), the movement for marriage equality has used litigation as a vehicle to achieve marriage equality.⁵ Over the past two decades, same-sex marriage has become legally recognized in five states and in the District of Columbia; all but two cases (New Hampshire and the District of Columbia) involved judicial intervention. In this same period, Congress passed the Defense of Marriage Act (DOMA), President Bush endorsed a proposed federal constitutional amendment that would ban same-sex marriage, and thirty-six states took legislative action to prohibit same-sex marriage. Clearly, there has been significant social and political backlash to same-sex marriage litigation.

The phenomenon of antijudicial backlash has received significant academic attention.⁶ However, much of the literature on antijudicial backlash takes a normative position, arguing either that litigation is, or is not, an ultimately effective tool in the arsenal of social-change movements. Where some see the courts as agents of change others contend that progressive decisions are all too often negated by fierce conservative counterattack.⁷ But this contention, even if true, is of little practical use. Activists will continue to bring heated issues before the courts and controversial decisions will inevitably engender some level of resistance.

Surprisingly, there has been no discussion about what factors may affect the intensity of backlash. Why do some decisions spark such acrimonious backlash while others produce little to none? Under what circumstances will antijudicial backlash overturn a court decision? What accounts for the variability in backlash? This paper proposes three variables that affect the magnitude of backlash: (1) public opinion; (2) the extent of legislative involvement; (3) and the ease of evading, eroding, or overturning the decision. By employing this three variable paradigm to contrast short-lived same-sex marriage decisions with those that were ultimately successful at establishing marriage equality I hope to articulate a useful framework for prognosticating antijudicial backlash.

This paper is divided into four parts. In Part I, I investigate the theory of antijudicial backlash and then outline the three variables that I will use to analyze the intensity of backlash precipitated by pro-same-sex marriages decisions. In Part II, I examine two same-sex marriage decisions that triggered immense backlash and then I go on discuss the role each variable played in intensifying the backlash. In Part III, I consider two same-sex marriage decisions that incurred little backlash and here argue this can be attributed to a favorable orientation of the same three sociopolitical factors. I conclude in

Part IV by exploring the various implications posed by the three variable paradigm for the marriage equality movement and, more generally, social change activism.

I. The Three-Variable System for Predicting the Intensity of Antijudicial Backlash

As Chief Justice Marshall expounded in *Marbury v Madison*⁸, the duty of the judicial branch is to protect and uphold the principles of the Constitution above all else. This responsibility often forces courts to assume a “countermajoritarian” role.⁹ It is when courts adopt this position that they trigger “a political and cultural backlash that may...hurt, more than help” progressive movements.¹⁰ The term “backlash” is used to describe “politically conservative reactions to progressive (or liberal) social or political change.”¹¹ In other words, backlash is the resistance of entrenched power to movements attempting to change the status quo. By nature, backlash must: (1) be a reaction to liberal change; (2) involve coercive power; and (3) focus on reinstating the previous power structure.¹² Virginia’s “Massive Resistance” to integration, pro-life groups’ outrage with *Roe v Wade*¹³; and anti-LGBT groups’ reaction to *Lawrence v Texas*¹⁴ are all examples of backlash. All three movements arose in response to progressive reform; employed both subtle (ostracism, threats, name calling) and explicit (lynchings, murders, bombings) coercive techniques; and all sought to impede change.

Court decisions generate backlash for two reasons. First, the nebulous and vague phrasing of the First, Fourth, Fifth, and Fourteenth Amendments—the amendments most often invoked in rights litigation—forces judges to define these national values such as dignity, family, freedom, and equality, which, given the heterogeneity of our society, embody a host of different and often conflicting meanings.¹⁵ When a court passes judgment on contested cultural values some segment of the public will inevitably feel alienated and angry. Naturally, this group will resist the court’s ruling.

Second, courts spark backlash because they bring about change in a more abrupt and rigid manner than would have otherwise occurred in a democratic setting.¹⁶ The legislative and executive branches engender backlash much less frequently because they often negotiate until a compromise can be reached. Courts, however, cannot broker deals or exchange favors, but rather must make unequivocal rulings in order to provide litigants with clear relief.¹⁷ Since the legitimacy of the judiciary is, in part, derived from its nonpolitical nature, courts cannot dilute decisions to appease the majority. Consequently, it is when courts recognize a minority’s rights without political or popular support and force change before the supportive infrastructure exists that they engender backlash.

A. The varying potency of backlash

The intensity of antijudicial backlash can be attributed to the interplay of three variables: (1) public opinion; (2) the extent of legislative involvement; and (3) the ease of evading or invalidating the court’s decision. The interaction of these three variables can have either a synergistic or antagonistic effect on the strength of backlash prompted by a judicial decision.

Fundamental to a court’s legitimacy and a key component of backlash is whether the court’s decision falls in line with public opinion. If a majority of the country (or state) is sympathetic to the movement and supports the court’s findings, then the backlash will be relatively weak. Localized opposition or fringe groups may be able to fight change for some time but will ultimately be defeated by elites, who will protect the

courts if doing so is politically profitable. When, however, the public strongly disagrees with a court's decision, opponents can easily mobilize a counterattack and accrue enough political capital to prevent the implementation of the decision. The greater a court diverges from public opinion, the stronger the resistance.

Congressional or state legislative involvement both before and during litigation considerably affects the virulence of antijudicial backlash. If the legislature has already advanced the issue, there may be a strong foundation of statutes and legislative history for the court to use in explaining the rationale behind its decision. What might have been seen as an activist decision without political support is instead seen as an affirmation and extension of the work being done by elected officials. Additionally, an important but often ignored factor is whether the court recognizes the role of the legislature in its decision. By deferring to elected officials, courts can allow moderate change to occur with broad support. When courts order the legislature to play a role in crafting the remedy, social change becomes a product of the people, weakening resistance. In sum, when courts have a legislative foundation to build on or allow the legislature to work out a politically acceptable solution, backlash is weakened; if, however, the courts are the sole catalyst of change, backlash is much stronger.

The ease with which direct democracy can minimize or invalidate the decision profoundly affects both the strength and success of backlash. Overturning a decision handed down by a court of last resort can be a long and politically tedious endeavor.¹⁸ States with easily amendable constitutions experience heightened backlash because the opposition can overturn the decision more easily. Conversely, in states where the constitutional amendment process requires opponents to overcome numerous legal, political, and social barriers, backlash is much weaker. If the social and political landscape affords opportunities for legitimized and effective resistance, backlash will be stronger than when opponents face an unwinnable and endless battle to maintain the status quo.

Thus, it follows that backlash is weakest when public opinion is in accord with the court, the legislature has created a supportive climate for change or plays a role in the decision, and no easy route exists to overturn the decision. The court will face ferocious backlash when the decision is at odds with popular ideologies, there is no legislative foundation to utilize or the court ignores popular government, and the decision can easily be invalidated. By applying these variables to a selection of key same-sex marriage cases, it will become evident that the strength of backlash is a product of these sociopolitical variables.

II. Failures

Same-sex marriage litigation has resulted in disaster on several occasions. Initial losses in federal court almost eliminated the possibility of a marriage equality movement.¹⁹ Yet even worse, several favorable state supreme court decisions have triggered severe backlash. Two cases in particular, *Baehr v Lewin*²⁰ and *In re Marriage Cases*²¹, ended when overwhelming public and political backlash overturned state supreme court decisions in favor of marriage equality. The trajectory of same-sex marriage in Hawaii and California demonstrates how these three variables can negatively impact social change litigation.

A. The history of short-lived decisions:

1. Hawaii: *Baehr v Lewin*

When the battle for marriage equality in Hawaii began in 1991, twenty-five states prohibited sodomy and approximately 70 percent of the country believed homosexuality was “wrong.”²² Clearly, the nation was not tolerant of homosexuality, much less same-sex marriage. In 1990, after being denied marriage licenses, three same-sex couples in Hawaii chose to sue John Lewin, the administrator of the state’s marriages and Director of the Hawaii Department of Health. After the trial court dismissed their claim, they appealed to the Hawaii Supreme Court. In 1993, the Supreme Court vacated the lower decision, finding the state in violation of the state constitution’s equal protection provisions unless it could demonstrate a compelling reason to limit marriage to heterosexual couples. In order to allow the state to demonstrate this interest, the Supreme Court vacated *Baehr* back to a trial court.²³ In 1996, the trial court concluded in *Baehr v Miike* that the state had failed to meet its burden.²⁴ Two years later, conservative backlash succeeded in overturning *Baehr* when Hawaiian voters approved a constitutional amendment allowing the legislature to limit marriage to heterosexual couples, which it did soon after.

The backlash to *Baehr* spread onto the mainland. Other states, fearing they would have to respect Hawaii’s marriage licenses under the Full Faith and Credit Clause, took action to carve out “policy exceptions.”²⁵ Utah, the first state to react to *Baehr*, passed legislation barring same-sex marriages in 1995.²⁶ The next year, thirteen state followed Utah’s lead.²⁷ By 1998, twenty-five states had banned same-sex marriage; twenty-three by legislation and two states, Hawaii and Alaska, by constitutional amendment.²⁸ In total, between 1990 and 2001 six states amended their constitutions to prevent marriage equality litigation.²⁹ *Baehr* also triggered a backlash at the federal level. In 1996, Representative Bob Barr and Senator Don Nickles introduced bills into their respective chambers aimed at restricting marriage to heterosexual couples. Titled the Defense of Marriage Act (DOMA), the law had two components: (1) “No state needs to treat a relationship between persons of the same sex as a marriage, even if the relationship is considered a marriage in another state” and (2) “The federal government defines marriage as a legal union exclusively between one man and one woman.”³⁰ Both houses passed DOMA by an overwhelming majority (Congress 243-67 and the Senate 85-14).³¹ In the House summary of the bill, the drafters were careful to point out that DOMA was passed “in light of the possibility of Hawaii giving sanction to same-sex marriage.”³² President Bill Clinton signed DOMA into law on September 21, 1996. Under DOMA, same-sex couples were deprived of the thousands of legal and economic benefits the federal government affords married couples.³³ Taking note of DOMA, states began to pass their own mini-DOMAs. By 1998, thirty states had passed legislation verbatim or similar to DOMA.³⁴

Although some called *Baehr* a “major breakthrough”, such claims are hard to accept due given the significant backlash to the Court’s ruling.³⁵ Indeed, fewer than five states had laws limiting marriage before the litigation began but by the time the trial court finished revisiting the issue that number had increased to fourteen, Congress had passed DOMA, and Hawaiian voters were deciding how to vote on an anti-same-sex marriage constitutional amendment.

2. California: *In re Marriage Cases*

The regressive arc of same-sex marriage in California also clearly illustrates how antijudicial backlash can be sufficient to overturn a decision. Just a month after President Bush called for a constitutional amendment against same-sex marriage in his 2004 State of the Union Address, San Francisco Mayor Gavin Newsom made headlines by ordering city officials to issue same-sex marriage licenses. Over three thousand same-sex couples were married from February 12th until March 11th, when the State Supreme Court halted the weddings, finding that Mayor Newsom had overstepped his authority.³⁶ Subsequently, five same-sex couples filed lawsuits seeking the right to marriage. These cases were consolidated into *In re Marriage Cases*. In the San Francisco Superior Court, Judge Richard Kramer ruled in favor of the couples but in November 2006, the California Court of Appeals, in a two-to-one decision, overturned the ruling. The California Supreme Court, in a four-to-three decision, sided with the trial court, ruling “the right to marry is not properly viewed simply as a benefit or privilege that a government may establish or abolish as it sees fit.”³⁷ With that decision, California became the fourth state to establish marriage equality in December 2006. The victory for gay rights groups was short lived.

Even before the California Supreme Court made its ruling, conservative organizations, the Catholic Church, and the Church of Latter-Day Saints had begun to push for an amendment to the state constitution. During the November 2008 election, California passed Proposition 8, adding a section to the California Constitution that read, “Only marriage between a man and woman is valid or recognized in California.”³⁸ Since the State Supreme Court has upheld the amendment there are only two ways to reestablish marriage equality in California: amend the California Constitution to invalidate the current amendment or have a federal court strike it down on US constitutional grounds.³⁹

B. Constitutional amendments and overwhelming backlash

1. Public Opinion

In Hawaii and California public opposition to same-sex marriage led to massive backlash. Since most disagreed with the courts, they either actively joined the backlash or quietly voted for the amendment. In response to *Baehr*, conservative organizations like the American Family Association, Concerned Women for America, Family Research Council and Focus on the Family collected signatures for an amendment petition, which they then presented to the Hawaiian State Legislature.⁴⁰ After a constitutional amendment was placed on the 1998 election ballot, these groups swamped the airwaves with ads against same-sex marriage. Proponents of gay rights quickly found themselves on the defensive. Offering no benefits to voters, pro-gay rights activists had to appeal to people’s sense of justice; they could not compete with the opposition’s message of religion and morality. While a poll conducted in October 1998 by the Honolulu Star-Bulletin and NBC Hawaii found that only 25 percent were in favor of an amendment with 35 percent undecided, by November their polls showed 55 percent supported a same-sex marriage amendment.⁴¹ Ultimately, the amendment passed by a more than two-to-one ratio.⁴² In other words, 69.2 percent of the state disagreed with the Court’s ruling in *Baehr*. As the director of the National Black and Gay Lesbian Leadership Forum, Keith Boykin, observed about the aftermath of *Baehr*, “The gay and lesbian movement is marching down the wrong path and running a disastrous

course...we don't have public support".⁴³ Indeed, significant public opposition allowed for the decision to be overturned so quickly.

Similarly, the marriage equality movement did not have sufficient public support in California. When Mayor Newsom ordered clerks to hand out marriage licenses to same-sex couples, half of all Californians disapproved of same-sex marriage and 55 percent disapproved of his decision.⁴⁴ Moderates in California were also largely against marriage equality. Of those who considered themselves "middle-of-the-road," 58 percent opposed same-sex marriage.⁴⁵ Proposition 8 passed by a margin of 52.2 percent to 47.7 percent.⁴⁶ However, geographically the state was much more opposed to same-sex marriage than the numbers indicate. With the exception of Los Angeles, San Francisco, and the counties on the border near Las Vegas, every other district in California voted in favor of Proposition 8.⁴⁷ By greatly diverging from public opinion, the supreme courts of both states energized conservative opposition. These two cases clearly illustrate how negative popular opinion amplifies antijudicial backlash.

2. Legislative Involvement

The gay rights movement evolved tremendously in the ten years between *Baehr* and *In re Marriage Cases*. At the time *Baehr* was filed the notion of marriage equality had yet to fully develop, but by the time same-sex marriage entered the courts in California it had exploded into a national issue. Yet despite this ten-year period of education and lobbying, the general lack of legislative support in both *Baehr* and *In re Marriage Cases* helps explain the magnitude of the resultant backlash.

Prior to *Baehr*, the legislature of Hawaii had barely touched the issue of gay rights, no less same-sex marriage. The state repealed its sodomy law in 1973, but this was merely an unintended byproduct of the wholesale adoption of the American Law Institute's Model Penal Code, which had shed sodomy statutes.⁴⁸ It wasn't until *Baehr* was remanded to the trial court that the state legislature made its voice heard by passing a state law limiting marriage to heterosexual couples. In an attempt to blunt criticism, the law included a provision calling for the establishment of a Commission on Sexual Orientation and the Law.⁴⁹ After reviewing the legal and economic benefits given to married couples, the Commission recommended that all benefits be extended to same-sex couples. However, the Reciprocal Beneficiaries Act of 1997 only granted to same-sex couples 60 out of the 160 spousal rights available to traditionally-married couples.⁵⁰ Subsequently, the legislature also passed a bill allowing the state to vote on a constitutional amendment which would authorize the legislature to restrict marriage. Thus, not only was the Hawaiian Supreme Court lacking a legislative foundation to begin with, but the Court also disregarded statutes that were being passed as *Baehr* developed.

On the other hand, the California legislature has long grappled with same-sex marriage. In 1977, when the County Clerk's Association of California requested the legislature to clarify the marriage statutes, the legislature limited marriage to heterosexual unions. Then in 2000, conservative groups successfully passed a mini-DOMA. Known as Proposition 22, the state easily passed the statute (61 to 39 percent).⁵¹ As public acceptance of gays grew, the legislature also responded to protect gay civil rights. The legislature passed the Domestic Partners Rights and Responsibilities Act in 2003, which granted domestic partners almost all the rights of married couples.⁵² At the time it was the most generous legal package of benefits anywhere in the country. Despite this positive movement, the next year the legislature voted down a same-sex marriage bill. Thus, by the time same-sex marriage had reached the State Supreme

Court, it was clear that, although the legislature thought same-sex couples should have legal rights, their unions should not be recognized as marriage. In ordering the state to accept same-sex marriages despite popular opinion or legislative history to the contrary, the state supreme courts in Hawaii and California ensured a strong backlash.

3. Avenues of Resistance

If *Baehr* and *In re Marriage Cases* demonstrate anything, it is that antijudicial backlash is most effective in instances where the decision can easily be invalidated. In both states, the ease of amending the constitution allowed conservative opposition to hold the status quo. Amending the Hawaii State Constitution is a straightforward process. The legislature need only to approve an amendment proposal by a two-thirds vote and then it must be passed by a majority of voters at the next general election.⁵³ This is exactly what occurred after *Baehr*. In response to the trial court decision, the Hawaiian Legislature passed an amendment proposal in May 1997 granting the legislature the “power to reserve marriage to opposite-sex couples”.⁵⁴ The ballot was passed overwhelmingly on November 3, 1998.⁵⁵ It took only a little over a year and a half to amend the state constitution to overturn the Hawaii Supreme Court.

The process of amending the California State Constitution is similarly easy. While the constitution can be amended by several procedures, Article 18, Section 3 allows for the most rapid reform: “the electors may amend the Constitution by initiative.”⁵⁶ Conservative opposition only needed to gather 694,354 signatures or 8% of the state’s population in order to place an amendment proposal on the November 2008 ballot. This bar was easily met in June 2008, when supporters of a ban submitted more than 1.1 million signatures.⁵⁷ For six months both sides waged an intense media war over Proposition 8. In November 2008, the ballot passed with a little over 52% of the vote.⁵⁸ Overturning *In re Marriage Cases* took a little more than a year. The low bar to amend the state constitutions of Hawaii and California provided an easy outlet for the antijudicial backlash in both states. Given the lack of legislative involvement and significant public opposition to marriage equality, the third variable, the ease of amending the state constitution, all but guaranteed a quick overturning of the marriage decisions.

III. Optimal Outcomes

Two recent cases, *Kerrigan v Commissioner of Public Health*⁵⁹ in Connecticut and *Varnum v Brien*⁶⁰ in Iowa, led to same-sex marriage without triggering especially strong backlash. Interestingly, while the three variables aligned almost perfectly in the Hawaii and California cases, they diverge greatly in the same-sex marriage cases of Connecticut and Iowa. Where public opinion in Connecticut was relatively supportive of same-sex marriage, it was tepid at best in Iowa. Moreover, while the legislature played an active role in Connecticut, the Iowa Supreme Court acted alone. In both states, however, it is very difficult to amend the constitution. Ultimately, a favorable composition of the three variables greatly disarmed same-sex marriage backlash in both Connecticut and Iowa.

A. The history of outright success

1. Connecticut: *Kerrigan v Commissioner of Public Health*

Just six months after winning *Goodridge v Department of Health*⁶¹, Gay and Lesbian Advocates and Defenders (GLAD) filed *Kerrigan v Commissioner of Public*

Health on behalf of eight same-sex couples in Connecticut in the late summer of 2004. While the case was still in the District Court, the Connecticut General Assembly passed a civil unions bill, becoming the second state in the country to authorize same-sex civil unions. Under the new law, those in same-sex civil unions were entitled to the same economic and legal benefits as were married couples.⁶² The law, however, also limited marriage to heterosexual couples.⁶³ Although the establishment of civil unions reflected the progressiveness of the state legislature, activists viewed it as a serious impediment to same-sex marriage. In the eyes of many members of the LGBT community, civil unions were to marriage what “separate but equal” was to true racial integration.⁶⁴ The District Court accepted civil unions as a legitimate substitution for marriage under the rationale that “The Connecticut Constitution requires that there be equal protection and due process of law, not that there be equivalent nomenclature for such protection and process.” In order to win on appeal, GLAD had to find a way to convince the Connecticut Supreme Court that *de jure* marriage segregation was unconstitutional. Overturning this *Plessy* mode of legal argument, the Connecticut Supreme Court, in a four-to-three decision, ruled that civil unions were an inadequate substitution for marriage.⁶⁵ In November 2008, Connecticut began officiating same-sex marriages.

The establishment of same-sex marriage in Connecticut followed a unique course, involving both the courts and the legislature. More unusually, there was no backlash to *Kerrigan*. Conservatives groups have been largely ineffective at stirring opposition towards the Court, and other issues, such as the economy, have taken the political spotlight. Marriage equality litigation in Connecticut never sparked antijudicial backlash because there was a long history of legislative support without public opposition or pressure to amend the state constitution.

2. Iowa: *Varnum v Brien*

In 2005, Lambda Legal Defense Fund, a prominent LGBT litigation organization, filed a marriage lawsuit in Polk County, Iowa, on behalf of six same-sex couples and three of their children. Although Lambda won in the District Court, the judge stayed the decision because the state had already appealed. The Iowa Supreme Court heard oral arguments in December 2008. Citing Iowa’s long history of leading the civil rights movement, the Court unanimously found the ban on same-sex marriage in violation of the equal protection and due process clauses of the Iowa State Constitution.⁶⁶ Acknowledging that many were religiously opposed to same-sex marriage, the Court cautioned that government could not engage in these “types of religious debates.”⁶⁷ With the stern explanation that “strong and deep-seated traditional beliefs and popular opinion” are not enough to justify unconstitutional laws, the Court ordered the state to begin granting marriage licenses to same-sex couples.⁶⁸ The drastic and rigid decision in *Varnum*—especially given the lack of public opinion or legislative support—led many to predict a strong backlash was inevitable. Yet the impossibility of amending the state constitution has largely insulated *Varnum* against conservative opposition. Thus, same-sex marriage litigation in Iowa demonstrates that one favorable variable can lead to a favorable outcome, even if the other two factors mitigate backlash.

B. An absence of backlash

1. Public Opinion

Although in both Iowa and Connecticut litigation resulted in little backlash, public support for same-sex marriage differed greatly between the two states. Iowans were not

particularly in favor of the decision. In a poll conducted by the *Des Moines Register*, 43 percent opposed *Varnum* while 26 percent supported the Court.⁶⁹ There also was not support for gay marriage. In fact, polls found that nearly twice as many opposed same-sex marriage as supported it (35 percent to 18 percent).⁷⁰ And though early polling indicated the issue would not receive prominent attention in the next election cycle (92 percent of those polled several months after the decision said their lives had not been affected by same-sex marriage and 63 percent said other issues were more important in choosing political candidates) in the 2010 midterm elections, voters chose to remove three of the Supreme Court justices who were part of the decision.⁷¹ The three justices—Chief Justice Michael Streit, Marsha Ternus, and David Baker—only received 45 percent of the vote. Their departure marked the first time a member of the high bench of Iowa has ever been rejected by voters, and it was the result of a coordinated and well-funded campaign carried out by an alliance of conservative organizations. In short, “justices who recognized the freedom to marry in Iowa fell victim,” as Carolyn Jenison, the director of One Iowa, a gay rights organization, phrased it, “to a perfect storm of electoral discontent and out-of-state special interest money.”⁷²

In contrast to Iowa’s opposition to *Varnum*, many in Connecticut favored spousal equality long before *Kerrigan*. Although voters rejected same-sex marriage by the small margin of 53 to 42 percent, they overwhelmingly supported civil unions (56 percent to 37 percent).⁷³ The evenness of opinion did not arise because Connecticut is an inherently liberal state. Rather, public support for gay rights was the due to the work of the marriage equality advocacy organization Love Makes A Family and other gay rights organizations. The change in public opinion over the last two decades reflects the results of years of community forums, networking, and media advocacy: From 1994 to 2004, support for marriage equality grew from 34 percent to approximately 43 percent.⁷⁴ Unlike *Baehr*, the Connecticut Supreme Court in *Kerrigan* simply recognized the current trend towards marriage equality.

Kerrigan and *Varnum* illustrate a key lesson about the relationship between public opinion and backlash: Public opinion alone does not determine the strength of antijudicial backlash. The absence of backlash in Iowa demonstrates that litigation can effectively bring about change even when there is little public support. Yet, the tolerant atmosphere in Connecticut certainly insulated the Court and ensured that the decision would be followed. While public opinion toward same-sex marriage in Iowa and Connecticut could not have been more different, neither experienced backlash.

2. Legislative Involvement

The degree of legislative involvement also greatly diverged between the two cases. Same-sex marriage in Iowa came about solely by means of the courts, whereas in Connecticut dialogue between the courts and legislature moved the state from no legal recognition of same-sex couples to marriage. However, in both states, the legislature refused to open debate on constitutional amendments. By denying the possibility of overturning the decision, legislatures in Iowa and Connecticut quickly put a stop to potentially mobilizing backlash.

The Iowa Legislature did not have a pro-gay rights track record at the time of *Varnum*.⁷⁵ In fact, in 1998, Iowa approved a mini-DOMA in response to *Baehr*.⁷⁶ Moreover, the Iowa Supreme Court did not engage with the legislature. Yet in Iowa, a strong Democratic leadership refused to discuss overturning the Court. The ratio of Democrats to Republicans was 32 to 18 in senate and 56 to 44 in the House. Although there was discussion of an amendment even before the Court had made its ruling, state

leaders reacted quickly to prevent opposition from mobilizing. On the day of the decision, Democrat Chet Culver, the Governor, released a statement explaining that while he personally believed marriage should be limited to heterosexual couples, he was “reluctant to support amending the Iowa Constitution.”⁷⁷ Senate majority leader Democrat Michael Gronstal, a democrat, echoed the Governor’s beliefs, bluntly stating, “It will not come up.”⁷⁸ Had the political leadership been more open to discussing the decision, conservative opposition might have more vigorously pushed the legislature to begin the amendment process.

Kerrigan, on the other hand, was litigated in a significantly more favorable environment. By 2004, the legislature had prohibited discrimination based on sexual orientation, included sexual orientation into their hate crimes statutes, allowed same-sex couples to adopt, and granted same-sex couples basic legal rights.⁷⁹ The legislature also involved itself in the same-sex marriage debate by passing a civil union bill in the midst of *Kerrigan*. While the Connecticut Supreme Court ultimately found civil unions to be constitutionally insufficient, this period was invaluable. First, it gave same-sex couples access to essential legal and economic benefits. This advancement should not be unappreciated. Connecticut was only the second state to adopt civil unions and the first to do so without judicial mandate. Second, the period of civil unions allowed for gradual change. Over the course of three years, citizens soon realized how little was the impact of giving legal standing to same-sex couples on their own lives and so same-sex marriage became a nonissue. Lastly, the passage of civil unions changed the issue before the Connecticut Supreme Court. Instead of having to convince the Court that the state should recognize same-sex couples, GLAD only had to show why civil unions were inadequate compared to civil marriage. In other words, the civil union bill reduced the work of the court and created a stable legal foundation with which the justices could work in the future. This dialogue between the courts and the legislature was critical to minimizing backlash. Connecticut’s gradual path of rights for same-sex couples, allowed time for citizens to get comfortable with the idea of same-sex marriage, which in turn eliminated any potential backlash.

3. Avenues of Resistance

Amending the state constitutions of Iowa and Connecticut could be characterized as political fantasy. In both states, the amendment process encompasses several not insignificant checks designed to limit the power of the majority. Although there was little public desire for an amendment in Connecticut, the inability to act against the decision in Iowa is what probably prevented backlash against *Varnum*.

In order to amend the Iowa State Constitution, the legislature must approve the amendment twice, in two consecutive General Assemblies, and then it must pass as a ballot proposition on the next regularly scheduled election.⁸⁰ The difficulty of amending the Iowa Constitution made the state an attractive target and, in fact, Lambda recognized from the very beginning that if they won a favorable decision they were guaranteed several years of same-sex marriages before an amendment could be passed. Their belief that during this gap citizens would cease to care has repeatedly been corroborated by the polls.

In Connecticut, amending the state constitution is a similarly tough process.⁸¹ A constitutional amendment overturning *Kerrigan* was not going to get very far in the Connecticut legislature for two reasons: First, democratic voters supported same-sex marriage and second the Democratic Party had a lock on Connecticut politics in 2009. Because Democrats strongly approve of same-sex marriage (66 percent), few

Democratic representatives would vote for an amendment that was not supported by their constituents. Mathematically, it is nearly impossible for an amendment to make it to voters; Democrats hold strong majorities in both the House (114 to 36) and the Senate (24 to 12).⁸² Given the political composition of the state legislature and the complexity of amending the constitution there is no way to invalidate *Kerrigan*. Since no opportunities exist to evade or overturn the decision, conservatives never made much of a stir.

Unlike the California State Constitution, the constitutions in Iowa and Connecticut cannot be easily changed. A ballot like proposition 8 is not plausible in either state. Moreover, the legislatures of both states have not allowed a constitutional amendment to come to a vote. If marriage equality activists learn anything from the litigation in Iowa and Connecticut it should be to target states whose constitutions cannot easily be amended.

IV. Conclusion

By comparing these four landmark same-sex marriage decisions, it is evident that three variables—public opinion, the extent of legislative involvement, and the avenues of resistance—greatly determine the intensity of antijudicial backlash. Massive public opposition in Hawaii and California led to overwhelming backlash, while moderate opinion in Connecticut deflated conservative opposition. Nevertheless, the lack of backlash in Iowa, despite unfavorable public opinion, illustrates that there must be other factors at play. The relative ease of banning same-sex marriage by constitutional amendment in Hawaii and California exacerbated backlash whereas the difficulty of amending the Iowa Constitution dampened it. The vehemence of backlash in both Hawaii and California can further be attributed to the lack of legislative involvement. As the sole catalyst of change, the state supreme courts of Hawaii and California made themselves the sole target of backlash. Clearly, the interaction of these variables profoundly affects the strength of antijudicial backlash.

Although same-sex marriage litigation has historically inhabited the state courts, some activists are returning to the federal courts. As this paper goes to press, a case challenging the constitutionality of Proposition 8 is working its way through the federal system. By invalidating Proposition 8, the appellants in *Perry v Schwarzenegger* hope to nullify all state laws and amendments prohibiting same-sex marriage. Many within the marriage equality movement have vocally denounced the case, calling it premature.⁸³ But instead of arguing whether the nation is “ready” for this case, it seems that the wisdom of *Perry* could best be evaluated by asking three simple questions: Where is national public opinion on same-sex marriage? Where is Congress on the issue? What are the avenues for resisting a pro-marriage decision handed down by the United States Supreme Court?

While these questions extend beyond the scope of this paper, these are the kinds of questions social-change litigants should ponder before filing a lawsuit. Although it may be attractive to write off backlash as part and parcel of social-change litigation, backlash does not need not be the fatal aftermath of a progressive-court decision. Rather, by keeping these three variables in mind, activists can carefully design a litigation strategy that will bring about change without sparking backlash sufficient to overturn the decision or provoke meaningful anti-change responses.

Endnotes

¹ The sociologist Doug McAdams defines a social-change movement as an attempt by a marginalized group to amass sufficient political capital to advance their interests through non-institutionalized means. Although his definition is widely accepted, it is by no means all encompassing. In fact, social-reform groups often seek to access political institutions to legitimize their rights. Due to the discrimination and stigma minorities face, they are often limited in their political options. When politically accountable officials are either unable or unwilling to act, activists look to the third branch of government: the judicial branch. See McAdams, Doug. *Political Process and the Development of Black Insurgency*. Chicago: University of Chicago Press, 1982.

² *Brown v Bd. of Educ.*, 347 U.S. 483 (1954).

³ *Roe v Wade* 410 U.S. 113 (1973).

⁴ Balkin, Jack. *What Roe v Wade Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision*. New York: New York University Press, 2005.

⁵ The marriage equality movement is similar to the NAACP and NOW in that they have crafted a litigation strategy to advance their cause. However, it is important to recognize that unlike the civil-rights and women's rights movements which focused on federal courts, gay rights activists have used a strategy known as "horizontal judicial federalism," in which an issue is litigated on a state-by-state basis. See Duncan, William. "Avoidance Strategy: Same-Sex Marriage Litigation and the Federal Courts." *Campbell Law Review* 29 (2006) : 29-46; Salokar, Rebecca. "Beyond Gay Rights Litigation." *GLQ* 3 (1997) : 385-415.

⁶ See Klarman, Michael. "How Brown Changed Race Relations: The Backlash Thesis." *J. Am. Hist.* 81 (1994) : 81-118; Ray, Laura. "Justice Ginsburg and the Middle Way." *Brook. L. Rev.* 68 (2003); Faludi, Susan. *Backlash: The Undeclared War Against American Women*. New York: Three Rivers Press, 2006; Rosenberg, Gerald. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press, 1991; Post, Robert., Siegal, Reva. "Roe Rage: Democratic Constitutional and Backlash." *Harv. C.R.-C.L. L. Rev.* 373 (2007) : 373-433.

⁷ For a stark comparison of these two camps one could compare: Rosenberg, Gerald. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press, 1991; and Post, Robert., Siegal, Reva. "Roe Rage: Democratic Constitutional and Backlash." *Harv. C.R.-C.L. L. Rev.* 373 (2007) : 373-433.

⁸ *Marbury v Madison* 5 U.S. 137 (1803).

⁹ Bickel, Alexander. *The Least Dangerous Branch*. New York NY: Bobbs-Merrill, 1962.

¹⁰ Kende, Mark. "Foreword." *Drake L. Rev.* 54 (2006) : 791-794.

¹¹ Mansbridge, Jane., Shames, Shauna. "Toward a Theory of Backlash: Dynamic Resistance and the Central Role of Power." *Politics and Gender* 4 (2008) : 623-634.

¹² *Ibid.*

¹³ *Roe v Wade* 410 U.S. 113 (1973).

¹⁴ *Lawrence v Texas* 539 U.S. 558 (2003).

¹⁵ Post, Robert., Siegal, Reva. "Roe Rage: Democratic Constitutional and Backlash." *Harv. C.R.-C.L. L. Rev.* 373 (2007) : 373-433

¹⁶ *Ibid.*

¹⁷ Klarman, Michael. *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*. New York: Oxford University Press, 2004.

¹⁸ The United States Supreme Court as well as state supreme courts are commonly referred to as “courts of last resort,” because these tribunals have the ultimate (i.e. final) jurisdictional authority.

¹⁹ The first few same-sex marriage cases were brought haphazardly by activists without a coherent plan or long-term goals. Even though in 1971 sodomy was still illegal in 49 states, Richard Baker and James McConnell asked the District Court of Minnesota to direct the county-clerk to issue them a marriage license. The judge simply referred to the dictionary definition of marriage to rule homosexual couples were ineligible. In their over-exuberance, they appealed the case all the way to the Supreme Court. In October of 1972, the Court dismissed *Baker v Nelson* 409 U.S. 810 (1972) for lack of a “substantial federal question.” Because *Baker* was a mandatory appellate review, the Court’s summary dismissal served as a decision on the merits and therefore became binding precedent. Over the next few years, several other marriage equality cases also failed in federal court, See *Singer v Hara* 522 P.2d 1187 (Wash App. 1974) and *Jones v Hallahan* 501 S.W.2s 588 (Ky. 1973).

²⁰ *Baehr v. Lewin* 852 P.2d 44 (Haw. 1993).

²¹ *In re Marriage Cases* 43 Cal.4th 757 (Cal. 2008).

²² For more about the history of sodomy laws see Anderson, Ellen. *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation*. Ann Arbor, MI: University of Michigan Press, 2005. To learn more about national public opinion trends on same-sex marriage see Persily, N., Citrin, J., Patrick, Egan. *Public Opinion and Constitutional Controversy*. New York: Oxford University Press, 2008.

²³ *Supra* note 30.

²⁴ *Baehr v Miike* 910 P.2d 112 (Haw. 1996).

²⁵ In 1939, the U.S. Supreme Court interpreted a “public policy exception” in the Full Faith and Credit Clause of the Tenth Amendment. See *Pacific Employers Ins. Co. v Industrial Accident Comm’n*, 306 U.S. 493 (1939). (“It has often been recognized by this Court that there are limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own status or policy.”)

²⁶ The Pew Forum on Religion and Public Life. “State Policies on Same-Sex Marriage.” Jul. 9, 2005.

²⁷ *Ibid*.

²⁸ *Ibid*.

²⁹ The Pew Forum on Religion and Public Life. “States with Voter Approved Constitutional Bans on Same-sex marriage 1998-2008.” Nov. 13, 2008.

³⁰ Defense Against Marriage Act Pub.L. 104-199, 110 Stat. 2419

³¹ On Passage of the Bill (h.r.3396).” United States Senate, 1996.

³² *Ibid*.

³³ *Supra* note 30.

³⁴ Ball, Carlos. “The Backlash Thesis and Same-Sex Marriage: Learning from *Brown v. Board of Education* and its Aftermath.” *Wm. & Mary Bill Rts. J.* 14 (2006) : 1493-1538.

³⁵ Schmalz, Jeffrey. “In Hawaii, Step toward Legalized Gay Marriage.” *New York Times* 7 May 1993. (William Rubenstein, the director of the ACLU’s homosexual rights project, called *Baehr* a “major breakthrough...This is the first court decision to give serious consideration to gay marriage.”)

³⁶ For more information on this sequence of events see *Lockyer v City and County of San Francisco* 33 Cal.4th 1055 (Cal. 2004) and *Lewis v Alfaro* in which the California Supreme Court reaffirmed the stay.

³⁷ Supra note 31.

³⁸ Official Voter Information Guide. (2008) "Text of Proposition 8".

<http://voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop8>. Accessed February 2010.

³⁹ Opponents of Proposition 8 have sought to overturn the statute through the federal courts. In May of 2009 two couples sued California Governor Arnold Schwarzenegger, Attorney General Jerry Brown and two officials in the state Department of Public Health in the District Court for the Northern District of California, alleging Proposition 8 violated the Due Process and Equal Protection Clauses of the 14th Amendment. On August 4, 2010, Judge Vaughn Walker overturned Proposition 8 in favor of the plaintiffs, finding there was no rational basis for denying gay and lesbians civil marriage. As this paper goes to print, *Perry v. Scharzenegger* is currently before the Ninth Circuit.

⁴⁰ Rosenberg, Gerald. *The Hollow Hope: Can Courts Bring About Social Change?* Chicago: University of Chicago Press, 1991

⁴¹ For initial polling results see Yuen, Mike. "55% favor ban on same-sex: but a poll also finds confusion on what 'yes' and 'non' votes mean." *Honolulu Star-Bulletin* Oct. 1998. To review latter polls see Yuen, Mike. "Same-sex Marriage Strongly Rejected." *Honolulu Star-Bulletin* Nov. 1998.

⁴² Staff. "Voters strongly oppose gay unions." *Honolulu Star-bulletin* 1997.

⁴³ See Boykin, Keith., Dunlap, David. "Some Gay Rights Advocates question Drive to Defend Same-sex Marriage." *New York Times* Jun. 1996.

⁴⁴ Pinkus, Susan. "Californians More Tolerant than Nation Over Same-Sex Marriage." *Los Angeles Times Poll Alert* 2004.

⁴⁵ Egan, P., and Sherrill, Kenneth. "California's Proposition 8: What Happened, and What Does the Future Hold?" National Gay and Lesbian Task Force Policy Institute, 2009. [Unpublished].

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Cahill, Sean. *Same Sex Marriage in the United States: Focus on the Facts*. New York: Lexington Books, 2004.

⁴⁹ 1997 Haw. Sess. Laws 2786, Act 383.

⁵⁰ Anderson, Ellen. *Out of the Closets and into the Courts: Legal Opportunity Structure and Gay Rights Litigation*. Ann Arbor, MI: University of Michigan Press, 2005.

⁵¹ Schacter, James. "Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now." *Southern California L. Rev.* 82 (2009) : 1153- 1213.

⁵² Domestic Partner Rights and Responsibilities Act, ch. 421, 2003 Cal. Sta. 2586.

⁵³ Hawaii State Const. Art. #17, Sec. 1-5.

⁵⁴ Supra note 47.

⁵⁵ Supra note 41.

⁵⁶ California State Const. Art. # 18, Sec. 1-4.

⁵⁷ Yi, Matthew. "Effort Intensifies for Same-sex Ban." *San Francisco Chronicle* Apr. 2008.

⁵⁸ Supra note 45.

⁵⁹ *Kerrigan v Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

⁶⁰ *Varnum v Brien*, 763 N.W.2d 862 (Iowa 2009).

⁶¹ *Goodridge v Dep't of Pub. Health*, 798 N.E. 2d 941, 968-70 (Mass. 2003). A landmark case, the Massachusetts Supreme Judicial Court decided four-to-three that no "constitutionally adequate reasons" existed for denying civil marriage to same-sex

couples. 1 The majority, acknowledging the decision “marks a change in the history...of marriage law,” chose to withhold judgment for 180 days so that the legislature could “take such action as it may seem appropriate.” In December, the State Senate asked the SJC to provide an advisory opinion on whether civil unions were a constitutionally adequate remedy. Again, in a narrow 4-3 decision, the Court held that the “dissimilitude” of civil unions relegated same-sex couples to a “second-class status.” Three months later, Massachusetts became the first state to recognize same-sex marriage. Unfortunately, I am unable to explore *Goodridge* within the three variable paradigm due to publication limitations.

⁶² Act Concerning Civil Unions, Pub. Act 05-10, 2005 Conn. Acts 13 (Reg. Sess.).

⁶³ *Ibid.*

⁶⁴ *Plessy v. Ferguson* 163 U.S. 537 (1896).

⁶⁵ *Supra* note 49.

⁶⁶ *Supra* note 49.

⁶⁷ *Supra* note 49.

⁶⁸ *Supra* note 49.

⁶⁹ Clayworth, J., and Beaumont, Thomas. “Iowa Poll: Iowans evenly divided on gay marriage ban.” *Des Moines Register* 21 Sept. 2009.

⁷⁰ *Ibid.*

⁷¹ For polling results see note 69; Sulzberger, Arthur. “Ouster of Iowa Judges Sends Signal to Bench.” *The New York Times* 3 Nov. 2010.

⁷² Geidner, Chris. “In Iowa, Judges Are Ousted.” *Metro Weekly* 3 Nov. 2010.

⁷³ *Ibid.*

⁷⁴ Lax, Jeffrey., Phillips, Justin. “Gay Rights in the States: Public Opinion and Policy Responsiveness.” *American Political Science Rev.* 103 (2009) : 367-386.

⁷⁵ Cain, Patricia. “Contextualizing Varnum V. Brien: A Moment in History.” *Journal of Gender Race and Justice* 27 (2009) : 27-59.

⁷⁶ The Pew Forum on Religion and Public Life. “U.S. Religious Landscape Survey.” 2009.

⁷⁷ Glover, Mike. “Iowa Senate Leader Rules Out Gay Marriage Debate.” *ABC News* 7 Apr. 2009.

⁷⁸ *Ibid.*

⁷⁹ Klein, Bennett., Redman, Daniel. “From Separate to Equal: Litigating Marriage Equality in a Civil Union State.” *Conn. L. R.* 41 (2009) : 1381-1396.

⁸⁰ Iowa State Const. Art #10, Sec 1-3.

⁸¹ Connecticut State Const. Art # 12, Sec. 1-4.

⁸² *Supra* note 79.

⁸³ Lambda Legal. (May 2009) “Why the Ballot Box and Not the Courts Should be the Next Step on Marriage in California.”

http://data.lambdalegal.org/publications/downloads/fs_why-the-ballot-box-and-not-the-courts.pdf. Accessed March 2010.

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