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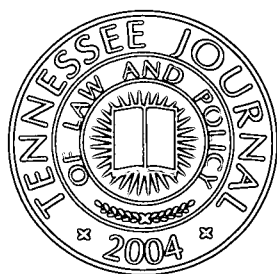
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# TJLP

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Lee Epstein, Andrew D. Martin, Lisa Baldez, & Tasina  
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*The Sullivan Decision*

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*The Writ of Habeas Corpus After Cone v. State*  
Nicole M. Grida



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**TENNESSEE JOURNAL OF LAW & POLICY** – More than a year ago, a small group of law students founded a new organization at the University of Tennessee College of Law that would devote itself to publishing a journal that explores the issues at the intersection of law and public policy. With this Inaugural Issue, those students, whose names are listed at the front of this publication, have established that journal, the **TENNESSEE JOURNAL OF LAW & POLICY**.

Like other law journals, the **TENNESSEE JOURNAL OF LAW & POLICY** will publish leading articles on timely subjects by lawyers, judges, journalists, and scholars. Notes and comments on important legal cases and public policies, based upon careful research, will also be published. Perhaps unlike traditional law journals, however, the **JOURNAL** will look beyond traditional legal scholarship and publish significant essays, commentaries and addresses by leading news and policy makers.

A student editorial board will be responsible for managing the **JOURNAL**'s affairs. The editing and preparation of materials for publication will be done by student editors who are selected on the basis of scholarship and general ability. The Comments and Notes will be written by student editors. Two members of the Law Faculty, Penny J. White, Associate Professor of Law, and Otis H. Stephens, Alumni Distinguished Service Professor of Political Science and Resident Scholar of Constitutional Law, will serve in an advisory capacity.

Professors White and Stephens already deserve extraordinary praise for their patience and enthusiasm. Future editorial boards and student editors will be guided, as we have been, by their wise counsel.

The JOURNAL could not have been established without the support of Thomas C. Galligan, Jr., the College of Law Dean and Elvin E. Overton Distinguished Professor of Law. His generosity and continued commitment to the TENNESSEE JOURNAL OF LAW & POLICY will ensure its continued success. Also deserving of our thanks is George W. Kuney, Associate Professor of Law and Director of the Clayton Center for Entrepreneurial Law, whose guidance in the early stages was, and continues to be, invaluable.

With each Issue, the TENNESSEE JOURNAL OF LAW & POLICY endeavors to enhance the public's understanding of questions of law and public policy. We hope this Inaugural Issue is only the first step.

LEONARD EVANS,  
Editor-in-Chief

RICHARD GREENE,  
Managing Editor

## ***Constitutional Sex Discrimination\****

Lee Epstein, Andrew D. Martin, Lisa Baldez, & Tasina  
Nitzschke Nihiser\*\*

### **Abstract**

Nearly thirty years have elapsed since the U.S. Supreme Court decided *Craig v. Boren*, a landmark case in the Court's constitutional sex discrimination jurisprudence. In *Craig*, the justices pronounced that they would apply neither the lowest level of scrutiny—rational basis—nor the highest level—strict scrutiny—to evaluate claims of sex

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discrimination. Rather, the Court invoked a standard “in between” the two, now known as intermediate or heightened scrutiny. Under this approach, the Court asks whether a law challenged on equal protection grounds is substantially related to the achievement of an important objective.

Certainly the *Craig* Court’s intermediate approach has its supporters; indeed, influential legal scholars are now advocating that courts adopt it to evaluate laws discriminating against gays and lesbians. But to many analysts, *Craig* (and its progeny) was and remains highly problematic. Among their claims is that the standard it instantiated is so “loose” and “amorphous” that it produces unpredictable results.

In this article, we seek to bring some empirical teeth to this debate by exploring patterns in sex discrimination litigation in the U.S. Supreme Court and in state courts of last resort. Our chief finding is that the critics of heightened scrutiny probably have the better case. At the very least, the *Craig* standard—while generating outcomes more favorable to parties alleging sex discrimination than did the traditional rational basis test—does, in fact, lead to far less predictable results than either rational basis or strict scrutiny. For reasons that may have little to do with the standard itself, courts are just as likely to uphold sex-based classifications as they are to eradicate them.

This finding has important implications for the future of sex discrimination litigation, as well as for the advancement of legal rights for gays and lesbians. As to the former, our results underscore the importance of elevating the standard used to adjudicate sex discrimination claims—a goal, as we demonstrate, that could be achieved in several distinct ways. As to gays and lesbians, our findings identify the possible costs and benefits associated with a litigation strategy designed to place their claims of discrimination in the intermediate scrutiny basket.

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## I. Introduction

Nearly thirty years have elapsed since the U.S. Supreme Court decided *Craig v. Boren*,<sup>1</sup> a landmark in its constitutional sex discrimination jurisprudence.<sup>2</sup> In *Craig*,

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<sup>1</sup> 429 U.S. 190 (1976).

<sup>2</sup> *Id.* We follow Mary Anne Case, *Constitutional Sex Discrimination: The Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1447 (2000) and “use the term ‘sex discrimination’ to refer to discrimination between males and females.” The vast majority of Supreme Court inquiries into denials of equal protection on grounds of

the justices pronounced that they would apply neither the lowest level of scrutiny—rational basis—nor the highest level—strict scrutiny—to evaluate claims of sex discrimination.<sup>3</sup> Rather, they would invoke a standard “in between” the two, now known as intermediate or heightened scrutiny. Under this approach, the Court asks whether a law challenged on equal protection grounds is substantially related to the achievement of an important

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sex—our chief concern in this Article—have focused on this type of discrimination, that is, “on deprivations caused by rules that, on their face, distinguish between males and females.” *Id.*

<sup>3</sup> Since we provide more details about these levels of scrutiny in Part II, suffice it to note here that prior to *Craig*, the Court invoked a two-tier approach to equal protection claims. Under this model, the Justices

upheld legislation so long as it was rationally related to a legitimate governmental purpose, unless that legislation impinged upon a “fundamental right” or classified on the basis of a “suspect trait” like race or ethnicity. Where a law employed a “suspect classification” or restricted the exercise of a “fundamental right,” the Court applied “strict scrutiny,” requiring that the government establish that the legislation was necessary to a compelling governmental objective and that no less restrictive alternative was available.

Peter S. Smith, *The Demise of Three-Tier Review: Has the United States Supreme Court Adopted a “Sliding Scale” Approach Toward Equal Protection Jurisprudence?*, 23 J. CONTEMP. L. 475, 477 (1997). See also LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE (2004); DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW (2003); SUSAN G. MEZEY, ELUSIVE EQUALITY (2003); Norman T. Deutsch, Nguyen v. INS and the Application of Intermediate Scrutiny to Gender Classifications, 30 PEPP. L. REV. 185 (2003); Michael C. Dorf, *The Paths to Legal Equality*, 90 CAL. L. REV. 791 (2002); Gerald Gunther, Foreword: *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection* 86 HARV. L. REV. 1 (1971); Risa E. Kaufman, *State ERAs in the New Era: Securing Poor Women’s Equality by Eliminating Reproductive-Based Discrimination*, 24 HARV. WOMEN’S L.J. 191 (2001).

objective.<sup>4</sup>

Since *Craig*, the Court has tinkered with this “in-between” standard. Most notably, in *United States v. Virginia* (the “VMI case”)<sup>5</sup> it seemed to “ratchet up” *Craig*,<sup>6</sup> stating that it would require an “exceedingly persuasive justification” to sustain a sex-based classification.<sup>7</sup> Tinkering, as it turns out, is the operative word. Despite the speculation of some commentators,<sup>8</sup> and

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<sup>4</sup> *Craig*, 429 U.S. at 197.

<sup>5</sup> 518 U.S. 515 (1996).

<sup>6</sup> Martha C. Daughtrey, *Women and the Constitution*, 75 N.Y.U. L. REV. 1, 21 (2000) (suggesting that in *VMI*, “Justice Ginsburg ratcheted up the already ‘heightened scrutiny’ another notch or two.”); *see also* Dorf, *supra* note 3 (claiming that “*United States v. Virginia* arguably ratcheted up the level of judicial scrutiny applicable to sex classifications from intermediate to nearly strict.”); *infra* notes 8 and 9.

<sup>7</sup> *United States v. Virginia*, 518 U.S. at 531 (“Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action. Today’s skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history.”). Some trace this language back to *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) and *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994). *See, e.g.*, Smith, *supra* note 3 at n.17 (asserting that “in recent gender discrimination challenges, the Court has applied a super-heightened scrutiny to equal protection challenges. The language for this redefinition of intermediate review derives from *Hogan* (requiring that gender-based governmental action demonstrate an ‘exceedingly persuasive justification.’)”; *see also* David K. Bowers, *Cracking the Code of United States v. Virginia*, 48 DUKE L.J. 305, 320 (1998); Jason M. Skaggs, *Justifying Gender-Based Affirmative Action under United States v. Virginia’s “Exceedingly Persuasive Justification” Standard*, 86 CAL. L. REV. 1169, 1170 (1998); Laura Weinrib, *Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in Nguyen v. INS*, 12 COLUM. J. GENDER & L. 222, 228 (2003).

<sup>8</sup> As Heather L. Stobaugh notes:

Over the years, commentators have argued that Justice Ginsburg’s use of “skeptical scrutiny” and her heavy reliance on the “exceedingly persuasive justification” language in the majority opinion of *Virginia* introduced a

even Court members,<sup>9</sup> *United States v. Virginia* has hardly generated a sea-change in the Court's approach to sex discrimination. In fact, in its most recent forays into the area the majority of the Court backed off *Virginia*,<sup>10</sup>

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stricter test into cases involving gender-based classifications as opposed to the traditional level of intermediate scrutiny established in *Craig v. Boren*.

Heather L. Stobaugh, *The Aftermath of United States v. Virginia*, 55 SMUL. REV. 1755, 1755 (2002). For commentary illustrating Stobaugh's claim, see, e.g., Steven A. Delchin, *United States v. Virginia and Our Evolving "Constitution": Playing Peek-a-boo with the Standard of Scrutiny for Sex-Based Classifications*, 47 CASE W. RES. L. REV. 1121, 1134 (1997) (arguing that "*VMI* may be the instrument for establishing strict scrutiny"); Cass Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 73 (1996).

<sup>9</sup> For example, in his dissent in *United States v. Virginia*, 518 U.S. at 574, Justice Scalia accused the majority of "a de facto abandonment of . . . intermediate scrutiny." See also Daughtrey, *supra* note 6, at 22, who writes that "in an address to the University of Virginia School of Law shortly after the *VMI* decision was announced, [Justice Ginsburg said,] 'There is no practical difference between what has evolved and the ERA.'"

<sup>10</sup> Since *VMI*, the Court has decided two cases mounting constitutional challenges to sex-based classifications, *Miller v. Albright*, 523 U.S. 420 (1998) and *Nguyen v. INS*, 533 U.S. 53 (2001). In both, it upheld the classification and invoked the specter of *Craig*, rather than *VMI*, in the process. As to *Miller*, the majority wrote, "[e]ven if, as petitioner and her amici argue, the heightened scrutiny that normally governs gender discrimination claims applied in this context, we are persuaded that the requirement imposed by §1409(a)(4) on children of unmarried male, but not female, citizens is substantially related to important governmental objectives." *Miller*, 523 U.S. at 434 n. 11 (citation omitted). Many scholars argue that this language "cannot be squared with . . . Court doctrine prohibiting sex-based classifications that are not supported by 'exceedingly persuasive justifications'." Cornelia T. L. Pillard and T. Alexander Aleinikoff, *Skeptical Scrutiny of Plenary Power*, 1998 SUP. CT. REV. 1 (1998). See also Kristin Collins, *When Fathers' Rights are Mothers' Duties*, 109 YALE L. J. 1669 (2002); Emily J. Gelhaus, *The New Lower Standard for Equal Protection Claims Concerning Gender*, 71 U. CIN. L. REV. 305. As to *Nguyen*, the Court's majority claimed that "[f]or a gender-based classification to

retreating to the familiar territory of *Craig*.<sup>11</sup> “The message of *United States v. Virginia*,” turned out to be “no different from *Craig*: gender classifications are subject to

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withstand equal protection scrutiny, it must be established ‘at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.’” *Nguyen*, 533 U.S. at 60. Because the Court once again relied on the standard articulated in *Craig* rather than the standard of *VMI* and *Nguyen*, many scholars argue that this represented “a marked shift away from the Court’s gender-based equal protection analysis set forth in *Virginia*.” Stobaugh, *supra* note 8, at 1756. See also Dorf, *supra* note 3, at n. 93 (suggesting that while “*United States v. Virginia* arguably ratcheted up the level of judicial scrutiny . . . *Nguyen* . . . ratcheted it back down.”). Stobaugh speculates that this “retreat” from *Virginia* occurred because

five Justices united to pull in the reins on the use of the “exceedingly persuasive justification,” which they believe imposes a higher level of scrutiny on gender-based classifications under Justice Ginsburg’s *Virginia* opinion. In other words, five Justices saw this area of the Court’s jurisprudence moving in a direction they did not support—toward treating gender as a suspect class—and they used *Nguyen* to prevent that result.

Stobaugh, *supra* note 8 at 1757.

<sup>11</sup> See Weinrib, *supra* note 7, at 227 (stating that “in light of the landmark anti-discriminatory outcome of *United States v. Virginia* . . . the apparent retreat in *Nguyen* came to many as an unpleasant surprise.”); Stobaugh, *supra* note 8, at 1756 (noting that “[d]espite such scholarly speculation about *Virginia*’s positive impact on future gender-based equal protection claims, it now appears not enough weight was given to those Justices who had expressed a strong dislike for the ‘exceedingly persuasive justification’ language and had disapproved of Justice Ginsburg’s heavy reliance on it.”); Bowsher, *supra* note 7, at 318 (“The Court has repeatedly applied the standard expressed in *Craig* without any further changes to the message.”). Also worth noting are Bowsher’s findings, at 306-07, that “[o]f the six federal Courts of Appeals that have considered whether *United States v. Virginia* heightened the standard of scrutiny, five have concluded that it did not.”

intermediate scrutiny.”<sup>12</sup>

Certainly *Craig*’s intermediate approach has its supporters;<sup>13</sup> influential legal scholars are now advocating that courts adopt it to evaluate laws discriminating against gays and lesbians.<sup>14</sup> But to many analysts, *Craig* (and its

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<sup>12</sup> Bowsher, *supra* note 7, at 320. But see Edward M. Gaffney, *Curious Chiasma*, 4 U. PENN. J. CONST. L. 394, 396-97 (2002) (claiming that “if the formal language of the standard used to evaluate claims of gender discrimination is not strict scrutiny, it is something very close to that sort of exacting review. It rarely meets a classification that it likes . . . . From *Hoyt v. Florida* to *United States v. Virginia*, the movement in the protection of gender equality has been from low to high, from toothless irrationality to de facto strict scrutiny.”).

<sup>13</sup> See, e.g., Bowsher, *supra* note 7, at 317-18 (arguing that “despite the objections of three members of the *Craig* Court, intermediate scrutiny has since proven to be very workable.”); Collin O’Connor Udell, *Signaling A New Direction in Gender Classification Scrutiny*, 29 CONN. L. REV. 521, 548 (1996) (claiming that “from a feminist perspective, the intermediate scrutiny standard was certainly preferable to the ‘mere rationality’ formulation,” but also asserting that “we can do better [than *Craig*].”); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982) (“when a classification expressly discriminates on the basis of gender, the analysis and level of scrutiny . . . does not vary simply because the objective appears acceptable to individual Members of the Court.”).

<sup>14</sup> Some commentators urge the application of heightened scrutiny to laws that discriminate between homosexuals and heterosexuals, that is, these analysts “seek to garner intermediate scrutiny for gays as gays.” Kenji Yoshino, *Suspect Symbols: The Literary Argument for Heightened Scrutiny for Gays*, 96 COLUM. L. REV. 1753. See, e.g., Ann Shalleck, *Revisiting Equality: Feminist Thought About Intermediate Scrutiny*, 6 AM. U. J. GENDER & LAW 31 (1997) (“As in the struggle for women’s equality, heightened constitutional scrutiny matters both symbolically and practically in the move ment for gay and lesbian rights.”); Yoshino, at 1756 (“In the near future, the United States Supreme Court is likely to consider the argument that gays should receive heightened scrutiny . . . The main purpose of this Article is to strengthen [that] argument.”) Another group of commentators suggest that discrimination against gays and lesbians is, in fact, discrimination on the basis of sex. Hence, courts should apply the same level of scrutiny to classifications based on sexual orientation as they do for

progeny) was and remains highly problematic. Among their claims is that the standard it instantiated is so “loose”<sup>15</sup> and “amorphous”<sup>16</sup> that it produces unpredictable results<sup>17</sup>—so much so that it was “only a partial victory in women’s rights advocates’ campaign for equality.”<sup>18</sup>

In this article we seek to bring some empirical teeth to this debate by exploring patterns in sex discrimination litigation in the U.S. Supreme Court and in state courts of last resort.<sup>19</sup> Our chief finding is that the critics of

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laws that discriminate on the basis of sex. See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187. See also Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 81 (1996) (stating that an “equality-based argument against antigay policies is that such policies constitute gender discrimination . . . . When one is barred from entering into a marriage with a same-sex partner who satisfies all other legal criteria of marriage eligibility, then one has been denied a marriage license solely because of sex. This triggers intermediate scrutiny.”); Andrea L. Clausen, *Marriage of Same-Sex Couples in Iowa*, 6 J. GENDER, RACE, & JUST. 451, 461 (2002) (“[I]f the Iowa Supreme Court were to recognize denial of same-sex marriage as a sex-based claim, but did not want to classify sex as a suspect class, the court could use intermediate scrutiny.”); SUZANNE PHARR, *HOMOPHOBIA: A WEAPON OF SEXISM* (1988). See also *infra* Part IV. For commentary advocating the use of intermediate scrutiny in other areas, see Rosemary M. Kennedy, *The Treatment of Women Prisoners after the VMI Decision*, 6 AM. U. J. GENDER & LAW 65 (1997) and Tamra M. Boyd, *Keeping the Constitution’s Promise: An Argument for Greater Judicial Scrutiny of Federal Alienage Classifications*, 54 STAN. L. REV. 319 (2001).

<sup>15</sup> Justice David Souter, quoted in Skaggs, *supra* note 7, at 1190.

<sup>16</sup> Joan A. Lukey and Jeffrey A. Smagula, *Do We Still Need a Federal Equal Rights Amendment?*, 44 BOSTON BAR J. 10, 26 (2000).

<sup>17</sup> See also, John Galotto, *Strict Scrutiny for Gender, via Croson*, 93 COLUM. L. REV. 508, 545 (1993) (writing that the “standard is chafing at the Court and [unconvincing] to most scholars.”).

<sup>18</sup> Shalleck, *supra* note 14, at 33.

<sup>19</sup> In Part III, we explain why we focus on state courts of last resort rather than on the lower federal bench. Suffice it to note here that

heightened scrutiny probably have the better case. At the very least, the *Craig* standard—while generating outcomes more favorable to parties alleging sex discrimination than did the traditional rational basis test—does, in fact, lead to far less predictable results than either rational basis or strict scrutiny. Courts are, for reasons that may have little to do with the standard itself, just as likely to uphold sex-based classifications as they are to eradicate them.

This finding has important implications for the future of sex discrimination litigation, as well as for the advancement of legal rights for gays and lesbians. As to the former, our results underscore the importance of elevating the standard used to adjudicate sex discrimination claims—a goal, as we demonstrate, that could be achieved in several distinct ways. As to gays and lesbians, our findings identify the possible costs and benefits associated with a litigation strategy designed to place their claims of discrimination in the intermediate scrutiny basket.<sup>20</sup>

We arrive at these implications in three steps. We begin in Part II with a description of the three-tier approach federal courts use to analyze claims of discrimination under the Fourteenth Amendment's Equal Protection Clause, along with a long-standing critique of that approach—that it leads, especially in the mid-level tier, to indeterminate results. In Part III, we demonstrate that this critique has merit. In particular, we show that while the application of the lowest and highest standards does, in fact, lead to rather predictable outcomes, the “in-between” standard does not. This result leads us in Part IV to emphasize the importance of elevating sex to the highest level of scrutiny and to question efforts designed to treat discrimination against gays and lesbians as sex discrimination—at least until

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because all three levels of scrutiny have been used in these courts to adjudicate claims of constitutional sex discrimination, they provide excellent laboratories for exploring patterns in this area of the law.

<sup>20</sup> See *supra* note 14 and *infra* Part IV B.

courts move away from *Craig*'s in-between test.

## II. Equal Protection and the Supreme Court

To say that the Supreme Court's equal protection jurisprudence has generated its fair share of commentary over the past few years is to make a rather uncontroversial claim. In fact, in the wake of recent decisions in the areas of sex discrimination,<sup>21</sup> affirmative action,<sup>22</sup> and gay rights,<sup>23</sup> scholars have scrutinized virtually every aspect of the Justices' approach to classifications based on sex, race, sexual orientation, and the like.<sup>24</sup> We do not intend to review the range of commentary, which would require a book or two. Instead we have two objectives. First, since an appreciation of current debates over *Craig* and its progeny requires some knowledge of the Court's three-tier approach to equal protection, we provide a brief overview of it in Part II A. Not much more is necessary since it has been so well described elsewhere.<sup>25</sup> Second, since we explicitly seek to put the debate on firmer empirical ground, we identify in Part II B the chief claims of both proponents and opponents of the Court's jurisprudence, first with regard to the determinacy of the results yielded by the current three-tier approach, and then with particular emphasis on its application to sex discrimination.

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<sup>21</sup> See, e.g., *Nguyen v. INS*, 533 U.S. 53 (2001).

<sup>22</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

<sup>23</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003), *reh'g denied*, 124 S.Ct. 35 (2003).

<sup>24</sup> For a recent and particularly insightful analysis, see Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003).

<sup>25</sup> For a sampling of work, see *supra* note 3.

### *A. The Three-Tier Approach to Equal Protection*

To analyze claims of discrimination under the Fourteenth Amendment's Equal Protection Clause,<sup>26</sup> judges, at least until *Craig*, applied one of two standards.<sup>27</sup> Under the traditional rational basis test, as Table 1 shows, courts presume the validity of whatever classification the government has made (e.g., allowing only those over the age of 18 to enter into contracts, or permitting only M.D.s to perform surgery); it is up to the party challenging the law to establish that it is irrational. Since this burden is difficult to meet, the conventional view among scholarly commentators is that rational basis leads to a predictable outcome: courts defer to the government, generally upholding its classification.<sup>28</sup>

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<sup>26</sup> The Equal Protection Clause of the Fourteenth Amendment is restricted to the states; the governing constitutional provision for claims of discrimination against the federal government is the Due Process Clause of the Fifth Amendment. For purposes of our discussion on sex discrimination, the two clauses are interchangeable.

<sup>27</sup> We adopt and adapt some of the discussion in this Part from Lee Epstein et al., *Do We Still Need an ERA? at* <http://epstein.wustl.edu/research/ERA.html>.

<sup>28</sup> See, e.g., EPSTEIN & WALKER, *supra* note 3; MEZEY, *supra* note 3; Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L. J. 871 (1971); Gunther, *supra* note 3; Kaufman, *supra* note 3. As we foreshadowed in Part I, some contemporary commentators take issue with this prediction. For their views, see Part II B.

Table 1. Equal protection tests<sup>29</sup>

Test	Example of Application	Validity Standard
Rational Basis	Age discrimination	The law must be a <i>reasonable</i> measure designed to achieve a <i>legitimate</i> government purpose.
Intermediate scrutiny	Sex discrimination	The law must be <i>substantially related</i> to the achievement of an <i>important</i> objective.
Strict scrutiny	Race discrimination	The law must be the <i>least restrictive</i> means available to achieve a <i>compelling</i> state interest.

Until the 1970s, the vast majority of claims of discrimination proceeded under the rules of the traditional rational basis test—with one particularly relevant exception: race. In light of the history surrounding ratification of the Fourteenth Amendment, the Court has held that classifications based on race should be subject to a less surmountable standard, known as “strict scrutiny” (or “suspect class”).<sup>30</sup> Under this standard, judges presume that a government action is suspect or unconstitutional. Only by showing that the law is the least restrictive means available to achieve a compelling state interest can the government overcome that presumption (see Table 1). Given the difficulty of making this showing, a conventional

<sup>29</sup> EPSTEIN & WALKER, *supra* note 3, at 645. See also *supra* note 3 and *infra* note 89.

<sup>30</sup> See supporting citations *supra* note 3.

wisdom emerged: the application of strict scrutiny generally leads to outcomes just as predictable as those under rational basis—only, of course, in the opposite direction: when courts apply this stricter test, they almost always rule in favor of the party alleging discrimination. Or, as Gunther famously put it, the suspect class test is “‘strict’ in theory and fatal in fact,” whereas the traditional rational basis standard provides “minimal scrutiny in theory and virtually none in fact.”<sup>31</sup>

It is thus no wonder that as part of their attempt to eradicate discrimination, women’s rights groups, beginning in the late 1960s, attempted to convince courts that sex-based classifications should be subject to strict scrutiny rather than to a rational basis analysis.<sup>32</sup> Their litigation efforts did not succeed, but neither did they wholly fail. In response to their claims, the U.S. Supreme Court in *Craig v. Boren*<sup>33</sup> articulated a new standard, often called intermediate or heightened scrutiny, that falls somewhere between rational basis and strict scrutiny.<sup>34</sup> Under it, the

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<sup>31</sup> Gunther, *supra* note 3, at 8. Justice O’Connor has taken issue with this claim, asserting strict scrutiny is not always “strict in theory, but fatal in fact.” *Grutter*, 123 S.Ct. at 2338. Some scholars agree, arguing more broadly, as we do in Part II B, that the standard three-tier approach fails to produce reliable expectations. Nonetheless, it is true that many contemporary commentators suggest that Gunther’s assertion remains generally apt. See, e.g., EPSTEIN & WALKER, *supra* note 3; MEZEY, *supra* note 3; Farber et al., *supra* note 3; Lukey, *supra* note 16. See also Part III for our attempt to empirically evaluate this debate.

<sup>32</sup> For descriptions of these efforts, see generally Daughtrey, *supra* note 6; Karen O’Connor & Lee Epstein, *Beyond Legislative Lobbying: Women’s Rights Groups and the Supreme Court*, 67 JUDICATURE 134 (1983).

<sup>33</sup> *Craig*, 429 U.S. at 218.

<sup>34</sup> For a history of the litigation leading up to *Craig*, including the Court’s decisions in *Reed v. Reed*, 404 U.S. 71 (1971) and *Frontiero v. Richardson*, 411 U.S. 677 (1973), see LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* (1998); Daughtrey, *supra* note 6; Gaffney, *supra* note 12; Weinrib, *supra* note 7.

challenged law must be substantially related to the achievement of an important government objective (see Table 1).<sup>35</sup>

Many argue that application of intermediate scrutiny leads to more favorable outcomes for parties alleging sex discrimination than did the traditional standard.<sup>36</sup> At the same time, though, they suggest that the intermediate approach, as opposed to rational basis or strict scrutiny, produces far less predictable results: the Court may more often than not void sex-based classifications, but it more than occasionally upholds them.<sup>37</sup>

### *B. Assessments of the Three-Tier Approach*

As we noted at the onset of this section, no shortage of critical commentary exists on the Court's three-tier approach to equal protection. Some comes from the bench itself, such as Justice Stevens's statement that "there is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply

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<sup>35</sup> As we explained in Part I, in *United States v. Virginia*, the majority articulated a variation on this approach which would require an "exceedingly persuasive justification" to sustain a sex-based classification. See *supra* note 7. But in its two most recent cases the Court "retreated" to the standard articulated in *Craig*. See *supra* note 10.

<sup>36</sup> See, e.g., Udell, *supra* note 13 (noting that "from a feminist perspective, the intermediate scrutiny standard was certainly preferable to the 'mere rationality' formulation"). See also LESLIE F. GOLDSTEIN, CONTEMPORARY CASES IN WOMEN'S RIGHTS (1994); Case, *supra* note 2.

<sup>37</sup> See, e.g., MEZEY, *supra* note 3; Deborah L. Brake, *Sex as a Suspect Class: An Argument for Applying Strict Scrutiny to Gender Discrimination*, 6 SETON HALL CONST. L.J. 953 (1996); Erin Chlopak, *Mandatory Motherhood and Frustrated Fatherhood: The Supreme Court's Preservation of Gender Discrimination in American Citizenship*, 51 AM. U. L. REV. 967 (2002); Deutsch, *supra* note 3; Lukey, *supra* note 16.

one standard of review in some cases and a different standard in other cases.”<sup>38</sup> There are numerous critics of the heightened scrutiny standard in particular. Mary Ann Case, for example, asserts that “the components” of the intermediate standard “have rarely been the moving parts in a Supreme Court sex discrimination decision,”<sup>39</sup> whereas Jason Skaggs points out the inconsistency of “subject[ing] gender-based affirmative action programs to strict scrutiny while analyzing all other gender-based classifications under intermediate scrutiny.”<sup>40</sup>

These scholars make interesting and useful points. Especially relevant for our project, though, are analyses centering on the reliability of the results yielded by the three-tier approach.<sup>41</sup> The issue raised in these analyses—

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<sup>38</sup> *Craig*, 429 U.S. at 211-12. Justice Stevens was responding to a potential critique of the now three-tiered, as opposed to the traditional two-tiered, approach. As he goes on to say: “Whatever criticism may be leveled at a judicial opinion implying that there are at least three such standards applies with the same force to a double standard.”

<sup>39</sup> Case, *supra* note 2, at 1449. Rather, she says, “to determine whether there is unconstitutional sex discrimination, one need generally ask only two questions: 1) Is the rule or practice at issue sex-respecting, that is to say, does it distinguish on its face between males and females? and 2) Does the sex-respecting rule rely on a stereotype?”

<sup>40</sup> Skaggs, *supra* note 7, at 1174-75. For other critiques, see Shalleck, *supra* note 14 (strict-scrutiny standard as applied to gender issues also important for gay and lesbian rights); Katharine B. Silbaugh, *Miller v. Albright: Problems of Constitutionalization in Family Law*, 79 B.U. L. REV. 1139 (1999). For more general commentary on the Court’s jurisprudential posture toward women’s rights, see JUDITH A. BAER, *OUR LIVES BEFORE THE LAW: CONSTRUCTING A FEMINIST JURISPRUDENCE* (1999) (suggesting that it has worked to reinforce male dominance).

<sup>41</sup> See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 83 (2002):

Reliability, [in empirical research], is the extent to which it is possible to replicate a measurement, reproducing the same value (regardless of whether it

whether various legal standards produce predictable and consistent outcomes—is important for many reasons, not the least of which is the implication for the norm of *stare decisis*. If courts decline to follow precedential rules of law or do so in unpredictable ways, they risk undermining their fundamental efficacy. Members of the legal and political communities predicate future expectations on the assumption that others will follow existing rules. Should courts make radical changes or apply rules inconsistently, these communities may be left unable to adapt.<sup>42</sup>

From this general logic emerge two specific critiques of the Court's equal protection jurisprudence. One, which has emerged in recent years, suggests that a three-tier approach no longer provides an adequate framework for reliable expectations about court decisions; the other, a more conventional view we previewed in Part

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is the right one) on the same standard for the same subject at the same time. If any one of us stepped on the same bathroom scale 100 times in a row, and if the scale [was] working properly, it would give us the same weight 100 times in a row—even if that weight is not accurate. (In contrast, a scale that is both reliable and valid will give a reading that is both the same and accurate 100 times in a row.) In other words, in empirical research we deem a measure reliable when it produces the same results repeatedly regardless of who or what is actually doing the measuring.

*Id.* This, it seems to us, is very similar to the criteria many commentators use to evaluate the predictability of legal standards.

<sup>42</sup> See, e.g., Lee Epstein & Jack Knight, *supra* note 34; Jack Knight & Lee Epstein, *The Norm of Stare Decisis*, 40 AM. J. POL. SCI. 1018. It is along similar lines that scholars are concerned with reliability. They suggest that unreliable measurement procedures might provide evidence that the researcher, however inadvertently, has biased a measure in favor of a personal hypothesis, which can then undermine any inferences reached therein. See Epstein & King, *supra* note 41, at 83.

IIA, asserts that while intermediate scrutiny may be relatively unpredictable, the two lowest and highest tiers are not. As a general matter, the application of rational basis leads courts to uphold classifications and the application of strict scrutiny leads courts to strike them down.

Those who believe that the standard equal protection framework no longer produces uniform results (if, in fact, it ever did) do so for various reasons. For Ashutosh Bhagwat, the problem is that the “the Court has failed to develop any coherent framework regarding how, in applying the tiers of scrutiny, courts are to assess whether the governmental interest asserted satisfies the requirements of the level of scrutiny at issue.”<sup>43</sup> In Robert Post’s view, the Court can circumvent the three-tier approach altogether by strategically avoiding (even obvious) equal protection arguments.<sup>44</sup> The commonalities among these and other critiques, however,<sup>45</sup> may be more

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<sup>43</sup> Ashutosh Bhagwat, *Affirmative Action and Compelling Interests: Equal Protection Jurisprudence at the Crossroads*, 4 U. PA. J. CONST. L. 260, 270 (2002).

<sup>44</sup> Post, *supra* note 24, at 99-101. He specifically points to *Lawrence v. Texas*, 124 S. Ct. 441 (2003), in which passages in the majority’s opinion “sound almost entirely in equal protection,” but which the Court decided on due process grounds. *Id.* at 99. Post argues that the justices took this route to avoid determining “whether classifications based upon sexual orientation should receive elevated scrutiny or merely rational basis review.” *Id.* at 100. Such strategic “instrumentation” on the part of judges seems to occur in other areas of the law, in other forms, and for a range of reasons. See Lee Epstein et al., *Dynamic Agenda-Setting on the Supreme Court: An Empirical Assessment*, 39 HARV. J. ON LEGIS. 395 (2002); Emerson H. Tiller & Pablo T. Spiller, *Strategic Instruments: Legal Structure and Political Games in Administrative Law*, 15 J.L. ECON. & ORG. 349, 362 (1999).

<sup>45</sup> See, e.g., Smith, *supra* note 3, at 476 (asserting “[t]he Rehnquist Court is moving away from [a three-tiered scheme of review] toward a more flexible approach. Moreover, even under the three-tier framework, the Court balances the importance of the rights or interests at stake with the government’s justification for the discriminatory

interesting than their differences. Broadly speaking, the argument advanced in study after study of judicial decisions is that although institutions—including legal standards—are certainly important, they are not as determinative as the three-tier framework might suggest. Indeed, the extant literature typically defines an institution as a set of rules that structures an interaction,<sup>46</sup> not as rules that establish outcome. Furthermore, it typically views the choices judges make as a function of many other forces, including personal political preferences, jurisprudential values, personal attributes, and the external environment in which they deliberate.<sup>47</sup>

There are multiple examples within the equal protection realm that demonstrate the inadequacy of the three-tier framework.<sup>48</sup> Commentators choose among a wide array of disputes to justify their position—from *Romer v. Evans*,<sup>49</sup> in which the Court “use[d] the heightened scrutiny mode of analysis when it claim[ed] to

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legislation in selecting and defining the appropriate tier. Recent cases have made it clear that the Court covertly employs [this] approach in every equal protection challenge.”)

<sup>46</sup> See, e.g., EPSTEIN & KNIGHT, *supra* note 34; WALTER F. MURPHY, *THE ELEMENTS OF JUDICIAL STRATEGY* (1964).

<sup>47</sup> See, e.g., DANIEL R. PINELLO, *GAY RIGHTS AND AMERICAN LAW* (2003); Gregory A. Caldeira et al., *Sophisticated Voting and Gate-Keeping in the Supreme Court*, 15 J. L. ECON. & ORG. 549 (1999); Erwin Chemerinsky, *Understanding the Rehnquist Court: An Admiring Reply to Professor Merrill*, 47 ST. LOUIS U. L.J. 659 (2003); Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155 (1998); Epstein & Knight, *supra* note 34; Tracey George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323 (1992); Gerard S. Gryski et al., *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143; DANIEL R. PINELLO, *GAY RIGHTS AND AMERICAN LAW* (2003); Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

<sup>48</sup> See *supra* note 47.

<sup>49</sup> 517 U.S. 620 (1996).

be employing rational basis review;”<sup>50</sup> to *United States v. Virginia*,<sup>51</sup> in which the Court, at least according to Justice Scalia,<sup>51</sup> applied strict (not heightened) scrutiny to assess a sex-based classification; to *Grutter v. Bollinger*,<sup>52</sup> in which the Court applied strict scrutiny but nonetheless upheld the University of Michigan Law School’s use of race in admissions decisions. In short, because “the applicable level of scrutiny remains susceptible to modification—either ratcheted up to the most demanding standard or reduced to the most permissive test”<sup>53</sup>—predictability is all but lost.

Many scholars, perhaps the majority, take issue with the purported inconsistency as it pertains to the highest and lowest levels of the three-tier approach. As we foreshadowed in Part II A, they say, and have long said, that these two extreme tiers have “evolved sub silentio so that the highest level, strict scrutiny, equates to an almost automatic conclusion of unconstitutionality, and the lowest, rational basis review, leads to an equally likely result of constitutionality.”<sup>54</sup> These analysts are aware of *Romer* and *Grutter*. They simply suggest that these cases are the exceptions to the general rule, as espoused by Gerald Gunther: strict scrutiny is “‘strict’ in theory and fatal in fact,” while rational basis provides “minimal scrutiny in theory and virtually none in fact.”<sup>55</sup>

While proponents of the three-tier approach differ with critics on the expectations created by the rational basis and strict scrutiny tests, there is virtually universal

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<sup>50</sup> Smith, *supra* note 3 at 476.

<sup>51</sup> See *supra* note 9. Justice Scalia is not alone. See *supra* note 8 (scholarly works supporting Scalia’s contention).

<sup>52</sup> 539 U.S. 306 (2003).

<sup>53</sup> Melanie K. Morris, *Ruth Bader Ginsburg and Gender Equality: A Reassessment of Her Contribution*, 9 CARDOZO WOMEN’S L. J. 1, 20-21.

<sup>54</sup> Bhagwat, *supra* note 43, at 270.

<sup>55</sup> Gunther, *supra* note 3, at 8.

agreement on the inherent unpredictability of the intermediate standard. Or, as Joan Lukey puts it:

Brennan's language in *Craig* indicated that this new test was more than the rational basis standard, under which classifications were almost always upheld. Still, it fell short of the onus of the strict scrutiny standard, under which almost every classification was struck down. It seemed that the concept of 'intermediate scrutiny' constituted a malleable, rather indeterminate standard of review, providing little or no guidance for lower courts—or even for future Supreme Court cases.<sup>56</sup>

Several members of the current Supreme Court agree. During his confirmation proceedings, Justice Souter declared that the intermediate scrutiny test "is not good, sound protection. It is too loose."<sup>57</sup> Prior to joining the Court, Justice Ginsburg cautioned that "variance within the federal judiciary will persist until the High Court provides unequivocal guidance by designating sex as a suspect classification requiring the application of strict judicial scrutiny."<sup>58</sup> Dissenting in *Craig*, Justice Rehnquist asked:

How is this Court to divine what objectives are important? How is it to determine whether a particular law is 'substantially' related to the achievement of such objective, rather than

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<sup>56</sup> Lukey, *supra* note 16, at 26. See also Udell, *supra* note 13, at 547 (arguing that "the Justices can draft such divergent opinions in their application of the intermediate scrutiny standard. . .").

<sup>57</sup> Skaggs, *supra* note 7, at 1190.

<sup>58</sup> See Morris, *supra* note 53, at 21. Ginsburg made this claim in Brief of Amici Curiae of the American Civil Liberties Union et al. at 14, *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (No. 79-381).

related in some other way to its achievement?  
 Both of the phrases used are so diaphanous and  
 elastic as to invite subjective judicial  
 preferences or prejudices relating to particular  
 types of legislation, masquerading as judgments  
 . . . .<sup>59</sup>

Two of the Court's most recent constitutional sex discrimination decisions illustrate these concerns. In *United States v. Virginia*, the U.S. government implored the Court to apply strict scrutiny to sex-based classifications, an invitation that Justice Scalia, along with many scholars, contend the majority "effectively" accepted.<sup>60</sup> Nevertheless, in a scathing critique of intermediate scrutiny, Norman Deutsch writes that "[t]he shoe was on the other foot in the Court's most recent gender case, *Nguyen v. INS*."<sup>61</sup> In the course of upholding the law at issue—one that privileges a mother over a father in citizenship proceedings—the *Nguyen* majority held that the sex-based classification achieved important government interests and passed the heightened scrutiny test. Justice O'Connor disagreed. In a vigorous dissent, she went so far as to accuse the Court of explaining and applying "heightened scrutiny. . . in a manner. . . that is a stranger to our precedents."<sup>62</sup> O'Connor went on to say that:

No one should mistake the majority's analysis  
 for a careful application of this Court's equal

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<sup>59</sup> *Craig*, 429 U.S. at 221 (Rehnquist, J., dissenting).

<sup>60</sup> See *supra* note 9. See also Delchin, *supra* note 8 (arguing that "while Justice Ginsburg never expressly referred to the Government's argument in her majority opinion, several factors support Justice Scalia's contention that the Court [adopted strict scrutiny]"); Sunstein, *supra* note 8.

<sup>61</sup> Deutsch, *supra* note 3, at 187.

<sup>62</sup> *Nguyen*, 533 U.S. at 74.

protection jurisprudence concerning sex-based classifications. Today's decision instead represents a deviation from a line of cases in which we have vigilantly applied heightened scrutiny to such classifications to determine whether a constitutional violation has occurred. I trust that the depth and vitality of these precedents will ensure that today's error remains an aberration.<sup>63</sup>

In short, O'Connor "not so subtly implied that the majority had, in effect, not applied intermediate scrutiny, but rational basis review."<sup>64</sup>

It is hardly a surprise that many scholars, regardless of what position they take over rational basis and strict scrutiny, have come to see that:

[D]ispute over the proper application of the standard of review in *Nguyen* and *Virginia* is symptomatic of the fact that intermediate scrutiny is a 'made up' rule that has had little effect on the outcome of the decisions. . . . [I]n the end, the results in the cases turn on how the Court and the individual Justices view the underlying facts and policies, rather than on the verbalization of the standard of review as intermediate scrutiny.<sup>65</sup>

If this is true, then as long as the Court continues to invoke the "murky" *Craig* rule, it will uphold or void classifications as it sees fit; and judges on state and lower federal courts will do the same or even "concoct" their own

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<sup>63</sup> *Id.* at 97.

<sup>64</sup> Deutsch, *supra* note 3 at 187.

<sup>65</sup> *Id.* at 187-88.

approaches to sex discrimination.<sup>66</sup> As a result, all predictability, reliability, and consistency is lost.

### III. An Empirical Analysis of the Equal Protection Tests

Several commentators dispute this view of intermediate scrutiny, claiming instead that its results are just as determinant as the rational basis and strict scrutiny tests. Edward Gaffney is exemplary: "If the formal language of the standard used to evaluate claims of gender discrimination is not strict scrutiny, it is something very close to that sort of exacting review. It rarely meets a classification that it likes . . ."<sup>67</sup> while this claim may be relatively anomalous, as the discussion above indicates, it is nonetheless worthwhile to assess this claim against assertions flowing from more mainstream camps that the three-tier approach reveals either very little or a great deal about the likely outcomes of equal protection suits, with the notable exception of sex-discrimination litigation.

Accordingly, in what follows we undertake this task. In Part III A, we examine empirically the degree to which the highest and lowest tiers produce reliable outcomes: i.e., decisions upholding classifications under a rational basis analysis and decisions striking down classifications under strict scrutiny. Then, in Part III B we explore the extent to which the intermediate test produces predictable results.

In conducting these investigations, we focus

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<sup>66</sup> See, e.g., MEZEY, *supra* note 3; Brake, *supra* note 37; Roberta W. Francis, *Reconstituting the Equal Rights Amendment: Policy Implications for Sex Discrimination*, paper presented at the annual meeting of the American Political Science Association, San Francisco (2001) (on file with the authors).

<sup>67</sup> Gaffney, *supra* note 12, at 396-97. See also Bowsher, *supra* note 7 at 317-18 (arguing that "despite the objections of three members of the *Craig* Court, intermediate scrutiny has since proven to be very workable").

primarily on state courts of last resort (and then on sex-discrimination litigation),<sup>68</sup> even though the vast majority of commentary has centered on the U.S. Supreme Court. This focus reflects the difficulty of generalizing about the High Court's adjudication of equal protection disputes from a small number of cases (e.g., since 1960, the Justices have decided only 30 sex discrimination cases implicating the Equal Protection Clause)<sup>69</sup> and from a lack of variation in the standards employed (e.g., with the possible exception of *United States v. Virginia*, a majority of the Court has never applied strict scrutiny to sex-based claims)<sup>70</sup>. These difficulties evaporate when we move to state supreme courts. Since 1960, state courts of last resort have addressed constitutional questions in 416 cases involving sex-based classifications, and they have done so using all three equal protection tests: rational basis, heightened scrutiny, and strict scrutiny.<sup>71</sup>

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<sup>68</sup> Throughout this article we use the terms "state court of last resort" and "state supreme court" interchangeably, even though some state courts of last resort are not named "supreme court."

<sup>69</sup> We obtained this figure from MEZEY, *supra* note 3, at 16, which lists the 29 cases decided between 1971 and 2001. The U.S. Supreme Court Database identifies one case decided before 1971, *Hoyt v. Florida*, 368 U.S. 57 (1961). U.S. Supreme Court Database, at <http://www.polisci.msu.edu/pljp/databases.html> (last accessed on January 1, 2003).

<sup>70</sup> In *Frontiero v. Richardson*, 411 U.S. 677 (1973), a plurality of four Justices deemed sex a suspect class. But the four could not obtain a fifth vote, which led to the "compromise" in *Craig*. See EPSTEIN & KNIGHT, *supra* note 34.

<sup>71</sup> The figure of 416—and all other data we present in this Article—comes from a database we amassed on all constitutional sex discrimination cases resolved in state courts of last resort between 1960 and 1999. Since that database (as well as all the documentation necessary to use it and an explanation of how we collected the information) is available on our web site, suffice it to note here that we included cases in which the state justices addressed a claim of constitutional sex discrimination and invoked an equal protection test in the course of addressing it. See Table 1 and *infra* note 89; see also

The use of different levels of scrutiny by state supreme courts with respect to the same class of disputes raises a number of interesting questions. Most importantly, why do justices in one state invoke strict scrutiny, while those in another apply the intermediate standard? On a somewhat different note, our attempt to gain insight into how the federal bench (especially the U.S. Supreme Court) employs the three-tier framework by focusing on the states and on sex discrimination raises a different set of questions. We address these matters in Part IV. For now, let us turn to the results of our analyses of the various tiers encompassing the judiciary's approach to equal protection.

#### *A. Rational Basis and Strict Scrutiny*

Were we to focus our empirical investigation exclusively on the U.S. Supreme Court's use of rational basis and strict scrutiny, it is entirely possible that we could muster support for virtually all existing commentary. Consider, for example, the conventional view that strict scrutiny and rational basis lead to predictable results. Using the former, the Court strikes classification, while under the latter, it upholds them. If we eliminate affirmative action cases from consideration,<sup>72</sup> this conventional expectation seems to hold. Since the 1960s, for example, it is difficult to identify a single act discriminating on the basis of race and challenged on equal protection grounds that the Justices upheld. Conversely, it is equally difficult to identify a single law involving age discrimination that the Justices struck down as a violation of equal protection.<sup>73</sup>

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*infra* note 90.

<sup>72</sup> We return to these cases momentarily.

<sup>73</sup> Using the U.S. Supreme Court Database (*see supra* note 69), we identified five age discrimination cases in the employment realm: *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Vance v. Bradley*, 440 U.S. 93 (1979); *Alexander*

The existence of successful challenges in the race area only and none involving age discrimination hardly seems a coincidence: the former are subject to strict scrutiny, and the latter to rational basis. This distinction in standard may explain the results we observe. The Court, in fact, suggested as much in the recent age discrimination case of *Kimel v. Florida Board of Regents*:

States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest. The rationality commanded by the Equal Protection Clause does not require States to match age distinctions and the legitimate interests they serve with razorlike precision. . . . In contrast, when a State discriminates on the basis of race or gender, we require a tighter fit between the discriminatory means and the legitimate ends they serve. . . . Under the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests. The Constitution does not preclude reliance on such generalizations. That age proves to be an inaccurate proxy in any individual case is irrelevant. . . . Finally, because an age classification is presumptively rational, the individual challenging its constitutionality bears the burden of proving that the "facts on which the classification is apparently based could not reasonably be conceived to be true by

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*v. Fioto*, 430 U.S. 634 (1977); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976). In none of the five did the Court find in favor of the party alleging discrimination.

the governmental decisionmaker.”<sup>74</sup>

If we incorporate affirmative action into our analysis, however, the picture changes dramatically, lending some support to those who proclaim the indeterminacy of even the highest level of scrutiny. Since *Regents of the University of California v. Bakke*—<sup>75</sup> the Court’s first major foray into the area of affirmative action—it has decided eight constitutional cases centering on preferences for minorities.<sup>76</sup> Despite the Court’s use of the strict scrutiny standard to examine the programs at issue, it upheld four of the eight.<sup>77</sup>

What should we take away from this analysis, as limited as it is, of the Supreme Court’s use of rational basis and strict scrutiny? Not much, as it turns out. Too few cases exist to reach any firm conclusions. Furthermore, as we suggested earlier, once the Court uses a particular test to evaluate a particular type of classification, it generally stays the course. The Court’s repeated application of rational basis in the age context is exemplary. With the possible exception of *United States v. Virginia*, a majority of the Court has never applied strict scrutiny to a sex-based claim;<sup>78</sup> and in only eight cases prior to *Craig* did it invoke the rational basis standard.

In an effort to overcome these problems, we turn to

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<sup>74</sup> *Kimel*, 528 U.S. at 83-84 (citations omitted).

<sup>75</sup> 438 U.S. 265 (1978).

<sup>76</sup> We identified these cases using the U.S. Supreme Court Database. See *supra* note 69.

<sup>77</sup> The four it upheld were in *Fullilove v. Klutznick*, 448 U.S. 448 (1979); *United States v. Paradise*, 480 U.S. 149 (1987); *Metro Broad., Inc. v. Fed. Communications Comm’n*, 497 U.S. 547 (1990); *Grutter v. Bollinger*, 124 S. Ct. 35 (2003). The four it struck were at issue in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1988); *Adarand Constructors v. Peña*, 515 U.S. 200 (1995); *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003).

<sup>78</sup> As we noted *supra* at note 70, in *Frontiero*, a plurality, not a majority, of the Justices deemed sex a suspect class.

the states and, in particular, to how their courts of last resort have employed the two extreme levels of scrutiny to sex-based classifications. Since 1960, these courts have resolved 416 constitutional sex discrimination suits. As Figure 1 shows, minimal scrutiny is used in 45% (n=191), strict scrutiny in 18.0 % (n=75), and a version of the *Craig* intermediate standard in the remaining 150 (36.1%).<sup>79</sup> This is quite a bit of inter-state variation in its own right, and it is especially noticeable when we compare it against the U.S. Supreme Court's adjudication of sex-based discrimination cases. Between 1960 and 2002, the Justices heard 30 cases, using the intermediate standard, or a variant thereof,<sup>80</sup> in nearly 70%.

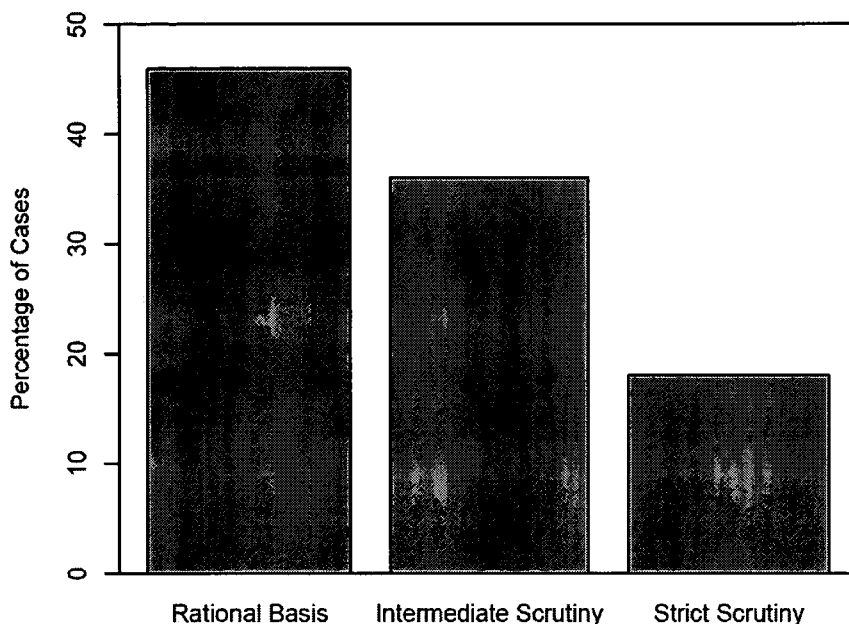
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<sup>79</sup> For information on how we defined these standards, *see infra* note 89.

<sup>80</sup> *See supra* note 35.

Figure 1: Use of equal protection tests in constitutional sex discrimination litigation in state courts of last resort.

N=416<sup>81</sup>



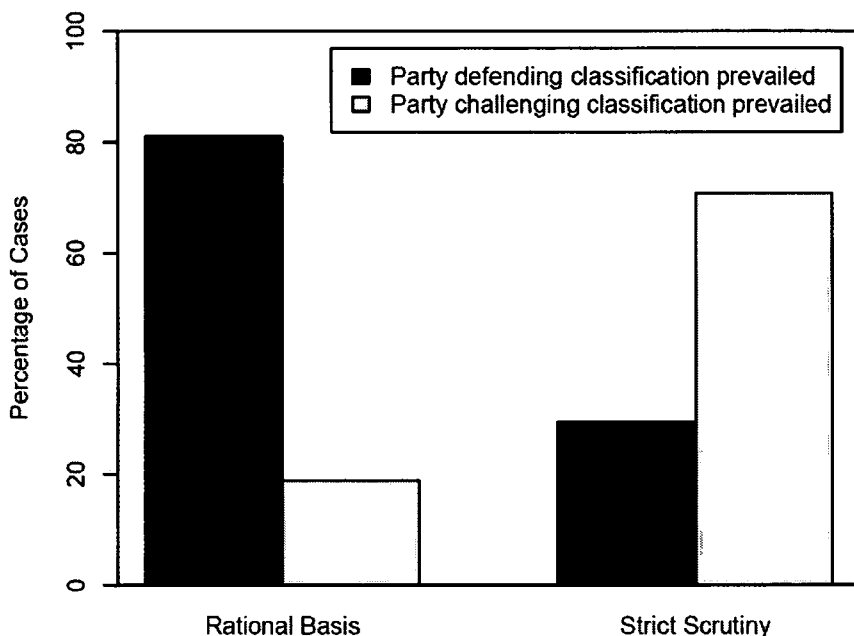
Let us consider the extent to which the upper and lower tiers produce reliable expectations about outcomes. Do courts invoking rational basis generally uphold classifications, while those employing strict scrutiny strike them down? A simple comparison, as seen in Figure 2, suggests that the answer is yes. The standard used by a court is, to a statistically significant degree,<sup>82</sup> associated

<sup>81</sup> See *supra* note 69 (information on the database we used to generate this figure); see also Table 1 and *infra* note 89 (how we defined these standards).

<sup>82</sup> The association is statistically significant (Chi-Square = 62.64;  $p < 0.001$ ).

with case outcomes. Of the 191 suits in which the court applied rational basis, the party alleging discrimination failed to prevail in 81.2% (155 of 191); when the state justices invoked strict scrutiny (22 of 75) the losing percentage was only 18.8%.<sup>83</sup>

Figure 2: Prevailing party by the application of the rational basis and strict scrutiny tests in constitutional sex discrimination litigation in state courts of last resort. N=266.<sup>84</sup>



<sup>83</sup> See *infra* note 90 (information on how we defined case outcomes).

<sup>84</sup> See *supra* note 69 (information on the database we used to generate this figure); see Table 1 and *infra* note 89 (how we defined these standards); see *infra* note 90 (how we treated case outcomes). See also *supra* note 80 for information on statistical significance.

From Figure 2, we can say that standards and outcomes appear to be associated in ways that many commentators would anticipate. Unfortunately, this sort of analysis does not enable us to make causal claims about that relationship; that is, from a simple comparison between standards and outcomes, we cannot claim that the standard employed caused the court to reach a particular outcome. There are many reasons for this, but most relevant here is that we have considered only the effect of the particular equal protection test on the case outcome and have failed to take into account other factors. To the extent that we have ignored various competing explanations, our simple comparison suffers from the most severe form of “omitted variable bias,” making inferences reached therein suspect.<sup>85</sup> For example, if we believe that politics plays a role in explaining court decisions, then failure to address the political composition of the deciding court could lead to an incorrect assessment of the true jurisprudential effect of legal standards.<sup>86</sup> Indeed, the impact of politics on judicial decision making could confound our results in any number of ways; for example, that only left-of-center courts invoke strict scrutiny or reach decisions in favor of the party

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<sup>85</sup> Epstein & King, *supra* note 41; GARY KING ET. AL., *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* (1994). Omitted variable bias occurs when a statistical comparison excludes variables that are (a) known to affect the outcome and (b) correlate with the explanatory covariate of interest.

<sup>86</sup> For more than six decades, political scientists and legal academics have documented the effect of the political preferences of judges on the decisions they reach. For recent examples, see JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002); Theodore W. Ruger, et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decision-Making*, COLUM. L. REV. (forthcoming) (manuscript on file with authors). See generally Lee Epstein et al., *Childress Lecture Symposium: The Political (Science) Context of Judging*, 47 ST. LOUIS U. L.J. 783 (2003); works cited *supra* note 47.

alleging discrimination regardless of the standard employed.

In light of the large amount of literature suggesting the importance of ideology, neither of these scenarios is much of a stretch.<sup>87</sup> More generally, while there may be good reasons to believe that the adoption of a higher standard of law will generate outcomes more favorable to parties alleging discrimination, there are equally good reasons to question that assertion and believe that other factors come into play. At minimum, the conventional view about the determinacy of (the most extreme) tiers of the Court's equal protection framework may ask too much of institutions. While rules certainly can serve to structure choices, it seems imprudent to believe that they do all the work—especially when so many studies of judging suggest otherwise.

Accordingly, we must attend to (that is “control for”) the other factors that may affect case outcomes. Without performing statistical control, comparisons like Figure 2 are not informative about the possible causal relationships among the variables of interest. Also, we ought to account for the possibility that the choice of which test to employ may be influenced by numerous factors.<sup>88</sup> In

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<sup>87</sup> See *supra* note 84.

<sup>88</sup> To be sure, federal courts are supposed to adhere to legal principles established by the U.S. Supreme Court, and state courts are supposed to view federal law as establishing a floor, instead of a ceiling, on civil rights and liberties. However, as the numerous studies, not to mention our own reading of state cases indicate, these norms do not always hold in this area of the law. Commentators point to federal courts that have all but ignored the current intermediate standard and have instead invoked higher or lower rules as they so desire; they also point to state courts of last resort that used a rational basis standard to adjudicate sex discrimination even after *Craig*. And, of course, there are states courts that treat sex as a suspect class. See, e.g., Brake, *supra* note 37; Branon P. Denning & John R. Vile, *Necromancing the Equal Rights Amendment*, 17 CONST. COMM. 593 (2000); Beth Gammie, *State ERAs: Problems and Possibilities*, 1989 U. ILL. L. REV. 1123 (1989);

a previous analysis of the state sex discrimination data, we took these steps, estimating a statistical model that incorporated four factors (or “variables”) to explain the equal protection test used by the court<sup>89</sup> and five factors, in addition to the test, to explain the outcome.<sup>90</sup> To be even more precise, we analyzed two equations, with two differentially measured dependent variables—the test (an ordinal variable that can take on three values: rational basis, intermediate scrutiny, and strict scrutiny<sup>91</sup>) and the outcome

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Kaufman, *supra* note 3; MEZEY, *supra* note 3; Kevin Francis O’Neill, *The Road Not Taken: State Constitutions as an Alternative Source of Protection for Reproductive Rights*, 11 N.Y.L. SCH. J. HUM. RTS. 5 (1993). *See also* Part IV, in which we examine factors explaining state courts’ choice of standard.

<sup>89</sup> These variables are as follows: (1) the presence or absence of a state equal rights amendment, (2) the political ideology of the court, (3) the proportion of the court composed of women, (4) the existence or not of a state intermediate appellate court, and (5) whether or not the state had ratified the national ERA. *See*

[<http://epstein.wustl.edu/research/sexdiscrimination.html>] (more details on these variables); *see also* Epstein et al., *supra* note 27 (the rationale behind including these variables).

<sup>90</sup> In addition to the equal protection test employed by the court, these variables are as follows: (1) the political ideology of the court, (2) the existence or not of a state intermediate appellate court, (3) a female as the party alleging discrimination, (4) a claim of a physical difference between men and women, and (5) the government as a defender of the sex-based classification. *See*

[<http://epstein.wustl.edu/research/sexdiscrimination.html>] (more details on these variables); *see also* Epstein et al., *supra* note 27 (the rationale behind including these variables).

the data and documentation on our web site; for the rationale behind including these variables, *see* Epstein et al., *supra* note 27.

<sup>91</sup> In the intermediate scrutiny category we also include a variation on that standard—that the government must offer an “exceedingly persuasive justification” for discriminating on the basis of sex—which some U.S. Supreme Court justices have endorsed. *See supra* note 35. In the strict scrutiny category, we also include a standard invoked occasionally by a few state courts—a standard that some observers liken to strict scrutiny, while others describe as “stricter” than strict

(a dichotomous variable in which the court either ruled for or against the party alleging discrimination<sup>92</sup>)—in one model. Since no standard statistical model adequately performs this task, we developed one: a bivariate mixed response probit model, which allows for correlation across two equations and which we estimate using maximum likelihood.<sup>93</sup>

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scrutiny because it supposedly does not allow for sex-based classifications. To the extent that courts qualify this “stricter” standard with terms such as “absent compelling justifications” or in cases based on “actual differences,” however, the prohibition is not absolute, thereby lending credence to the view that it is akin to strict scrutiny. For our purposes, though, the key point is that it is closer, if not identical, to strict scrutiny.

<sup>92</sup> To code case outcome, we rely on the approach commended by Gryski et al., *supra* note 47 and assess whether the party alleging sex discrimination won or lost the dispute. In taking this route, we are well aware of normative debates among some feminists over whether, as Goldstein, *supra* note 36, at 209, puts it, “to argue for ‘protective’ legislation for women on the grounds that without such legislation women are unfairly disadvantaged by making them play by rules that were designed with men in mind, and that are ill-adapted to women’s biology and life patterns.” While we appreciate this argument, our coding scheme remains relatively agnostic over it.

<sup>93</sup> See Epstein et al. *supra* note 27, at app. B (statistical model, along with our estimation methods). What is important here is that even though the parameter estimates resulting from these procedures admit to an interpretation akin to probit coefficients, our methodological approach is distinctive in two regards. First, it enables us to estimate parameters that, while substantively similar to those that would result from analyzing decisions over standards of law and case outcomes independently, are more efficient because we employ all the data to obtain them. Second, the approach facilitates a more exacting investigation of the dependence between the choices of standard and outcome because we are able to obtain a precise estimate of that dependence, in the form of an estimate of a correlation parameter, as a result of our ability to control for the factors that may affect both the standard and outcome in one model. Estimating this bivariate mixed response probit model leads to the results depicted in the table below—results that are quite striking: All the variables produce statistically significant coefficients in the expected direction. The estimate,

From this model, we gain a great deal of insight into the resolution of constitutional sex discrimination cases in the states. For example, we can now account for why state courts adopt different standards of law to adjudicate the same class of cases.<sup>94</sup> Furthermore, we can speak to the matter directly at hand: whether different equal protection tests lead to different results. The bivariate analysis presented in Figure 2 suggested that they do; and, as it turns out, this basic conclusion remains even after we control for the other relevant factors.

In particular, from our analyses, we find that the standard a court uses and the outcome it reaches are significantly correlated<sup>95</sup>—in the direction many commentators would anticipate. Moreover, the probabilities displayed in Figure 3 reveal that the relationship is

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indicating the correlation between the equal protection test used and the outcome reached, also attains statistical significance.

Parameter		MLE	Standard Error
$\beta_1$	Constant	-1.106	0.189 *
$\beta_1$	ERA	0.460	0.120 *
$\beta_1$	Judicial Ideology	0.011	0.004 *
$\beta_1$	ERA Ratification	0.456	0.143 *
$\beta_1$	Proportion Women	2.187	0.566 *
$\beta_1$	Intermediate Appellate Court	0.354	0.138 *
$\tau_1$	Cut Point	1.179	0.084 *
<hr/>			
$\beta_2$	Constant	-0.794	0.225 *
$\beta_2$	Judicial Ideology	0.017	0.004 *
$\beta_2$	Intermediate Appellate Court	0.376	0.153 *
$\beta_2$	Physical Difference	-0.685	0.160 *
$\beta_2$	Government Opposition	-0.725	0.130 *
$\beta_2$	Female	0.376	0.138 *
<hr/>			
$\rho$	Correlation	0.532	0.060 *

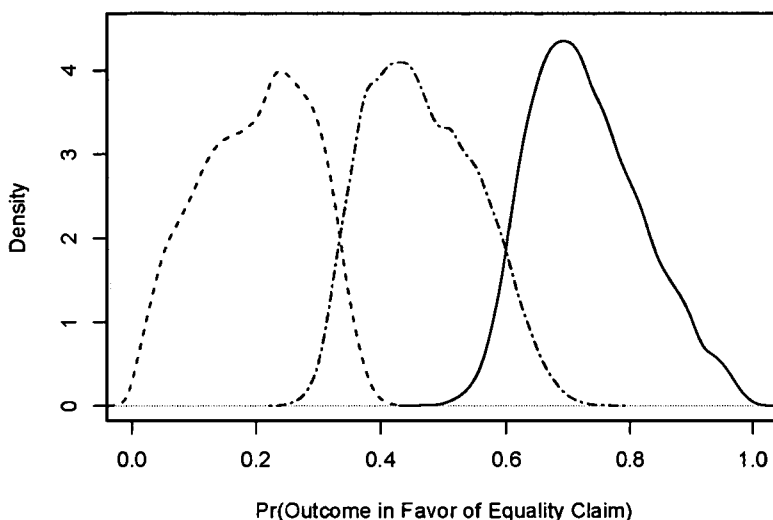
Maximum likelihood estimates and (asymptotic) standard errors for the bivariate mixed response probit model fit to the constitutional sex discrimination data.  $N = 416$ .  $\ln L = -593.0884$ . \* denotes statistical significance ( $\alpha = 0.05$ .) See *supra* note 87 and *supra* note 88 (information on the variables used in this model).

<sup>94</sup> We describe these results later in Part IV, in which we explore the implications of our study.

<sup>95</sup> See the  $\rho$  coefficient in the table presented in note 91 *supra*.

substantively meaningful as well. Consider the two curves at the extreme right (representing rational basis) and the extreme left (strict scrutiny) of the figure, and notice the monotonic increase in the odds, such that when courts assess sex classifications via a rational basis test—the lowest level of scrutiny—the likelihood of finding in favor of the equality claim is just .20. That probability increases to a rather large .73 when they invoke strict scrutiny. In other words, and inline with much extant commentary, application of the lowest and highest standards leads to rather predictable outcomes—though in opposing directions: claims of sex discrimination will, on average, fail under a rational basis standard, and in all likelihood prevail under strict scrutiny.

Figure 3: Kernel density estimates of probabilities of an outcome favoring the litigant alleging sex discrimination given the rational basis standard (the left-most dashed line), the intermediate standard (the middle dashed line), and the strict scrutiny standard (the solid line).<sup>96</sup>



### *B. Heightened Scrutiny*

What our analysis thus far reveals is that state court adjudication of sex discrimination cases fits conventional views about the predictability of results yielded by rational basis and strict scrutiny approaches to equal protection. But what of the in-between tier—a tier that many, if not most, scholars suggest can lead to unexpected results? Are the outcomes as unpredictable as so many commentators

<sup>96</sup> These estimates account for all parameter uncertainty and were constructed from the simulation outlined in Epstein et al. *supra* note 27, at app. B. All covariates are held at their sample means. See *supra* note 69 (information on the database we used to generate this figure); Table 1 and *supra* note 89 (how we defined these standards); *supra* note 90 (how we treated case outcomes).

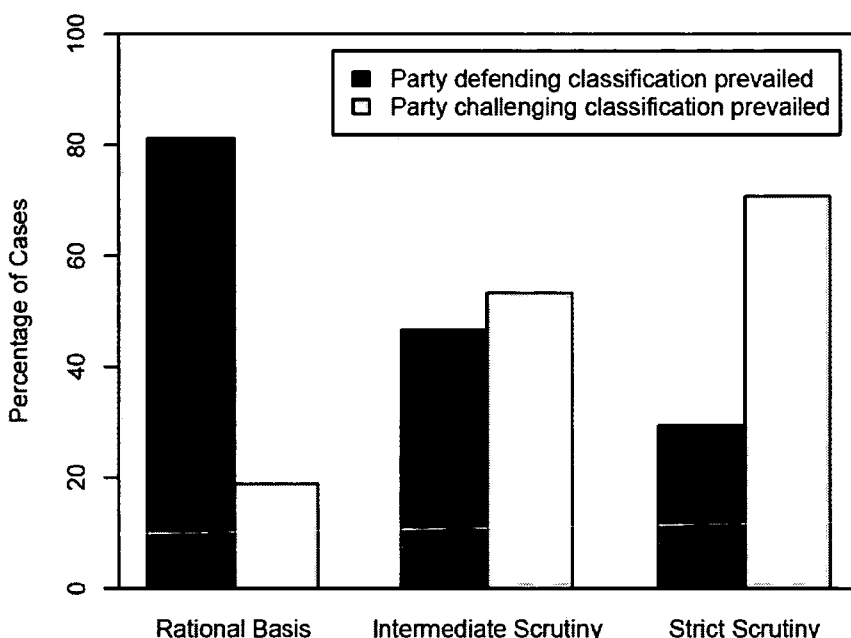
assert?

The middle curve displayed in Figure 3 (which represents heightened scrutiny) begins to provide an answer, and it is in the affirmative: When courts apply the intermediate standard, the probability that a litigant alleging discrimination will prevail is 47%. Just as many scholars would expect, under mid-level scrutiny litigants claiming sex discrimination are nearly as likely to win as they are to lose. This is in contrast to the relatively predictable outcomes generated by rational basis (under which a litigant faces only 20% likelihood of winning) and strict scrutiny (with a 73% probability of success).

Further analyses of the data do little to change the basic conclusion about the predictability—or, more pointedly, lack thereof—of the intermediate standard. For example, if we focus exclusively on the 150 cases in which state courts invoked this approach, we find once again, as Figure 4 shows, that parties alleging sex discrimination lost nearly as often as they prevailed (46.7% versus 53.3%). Moreover, the outcomes in the 150 cases are themselves somewhat difficult to predict. From analyses designed to take into account the multitude of factors that may affect court decisions, we were able to identify only a few that were substantively significant predictors. One, notably, was the ideology of the state justices deciding the dispute: the more left-of-center (“liberal”) the court, the more likely it was to apply intermediate scrutiny in a way favorable to the party alleging discrimination. Our model suggests that the most conservative court would find for the plaintiff alleging sex discrimination in only 26.1 % of the cases, while the most liberal court would do so in 70.9%. The government also plays an influential role. When it was the party defending discrimination, the court was far more likely to uphold the challenged classification (65.4% versus

33.0%).<sup>97</sup>

Figure 4: Prevailing party by application of equal protection tests in constitutional sex discrimination litigation in state courts of last resort. N=416.<sup>98</sup>



What these analyses tell us is that even after controlling for a range of relevant factors, a good deal of uncertainty remains about the conclusions state justices reach in constitutional sex discrimination disputes when they apply intermediate scrutiny—and those factors that

<sup>97</sup> We performed this analysis using a CLARIFY-like simulation. See *infra* note 109. The data and documentation necessary to reproduce these results are available on our web site.

<sup>98</sup> See *supra* note 69 (information on the database we used to generate this figure); Table 1 and *supra* note 89 (how we defined these standards); *supra* note 90 (how we treated case outcomes).

eliminate some of that uncertainty appear more related to politics than to the legal standard. If we move to the U.S. Supreme Court, however, even this degree of predictability vanishes. Since *Craig*, the justices have resolved 20 constitutional sex equality cases on equal protection grounds,<sup>99</sup> with the party alleging discrimination prevailing in fewer than half (nine out of 20, or 45%). While there may be some underlying explanation(s) to account for these outcomes, we were not able to identify a single one.<sup>100</sup> The Court does not seem to differentiate cases on the basis of whether a female litigant brought the claim, as some scholars have suggested,<sup>101</sup> and it is not particularly deferential to the federal government (or the states, for that matter) when it attempts to defend a sex-based classification. Nor does the political ideology of the justices seem to exert much impact on their resolution of these cases. Though given the small number of cases we do not want to make too much of these findings, the latter is especially surprising in light of the large number of empirical studies ascribing a significant role for ideology in Court decision-making.<sup>102</sup>

#### **IV. Implications of the Analysis for Discrimination Based on Sex and Sexual Orientation**

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<sup>99</sup> See MEZEY, *supra* note 3.

<sup>100</sup> We considered four basic variables (under different measurements and specification): the ideology of the court, the presence or absence of women justices, whether a woman was claiming discrimination, and whether a government defended a sex-based classification. We measured the Court's ideology using the Segal & Cover scores. See Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989). See [<http://epstein.wustl.edu/research/sexdiscrimination.html>] (data and documentation necessary to reproduce these analyses).

<sup>101</sup> See Baer, *supra* note 40.

<sup>102</sup> See, e.g., studies cited in *supra* note 47 and *supra* note 84.

Given the results of our analyses, it would be difficult to take issue with Andrew Koppelman's conclusion about intermediate scrutiny. Even though he advocates treating laws that discriminate on the basis of sexual orientation as sex discrimination for purposes of equal protection analysis,<sup>103</sup> he recognizes that the sex discrimination argument is not free from indeterminacy. The question inevitably arises as to whether the state can offer an adequate justification for what it has done, and then a court must balance the interests involved in a way that will unavoidably allow for judicial discretion.<sup>104</sup>

Our findings about the apparent indeterminacy of heightened scrutiny, not to mention our results reinforcing the relative predictability of rational basis and strict scrutiny, may lend support to Koppelman's conclusion. But what lessons should we take from our study? We see two as particularly important, one pertaining to the future of sex discrimination litigation, and the other, to the advancement of legal rights for gays.

We take up both in what follows. But before doing so, an important cautionary note is in order: Because we largely base these implications on analyses of state court decisions, we cannot state with any certainty the extent to which they transport to all American courts. More pointedly, using knowledge that we have gained from investigations of state cases to make inferences about federal litigation is a risky business indeed. The types of suits may differ,<sup>105</sup> as well as the parties,<sup>106</sup> to name just two points of distinction. Nonetheless, in light of the severe problems of addressing debates over equal

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<sup>103</sup> See Koppelman, *supra* note 14.

<sup>104</sup> *Id.* at 535-36.

<sup>105</sup> For example, state courts typically do not resolve questions concerning federal immigration law or the military draft.

<sup>106</sup> For example, the U.S. government was not a participant in any of the 416 state cases in our database.

protection with reference only to federal courts, the state judiciary provides an antidote. For example, only by looking to the states—some of which have invoked strict scrutiny to resolve sex discrimination suits—were we able to get a handle on the counterfactual world: one in which federal courts deem sex a suspect class. And only by looking to the states, as we explain below, are we able to isolate those factors that could move sex-based litigation from the counterfactual to the factual: from a federal judiciary that now applies the intermediate standard to one that instead employs strict scrutiny.

### *A. Sex Discrimination Litigation*

Throughout this article we have noted various expressions of dissatisfaction with intermediate scrutiny. While the critiques are many in number, one standing above virtually all others is the test's indeterminacy. From the vantage point of equality, the in-between approach may generate "better" outcomes than the traditional rational basis standard but it is highly unpredictable in application.

Our study confirms the veracity of this critique. As Figure 3 makes clear, if we believe it is desirable for courts to produce a larger number of equality-oriented outcomes, then heightened scrutiny better serves that objective than rational basis. Controlling for a host of other relevant factors, litigants challenging sex-based classifications are more than twice as likely to prevail now than they were prior to *Craig*. On the other hand, their odds, even under the intermediate test, are no better than 50-50, a far cry from the likelihood of victory under strict scrutiny—73%.

What these results underscore is a claim that advocates for women's rights have long made: the importance of elevating sex to a suspect class.<sup>107</sup> Until the

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<sup>107</sup> See, e.g., MEZEY, *supra* note 3; Brake, *supra* note 37; Francis, *supra*

Supreme Court takes this step, federal courts will continue to employ the amorphous intermediate rule, sometimes upholding sex-based classification and sometimes voiding them—with little predictability.

On this much many agree. The question, of course, is how to alter the current standard. Our investigation into why state tribunals apply the equal protection tests supplies two answers. One is the existence of an equal rights amendment; the other is the presence of women on the bench.

### *1. Equal Rights Amendments (ERA)*

Beginning with an ERA, scholars have long argued that the adoption of a federal ERA will force jurists to elevate sex to a suspect class, which in turn will lead them to eradicate virtually all sex-based classifications, as they now do in the case of race.<sup>108</sup>

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note 64. *See also infra* note 108.

<sup>108</sup> Elevating sex to a suspect class was a primary motivation for the drive for (and against) the ERA in the 1970s. *See, e.g.*, WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* (1997); HERMA H. KAY, *SEX-BASED DISCRIMINATION: TEXT, CASES AND MATERIALS* (2d ed. 1988); Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264 (1989); Brown, *supra* note 28; Mary Anne Case, *Reflections on Constitutionalizing Women's Equality*, 90 CALIF. L. REV. 765 (2002); Ruth Bader Ginsburg, *The Equal Rights Amendment is the Way*, 1 HARV. WOMEN'S L.J. 19 (1978); Kaufman, *supra* note 3; Catharine A. MacKinnon, *Unthinking ERA Thinking*, 54 U. CHI. L. REV. 759 (1987); Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CALIF. L. REV. 735 (2002); Francis, *supra* note 66; Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment*, 84 HARV. L. REV. 1499 (1971). On other hand, some scholars argue that a formal rule, such as an ERA, will not effectively end the subordination of women by men at least in part because of the prevalence of male dominance in most facets of social, political and economic life. We do not attempt to assess this position, but our

Our exploration of the standards used in sex-based discrimination cases supplies some confirmation of the importance of an equal rights amendment, which over one-third of the states have now incorporated into their constitutions—with many containing similar language and purporting to carry analogous objectives as the federal ERA.<sup>109</sup> What we find, after controlling for all other relevant factors,<sup>110</sup> is that the presence of an ERA significantly increases the odds of a court adopting a higher equal protection test. Specifically, when we set all other variables at their mean, the likelihood, on average, of a court invoking strict scrutiny to adjudicate a sex-based claim is just 11% in the absence of an ERA. That probability doubles to 23% when an ERA is in effect.

Of course, because this figure of .23 is relatively distant from 1.00, it is far from certain that an ERA will assure the application of strict scrutiny. But it does raise the probability of state jurists taking that step—and it may very well have the same effect on U.S. Supreme Court justices. In fact, in the early 1970s several declined to elevate sex to a suspect class at least in part because they thought it “inappropriate to ‘amend’ the Constitution while the ERA was pending.”<sup>111</sup>

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analysis does lend support to the claims of others who argue that formal equality provisions are not always inefficacious, but rather their effectiveness depends a good deal on who is interpreting them. Specifically, to foreshadow our results, we find that as the fraction of women serving on a state supreme court increases, the likelihood of the court adopting a higher standard of law also increases—and significantly increases at that. *See* Part IV.

<sup>109</sup> *See, e.g.,* Susan Crump, *An Overview of the Equal Rights Amendment in Texas*, 11 Hous. L. Rev. 136 (1973); Andrea J. Farone, *The Florida Equal Rights Amendment: Raising the Standard Applied to Gender Under the Equal Protection Clause of the Florida Constitution*, 1 FL. COASTAL L.J. 421 (2000).

<sup>110</sup> *See supra* note 91.

<sup>111</sup> ESKRIDGE & HUNTER, *supra* note 108, at 78; *see also* Ginsburg, *supra* note 108.

The Court's declination came at a time when the ERA's passage looked promising. What about now, some thirty years later? What are the odds of adding an ERA to the U.S. Constitution? Addressing this question is beyond the scope of this article so we will only note here that, despite pronouncements in the 1980s to the contrary, the Equal Rights Amendment (ERA) may not be dead. Actually, there are signs that the battle may be heating up yet again.<sup>112</sup> For example, the "three-state" strategy deployed by organized interests in response to claims appearing in scholarly journals, policy memoranda, and the press that ratification of the 27th Amendment in 1992—over 200 years after it was proposed—may hold implications, if not promise, for the ERA.<sup>113</sup> To be sure, this "reconstituted" drive for the ERA has generated substantial opposition (especially from Phyllis Schlafly and her Eagle Forum), but it may very well succeed in Illinois, where in 2003 65% of voters supported ratification and only 19% did not (17% had no opinion).<sup>114</sup> Another sign is the increasing importance attached to the Amendment in academic and media treatments. By way of illustration, consider that in the first six months of 1993, just 186 news articles made mention of the ERA. For the same period in 2003, the number of news articles that mentioned the ERA was more than double (N=471) the amount of the corresponding period in 1993.<sup>115</sup> Yet a final indication of the rising importance of the ERA comes from legal commentators. A passage from Judge Martha Daughtrey's

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<sup>112</sup> Epstein et al., *supra* note 27.

<sup>113</sup> See, e.g., Denning & Vile, *supra* note 88. But see Georgia Duerst-Lahti, *Time To Ratify the Equal Rights Amendment*, *NEWSDAY*, May 20, 2003, at A30; Ellen Goodman, *Equal Rights Amendment is Not Dead Yet*, *NEW ORLEANS TIMES-PICAYUNE*, Feb. 21, 2000, at B5.

<sup>114</sup> Christi Parsons, *Not So Controversial to Voters: Poll Says Many Back Gay Rights, ERA, Gun Limits*, *CHI. TRIB.*, June 17, 2003, at C1.

<sup>115</sup> We obtained these figures from a LEXIS search (in the news group file) on the term "Equal Rights Amendment."

Madison Lecture, delivered at New York University, provides but one example:

In the course of cleaning out closets and drawers that had collected much too much stuff over a dozen years, I found this political button, brought home—as I recall—from an ABA meeting some years ago. It reads: “Happy Birthday E.R.A. 1923-1993, You Are Long Overdue!”

About the same time that I found the button, the ABA Journal published a cover story on the renewed efforts to amend the United States Constitution to prohibit discrimination on the basis of gender. As it turns out, the Equal Rights Amendment (ERA) which, if ratified, would have become the twenty-seventh amendment to the Federal Constitution—but which “died” for lack of ratification by three additional states in 1982—has been reintroduced in the current session of Congress. The prospect of a renewed effort to pass the ERA in Congress and to mount ratification campaigns in the fifty state legislatures raises a number of questions that I would like to explore with you this evening.<sup>116</sup>

Whether the “renewed effort” of which Judge Daughtrey speaks will succeed we cannot say. What does seem to be the case is that the bulk of contemporary commentary now suggests that the ERA may be as dead as the 19th Amendment, which took over 40 years to gain

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<sup>116</sup> Daughtrey, *supra* note 6, at 2-3 (citations omitted).

ratification.<sup>117</sup>

## 2. *Women on the Bench*

Certainly our results indicate that ERAs are important components in the quest for the eradication of sex-based discrimination because they increase the probability of a court applying a higher standard of law to adjudicate claims of sex discrimination. Furthermore, the application of a higher standard of law, even after controlling for other relevant factors, increases the probability of a court reaching a disposition favorable to litigants alleging a violation of their rights.

An ERA is not, however, the only factor that lifts the odds of the adoption of strict scrutiny. As some scholars have long speculated, the proportion of women on the deciding court also exerts a statistically significant effect.<sup>118</sup> As that proportion increases, the probability of

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<sup>117</sup> See Francis, *supra* note 66 (parallels between the campaigns for ratification of the 19th Amendment and the ERA).

<sup>118</sup> Virtually from the day Suzanna Sherry penned her classic work *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986) on the possibility of a “feminine” jurisprudence, scholars have hotly debated whether female judges “speak in a different voice.” For recent reviews of this literature, see Herma Hill Kay & Geraldine Sparrow, *Workshop on Judging: Does Gender Make a Difference?*, 16 WIS. WOMEN’S L.J. 1 (2001); Daniel M. Schneider, *Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases*, 31 N.M. L. REV. 325 (2001). While the results of various research projects exploring whether male and female judges vote differently reach decidedly mixed results, those centering on jurisprudence (Sherry’s original target)—especially in the area of sex discrimination—are clearer. A consensus now exists that women have “pushed the law forward in sex discrimination cases” with their distinct approach to legal principles possibly altering the choices made by their male colleagues. Kay & Sparrow, at 11. See, e.g., Sherry; Sullivan, *supra* note 106. Our study lends empirical support to this growing consensus. At minimum, it seems rather clear that the presence of women on state judiciaries exerts an influence on how

applying a higher standard of law soars even after controlling for the presence (or absence) of an ERA.

To see the magnitude of the effect, consider a court composed exclusively of male justices. On average, the odds of that court using a rational basis standard, setting all other variables at their mean, is a hefty .50; the probability of that same court applying strict scrutiny is but .12. Now consider a court nearly equally divided between male and female judges: the probabilities nearly reverse. The odds of this court applying rational basis are, on average, but 14% while the probability for strict scrutiny jumps to 47%.

This result commends a rather pointed strategy for those seeking more equality-oriented outcomes in court cases, a campaign designed to bring more women to the federal judiciary. Surely the ultimate target would be the U.S. Supreme Court: with one more favorably disposed justice, a majority supporting strict scrutiny could emerge.<sup>119</sup> Of course, history shows that the new justice need not be a woman; after all, it was William J. Brennan who was among the first to urge his colleagues to elevate sex to a suspect class.<sup>120</sup> On the other hand, it is perhaps no coincidence that it is Justices O'Connor<sup>121</sup> and Ginsburg<sup>122</sup> who continue to push the *United States v. Virginia* standard—a standard some say is more akin to strict

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courts adjudicate sex-based claims.

<sup>119</sup> This assumes that the four dissenters in *Nguyen*, 533 U.S. 53 (2001), the Court's most recent sex-discrimination case, who invoked the "exceedingly persuasive justification" of the *VMI* case to support their views, would be willing to elevate sex to a suspect class. Surely this is true of Justice Ginsburg, who may have viewed *VMI* as the first step in that direction. See Skaggs, *supra* note 7; Stobaugh, *supra* note 8; Morris, *supra* note 53. It is not so clear that Justices Breyer, O'Connor, and Souter viewed the *VMI* case in the same way.

<sup>120</sup> See *Frontiero*, 411 U.S. at 677 (Brennan's judgment for the Court).

<sup>121</sup> See, e.g., *Nguyen*, 533 U.S. at 74 (O'Connor's dissent).

<sup>122</sup> See, e.g., *United States v. Virginia*, 588 U.S. at 519 (Ginsburg writing the majority opinion of the Court).

scrutiny than it is to *Craig*.<sup>123</sup>

Nonetheless, however important the U.S. Supreme Court, ignoring the lower appellate bench in any campaign designed to increase the number of female judges would be

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<sup>123</sup> See *supra* note 8; *supra* note 9. See also Linda Greenhouse, *From the High Court, A Voice Quite Distinctly a Woman's*, N.Y. TIMES, May 26, 1999, at A1. Greenhouse writes that Ginsburg:

recounted in a 1997 speech to the Women's Bar Association . . . that a year earlier, as she announced her opinion declaring unconstitutional the all-male admissions policy at the Virginia Military Institute, she looked across the bench at Justice O'Connor and thought of the legacy they were building together.

Justice Ginsburg's opinion in the Virginia case cited one of Justice O'Connor's earliest majority opinions for the Court, a 1982 decision called *Mississippi University for Women v. Hogan* that declared unconstitutional the exclusion of male students from a state-supported nursing school. Justice O'Connor, warning against using "archaic and stereotypic notions" about the roles of men and women, herself cited in that opinion some of the Supreme Court cases that Ruth Ginsburg, who was not to join the Court for another 11 years, had argued and won as a noted women's rights advocate during the 1970's.

Addressing the women's bar group, Justice Ginsburg noted that the vote in Justice O'Connor's 1982 opinion was 5 to 4, while the vote to strike down men-only admissions in Virginia 14 years later was 7 to 1.

"What occurred in the intervening years in the Court, as elsewhere in society?" Justice Ginsburg asked. The answer, she continued, lay in a line from Shakespeare that Justice O'Connor had recently spoken in the character of Isabel, Queen of France, in a local production of "Henry V": "Haply a woman's voice may do some good."

See also Daughtrey, *supra* note 6, at 21-22.

in error. Since change from the “bottom up” is not unknown in American legal history,<sup>124</sup> it is always possible that women serving in the circuits could exert “hydraulic pressure” on the Supreme Court, forcing it to reevaluate its current standard.<sup>125</sup> Yet, at the time of this writing, less

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<sup>124</sup> An interesting example along these lines comes from early legal debates over how to define obscenity. While the U.S. Supreme Court until the 1950s clung to a highly restrictive definition developed in the British case of *Regina v. Hicklin*, L.R. 3 Q.B. 360 (1868), the lower federal courts were liberalizing or even rejecting that definition. Among the most prominent exemplars is Judge Augustus Hand’s opinion in *United States v. One Book Entitled “Ulysses” by James Joyce*, 72 F.2d 705 (1934). See EPSTEIN & WALKER, *supra* note 3, at 359-60.

<sup>125</sup> In the legal annals, the term “hydraulic pressure” (usually associated with public pressure on the Court) has taken on a negative connotation owing to its use by Justice Holmes in his dissent in *Northern Securities Company v. United States*:

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

193 U.S. 197, 400-01 (1903). See also *Furman v. Georgia*, 408 U.S. 238, 405 (1972) (Burger, C.J., dissenting) (“The ‘hydraulic pressure[s]’ that Holmes spoke of as being generated by cases of great import have propelled the Court to go beyond the limits of judicial power, while fortunately leaving some room for legislative judgment.”); *Payne v. Tennessee*, 501 U.S. 808, 867 (1991) (Stevens, J. dissenting) (“The great tragedy of the decision, however, is the danger that the “hydraulic pressure” of public opinion that Justice Holmes once described—and that properly influences the deliberations of democratic legislatures . . . .”); *Nixon v. Administrator of General Services*, 433 U.S. 425, 505 (Burger, C.J., dissenting) (“Well-settled principles of law are bent today by the Court under that kind of ‘hydraulic pressure.’”). But pressure can, of course, come from sources other than public opinion,

than 25% of the seats on the federal circuit courts are occupied by female judges (32 of 134),<sup>126</sup> meaning that the odds of attaining a panel with two women, much less three, are rather small— and, for some circuits, border on trivial, as Table 2 indicates. A strategy aimed at increasing these figures, if successful and if our analysis of the state courts transports to the federal judiciary, would likely help, and not impede, the goal of elevating sex to a suspect class.

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and it is equally as certain that pressure to change problematic principles of law, even if well-settled, is hardly the tragedy that some of these statements suggest.

<sup>126</sup> Data are available at

[http://www.allianceforjustice.org/judicial/judicial\\_selection\\_resources/selection\\_database/activejudges.asp](http://www.allianceforjustice.org/judicial/judicial_selection_resources/selection_database/activejudges.asp) (last accessed on December 31, 2003).

Table 2: The gender composition of the U.S. Courts of Appeals. Each cell represents the probability of panel composed of a particular combination of male (M) and female (F) judges across the appellate courts, assuming random assignment of three-judge panels.<sup>127</sup>

Circuit (Gender Composition)	Probability of a Panel of:		
	Three Female	Two Females	One Female
1 <sup>st</sup> (4 M; 1 F)	0.00	0.00	0.60
2 <sup>nd</sup> (7 M; 2 F)	0.00	0.08	0.50
3 <sup>rd</sup> (7 M; 4 F)	0.02	0.26	0.51
4 <sup>th</sup> (9 M; 2 F)	0.00	0.06	0.44
5 <sup>th</sup> (8 M; 3 F)	0.01	0.15	0.51
6 <sup>th</sup> (5 M; 5 F)	0.08	0.42	0.42
7 <sup>th</sup> (8 M; 2 F)	0.00	0.07	0.47
8 <sup>th</sup> (7 M; 1 F)	0.00	0.00	0.38
9 <sup>th</sup> (15 M; 5 F)	0.01	0.13	0.46
10 <sup>th</sup> (8 M; 3 F)	0.01	0.15	0.51
11 <sup>th</sup> (8 M; 1 F)	0.00	0.00	0.33
D.C. (6 M; 1 F)	0.00	0.00	0.43
Mean	0.01	0.11	0.46

### *B. Discrimination Against Gays and Lesbians*

In an effort to eradicate discrimination against gays and lesbians, commentators have proposed a number of doctrinal avenues.<sup>128</sup> One, the Due Process Clause, proved

<sup>127</sup> The data on gender composition are as of January 1, 2003 (derived from

[http://www.allianceforjustice.org/judicial/judicial\\_selection\\_resources/selection\\_database/activejudges.asp](http://www.allianceforjustice.org/judicial/judicial_selection_resources/selection_database/activejudges.asp) and do not include vacancies.

Assuming random assignment of federal appellate judges to panels, we calculated the probabilities in accord with simple probability rules. See generally SHELDON ROSS, A FIRST COURSE IN PROBABILITY 24-63 (6th ed. 2002).

<sup>128</sup> For reviews, see ESKRIDGE & HUNTER, *supra* note 108; Massaro, *supra* note 14; ANDREW KOPPELMAN, THE GAY RIGHTS QUESTION IN AMERICAN LAW (2002). For a critique of many of these arguments, see

successful in *Lawrence v. Texas*.<sup>129</sup> That has not, however, diminished the importance of equal protection in the battle to eradicate classifications based on sexual orientation.<sup>130</sup>

Along these lines, scholars have suggested two chief courses of action. Some urge the application of heightened scrutiny to laws that discriminate between homosexuals and heterosexuals, that is, these commentators "seek to garner intermediate scrutiny for gays as gays."<sup>131</sup> Another group suggests that discrimination against gays and lesbians is, in fact, discrimination based on sex. Hence, courts should apply the same level of scrutiny to classifications based on sexual orientation as they now do for laws that amount to sex discrimination.<sup>132</sup>

Cass Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1 (1994); *but see* Massaro's cogent response, *supra* note 14.

<sup>129</sup> 539 U.S. 558, 123 S.Ct. 2472. *But see* Post, *supra* note 24. Post claims that passages in the opinion are framed in the language of equal protection. Indeed, the Court itself seemed to "meld" equal protection and due process when it wrote that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects," though it added that "a decision on the latter point advances both interests." 123 S.Ct. at 2482.

<sup>130</sup> *See* Massaro *supra* note 14; WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE (1996).

<sup>131</sup> *See* Yoshino, *supra* note 14; Shalleck, *supra* note 14. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980). Along similar lines, some scholars and judges have proposed applying strict scrutiny to discrimination based on sexual orientation. *See, e.g.,* Watkins v. U.S. Army, 875 F.2d 699, 711-28 (9th Cir. 1989) (Norris, J., concurring), *cert. denied*, 498 U.S. 957 (1990); Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. TEX. L. REV. 205 (1993); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285. Our analysis below speaks to this proposal as well.

<sup>132</sup> *See* Clausen, *supra* note 14; Koppelman, *supra* note 14; Law, *supra* note 14; Massaro, *supra* note 14; Pharr, *supra* note 14. *See also* ESKRIDGE, *supra* note 130, at 162 (noting that in *Baehr v. Lewin*, the court adopted the argument that "the state's refusal to give marriage licenses to same-sex couples is sex discrimination . . . [T]he Hawaii

This last argument has some appeal: if courts treat sex as a suspect class and if they place discrimination on the basis of sexual orientation under the rubric of sex discrimination, then the odds are high of eradicating whatever classification is at issue. This is the central message of our study; and it is the lesson of *Baehr v. Lewin*, as well.<sup>133</sup> In that case, the Supreme Court of Hawaii treated the denial of same-sex marriages as sex discrimination and applied strict scrutiny—the standard it uses, owing to the presence of state ERA, to assess sex-based classifications. But the argument for treating discrimination against gays and lesbians as sex discrimination—as well as, of course, proposals seeking to “garner intermediate scrutiny for gays as gays”—loses some of its appeal in the current federal context, as well as in most states. In those arenas, sex is not treated as a suspect class, but subject to intermediate scrutiny, which, as we have demonstrated throughout, is far less likely to lead to equality-oriented outcomes.

This demonstration, however, is not meant to suggest that advocates for gay rights should eschew an equal protection strategy designed to attain heightened constitutional scrutiny. Actually, we, along with many legal scholars, see benefits to this approach—some of which are symbolic, but others, quite practical. For one thing, as our data suggest, moving from rational basis to intermediate scrutiny will, in all likelihood, further the cause of gay rights. Indeed, if the results presented here generalize across the judiciary and transport from sex discrimination to sexual orientation, the probability of success in court will double. For another, as Ruth Bader Ginsburg points out, the elevation of sex from rational basis to heightened scrutiny has had salutary effects that

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court made the right decision.”).

<sup>133</sup> 852 P.2d 44 (Haw. 1993).

transcend the courtroom:

The Supreme Court, since the 1970s, has effectively carried on in the gender discrimination cases a dialogue with the political branches of government. The Court wrote modestly, it put forth no grand philosophy. But by forcing legislative and executive branch re-examination of sex-based classifications, the Court helped to ensure that laws and regulations would catch up with a changed world.<sup>134</sup>

On the other hand, there are costs associated with the strategic pursuit of heightened scrutiny in the name of advancing the legal rights of gays. Primarily, if courts began to apply the mid-level test to classifications based on sexual orientation—either by treating them as a separate class or folding them into sex discrimination—they would, in all likelihood, abide by that standard for the foreseeable future if constitutional sex discrimination litigation is any indication. To see this danger, we need only to recall that the test established in *Craig* nearly 30 years ago remains the test that the Court applies today despite efforts on the part of Justice Ginsburg and others to “ratchet it up.”<sup>135</sup>

That principles of law endure is no great surprise. As we noted earlier,<sup>136</sup> if courts do not follow previously established rules of law, or do so in unpredictable ways, they risk undermining their fundamental efficacy, for members of legal and political communities base their future expectations on the belief that others will follow

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<sup>134</sup> Ruth B. Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 HOFSTRA L. REV. 263, 270 (1997).

<sup>135</sup> See *supra* note 6.

<sup>136</sup> See *supra* note 42.

existing rules. However, this phenomenon does not appear to be the case with regard to *Craig*, which has generated unpredictable results in the sex discrimination area and may very well do the same in constitutional cases centering on sexual orientation. Advocates for gay rights can expect, if our results are any indication, to lose as many cases as they win, with the equal protection test itself providing little guidance to differentiate between the two.

By explicating these problems, we emphasize once again that our goal is not to deter advocates from following the equal protection path (especially in the event of the Court elevating sex to a suspect class). It is rather to persuade members of the legal community to undertake an analysis of its particular costs and benefits—whether with our data or with other, more tailored observations.

## V. Conclusion

For nearly thirty years now, the U.S. Supreme Court has employed a “heightened scrutiny” test to adjudicate constitutional claims of sex discrimination. While some commentators endorse this approach, far more have questioned it. Their critiques are varied in message and many in number, but chief among them is the test’s seeming lack of determinacy: because the test is so “amorphous” it fails to establish reliable expectations about the results of sex-discrimination litigation.

Our empirical results put this normative critique on stronger footing. We find that when courts apply the intermediate standard, litigants alleging sex discrimination are nearly as likely to win as they are to lose. This finding is in marked contrast to the relatively predictable outcomes generated when courts apply strict scrutiny, under which most parties challenging sex-based classifications prevail.

For those desiring a larger number of equality-oriented outcomes, the task is to convince courts to elevate

sex to a suspect class. We supplied several strategies for accomplishing this objective, and surely others exist. Until one or more succeeds, however, Ginsburg's cautionary remark of two decades ago remains apt: "variance," and not uniformity, "within the federal judiciary will persist."<sup>137</sup>

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<sup>137</sup> Ginsburg, *supra* note 58.

***On The Freedom To Associate or Not To Associate with Others***

Thomas Kleven\*

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In casual conversation, it is commonly asserted that there is, or should be, a right to associate or not to associate with whom one chooses. Societies, however, frequently induce associations people do not want and deter those they do. This article addresses the types of situations that give

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rise to associational issues and the considerations relevant to their resolution. It does not attempt to develop a general theory of free association because, given the unresolvable value disputes underlying all associational issues, I am skeptical about the possibility of developing such a general theory. Unpacking how differing associational issues are resolved in practice within and among societies should, however, shed some light on those values.

Part A outlines the types of situations in which associational issues arise. How associational issues are resolved greatly depends on whether a more individualistic or collective perspective is brought to bear. Part B develops this point in general through a discussion of both Locke and Aristotle. Part C illustrates the point through a brief excursion into the institution of marriage. Part D analyzes in more detail how the process plays out regarding conflicts among society's members. Part E then analyzes the process when society itself is a party.<sup>1</sup>

## **I. Types of Associational Issues**

Associational conflicts abound in social life. Within a society Party A may wish to associate with Party B, who, in turn, may not wish to associate with Party A. Examples of this include: A's desire, not shared by B, to be friends with, to marry or to remain married to B, A's desire to go to school with or live in the same neighborhood as B, to belong to the same club or professional association as B, and many more.<sup>2</sup> To resolve these conflicts, society could

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<sup>1</sup> For other treatments of free association, *see, e.g.*, FREEDOM OF ASSOCIATION (Amy Gutman ed., 1998) (articles discussing the importance of free association within a society and factors relevant to the resolution of conflicts over free association).

<sup>2</sup> Even situations as seemingly impersonal as taxation, when society seeks to compel those who do not want to participate to financially support public programs that benefit others, entail associational

empower A to force the association on B, empower B to avoid the association, or resolve the matter itself by taking into account the wishes of the parties and other considerations it deems relevant.

On the other hand, Party A and Party B may wish to have an association that society finds objectionable or, conversely, to avoid an association that society desires. Under such circumstances, society must decide whether to abide by the wishes of the parties or to prevent or compel the association despite the parties' wishes. Examples of preventing associations that parties wish to have include the regulation of sexual behavior and criminalizing conspiracies in restraint of trade. Examples of compelling associations parties do not wish to have include the draft and forced integration.

Moreover, society itself may be a party to an associational conflict. Examples include when someone wants to leave or enter a society against society's wishes, or when people occupying part of a society wish unilaterally to secede. In these instances, society must decide whether to accede to the other party or attempt to impose its will on that party. At times, all the parties involved in an associational conflict may be societies. Examples include territorial disputes and treaty withdrawal. Here, the international community may try to intervene in a way similar to a society's resolution of conflicts among its members. In the absence of such intervention, societies have to work it out among themselves.

In all these associational contexts, some individual or entity ultimately must control whether an association exists. Parties cannot simultaneously be both friends and not friends, be married and not married, attend integrated and segregated schools, participate together in some

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conflicts. A relationship between parties on a purely financial level is still a type of association and poses questions that resemble those arising in more intimate associations.

societal venture and not participate together, be a member and not be a member of society, be a party and not be a party to a treaty. All societies have methods—through law, custom, and at times brute force—for allocating the power to control the outcome in such associational contexts and to compel or induce the adherence of their members and others. The purpose of this paper is to examine the ways in which that power is allocated in order to identify and evaluate the considerations that underlie differing resolutions of associational conflicts in divergent social contexts.<sup>3</sup>

## II. Who Should Control: Individual and Collective Perspectives

One's view of the appropriate resolution of associational conflicts and who should control the outcome depends to a great degree on one's view of the nature of social life. In particular, it depends upon the extent to which one takes an individualistic or communal view of social life.

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<sup>3</sup> This is not the place to attempt a thorough explanation of the meaning of the concept "society," which involves such factors as interdependence, common values and culture, authoritative institutions, territoriality, and the perception of its members. Generally, I use society to refer to something on the order of a country or nation. Depending on which factors are emphasized, however, the concept is flexible enough to include associations from those as small as a nuclear family to the world community as a whole. Consequently, it is possible for someone to be a member of many societies at the same time, both public and private and with or without a formal governmental structure. Each society may have its particular method of resolving associational issues, although the types of considerations that come into play may correspond. On the nuances in meaning of the concepts of society, community and nation, and on their constitutive factors, *see generally*, KARL W. DEUTSCH, NATIONALISM AND SOCIAL COMMUNICATION: AN INQUIRY INTO THE FOUNDATIONS OF NATIONALITY (1966); ANTHONY D. SMITH, NATIONAL IDENTITY (1991).

The extreme individualistic view posits the primacy of the individual.<sup>4</sup> The individual precedes society and all relationships. Society and any relationship is only justifiable or consistent with the rights of the individual when people freely choose to enter society or form relationships.

The extreme communal view posits the primacy of the collective over the individual.<sup>5</sup> People are inevitably and unavoidably enmeshed in relationships because they are, by nature, social animals born into relationships not only with their parents but on some level with all others. Their fates are inescapably intertwined with the fates of all others, their welfare inescapably interdependent with the welfare of all others, and in some way, all of their actions affect all others and the actions of all others affect them.<sup>6</sup>

Consequently, many relationships that may seem to be freely chosen or rejected are, in fact, highly conditioned by the social circumstances in which people find themselves. And society at large has a legitimate interest in preventing and imposing relationships in the name of the common good. Even those relationships that are left to private choice entail a collective decision that society is better off by treating them as such.

The reality of social life in all modern, and perhaps all historical, societies is some blend of individualistic and communal thinking. Some types of relationships are more

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<sup>4</sup> As expressed, for example, in the philosophies of John Locke and Robert Nozick. See JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* (Thomas P. Peardon ed., Liberal Arts Press 1952) (1690); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

<sup>5</sup> As expressed, for example, in the philosophies of Aristotle and Michael J. Sandel. See ARISTOTLE, *THE POLITICS* (Stephen Everson ed., Cambridge University Press 1988); MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

<sup>6</sup> Even death does not fully avoid relationships, which may continue in the form of obligations imposed on one's estate or of the influence one continues to have on others after death.

or less freely chosen, while others are more or less involuntary or imposed. Often the line between free choice, involuntariness, and imposition is blurry. Moreover, the treatment of particular relationships as more open to choice or as more subject to imposition is a function of both individualistic and collective considerations that may cut both ways. In most instances, it is possible to advance both types of considerations for or against treating relationships as open to choice or subject to imposition.

This interplay between the individual and the collective is found in even the most individualistic and communal thinkers. Consider, for example, Locke and Aristotle, who certainly represent thinkers close to the opposite ends of the spectrum. For Locke, political—and by extension social—life begins when people in “a state of perfect freedom . . . by their own consents . . . make themselves members of some body politic.”<sup>7</sup> Within given societies, people then “by compact and agreement” establish rules regarding the control and distribution of property and other resources,<sup>8</sup> and “by common consent” states do the same as among themselves.<sup>9</sup> Locke’s emphasis on consent, which is at the heart of contemporary libertarianism,<sup>10</sup> is a highly individualistic view that at first blush would seem to make it difficult to ever justify imposing a political or any other relationship on someone.

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<sup>7</sup> LOCKE, *supra* note 4, at 4, 11. “Men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate without his own consent.” *Id.* at 54.

<sup>8</sup> LOCKE, *supra* note 4, at 27.

<sup>9</sup> *Id.*

<sup>10</sup> See NOZICK, *supra* note 4, at 334 (“Voluntary consent opens the border for crossings . . . Treating us with respect by respecting our rights, [the minimal state] allows us, individually or with whom we choose, to choose our life and to realize our ends and our conception of ourselves, in so far as we can, aided by the voluntary cooperation of other individuals possessing the same dignity.”).

Yet several qualifications bring collective considerations into play. First is the obligation Locke imposes on people not to use their freedom so as "to harm another,"<sup>11</sup> and the related limitation on their right to freely appropriate the common resources of the state of nature that they leave "enough and as good . . . in common for others."<sup>12</sup> These qualifications force people into relationships with others in three ways: by having to take the interests of others into account in planning one's own behavior; by having to respond to the complaints of others that one has violated the qualifications; or by having to bargain and coordinate with others so as to minimize conflict over and prevent overexploitation of resources. Such necessities help explain why Nozick describes the development of his Lockean Minimal State less as a voluntary coming together than as a spontaneous, almost automatic process.<sup>13</sup>

Second, even with regard to voluntary political relationships, once someone "by actual agreement and any express declaration" consents thereto, the person becomes "subject to the government and dominion of that commonwealth as long as it has a being . . . and can never again be in the liberty of the state of nature."<sup>14</sup> Moreover, once someone becomes a member of a society "he authorizes the society . . . to make laws for him as the

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<sup>11</sup> LOCKE, *supra* note 4, at 5.

<sup>12</sup> *Id.* at 17.

<sup>13</sup> NOZICK, *supra* note 4, at 10-25, 108-19 (describing the "invisible-hand" process by which a "minimal state" arises out of the anarchic state of nature as a means of people's protecting their rights and interests). "Out of anarchy, pressed by spontaneous groupings, mutual-protection associations, division of labor, market pressures, economies of scale, and rational self-interest, there arises something very much resembling a minimal state or a group of geographically distinct minimal states." *Id.* at 16-17.

<sup>14</sup> LOCKE, *supra* note 4, at 69.

public good of the society shall require,"<sup>15</sup> and within the society, "the majority have a right to act and conclude the rest."<sup>16</sup> In short, by consensually entering into a societal relationship, one may not withdraw from that relationship and is then subject to, or is deemed to have consented to, many other types of relationships imposed upon the party pursuant to collective considerations.

Locke must, of course, deal with the question of people who are born into already existing societies, which is to say most people throughout history. If after a society's initial consensual founding everyone born into it automatically and irrevocably became members of it, this would be the end of the consensual nature of political relationships. Consequently, Locke propounds that "a child is born subject to no country or government,"<sup>17</sup> and upon becoming an adult is "at liberty what government he will put himself under."<sup>18</sup>

As a practical matter, however, the exercise of that liberty is often highly constrained and subtle. Thus, "the son cannot ordinarily enjoy the possessions of his father but under the same terms his father did, by becoming a member of the society."<sup>19</sup> Moreover, the socialization process and a multitude of economic and emotional bonds that exist in all societies inhibit most people from choosing to join a society other than their own. Thus, the process of consent is such that "people take no notice of it and, thinking it not done at all, or not necessary, conclude they are naturally subjects as they are men."<sup>20</sup> Finally, unlike in Locke's time, the world is now divided into nation-states that strictly regulate entry, thereby creating significant legal

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<sup>15</sup> *Id.* at 50.

<sup>16</sup> *Id.* at 55.

<sup>17</sup> *Id.* at 67.

<sup>18</sup> *Id.* at 68.

<sup>19</sup> *Id.* at 67.

<sup>20</sup> *Id.*

obstacles to expatriation. It is only a short step to a general view that, in reality, many relationships are far from voluntary, and that the appearance of consent is often illusory and masks the largely socially constructed nature of relationships.

This view readily comports with Aristotle's. Aristotle's starting point, unlike Locke's "state of perfect freedom," is that "man is by nature a political animal."<sup>21</sup> Rather than arising from consent, the state is a "creation of nature,"<sup>22</sup> and is "clearly prior to the family and to the individual."<sup>23</sup> Social life is an involuntary relationship because "a social instinct is implanted in all men by nature" and "the individual, when isolated, is not self-sufficing."<sup>24</sup>

From this starting point, Aristotle posits a variety of involuntary relationships in social life. One is the relationship of ruler and ruled: "For that someone should rule and others be ruled is a thing not only necessary, but expedient; from the hour of their birth, some are marked out for subjection, others for rule."<sup>25</sup> For Aristotle this extends to gender relationships, in that "the male is by nature superior, and the female inferior; and the one rules, and the other is ruled; this principle, of necessity, entails to

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<sup>21</sup> ARISTOTLE, *supra* note 5, at 3.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 4.

<sup>24</sup> *Id.* Compare SANDEL, *supra* note 5, at 150:

To say that the members of a society are bound by a sense of community is not simply to say that a great many of them profess communitarian sentiments and pursue communitarian aims, but rather that they conceive their identity . . . as defined to some extent by the community of which they are a part. For them, community describes . . . not a relationship they choose (as in a voluntary association) but an attachment they discover, not merely an attribute but a constituent of their identity.

<sup>25</sup> ARISTOTLE, *supra* note 5, at 6.

all mankind.”<sup>26</sup> It is possible to reject Aristotle’s view of class and gender roles and still find a case for the non-consensual nature of many social relationships.

Yet, bearing in mind that the notion of individual rights was not highly developed in his era, Aristotle’s philosophy also contains the yin-yang of communal and individualistic thinking.<sup>27</sup> Thus, subject to its regulation for the common good, Aristotle supports private ownership of property<sup>28</sup>—the essence of which, as modern commentators have noted, is the owner’s power to choose with whom to associate regarding its use.<sup>29</sup> Aristotle’s reasons have both

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<sup>26</sup> *Id.* at 7.

<sup>27</sup> *See, e.g.*, ARISTOTLE, NICOMACHEAN ETHICS (Terence Irwin trans., Hackett Publishing Co. 1985). For Aristotle, one’s ethical duties regarding how one should treat others derive from the pursuit of one’s highest end, which is happiness. Happiness is properly sought through the development of one’s excellences and virtues, which include the way one treats others. *See also* THE INDIVIDUAL AND THE STATE 1-24 (H. M. Currie ed., 1973) (discussing the roots of respect for the individual in ancient Greek and Roman democracies, and the maturation in Western civilization since the Renaissance and Reformation of “the essential dignity and sanctity of human life, freedom of thought and criticism, . . . popular government . . . , [and] the rule of law based on the impartial administration of justice” beginning with the Renaissance and Reformation periods (at 5)).

<sup>28</sup> “It is clearly better that property should be private, but the use of it common; and the special business of the legislature is to create in men this benevolent disposition.” ARISTOTLE, *supra* note 5, at 26. “The true forms of government, therefore, are those in which the one, or the few, or the many govern with a view to the common interest.” *Id.* at 61.

<sup>29</sup> *See, e.g.*, Thomas Kleven, *Private Property and Democratic Socialism*, 21 LEGAL STUD. F. 1, 12-21 (1997) (“Ownership confers decision making power over things, the right to determine how things are to be used and who may have access to them, which in turn means that others who do not have the right to share therein, i.e., who are not co-owners, have the duty not to interfere with the owner’s control.” (at 18)); Kenneth J. Vandeveld, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 360 (1980) (“To say that one owned property was

collective and individualistic overtones. “[W]hen a man feels a thing to be his own,” this contributes to personal pleasure and thereby to the development of one’s excellence;<sup>30</sup> the greatest pleasure is “doing a kindness or service [to others], which can only be rendered when a man has private property.”<sup>31</sup> Private property enables people to “set an example of liberality” or “liberal action,” deriving from “the use which is made of property.”<sup>32</sup> Finally, “there is much more quarreling among those who have all things in common,”<sup>33</sup> such that with private property “men will not complain of one another, and they will make more progress, because everyone will be attending to his own business.”<sup>34</sup>

In addition, though people are naturally political animals, Aristotle acknowledges that “they are also brought together by their common interests,”<sup>35</sup> implying that free choice is at play in establishing political relationships. Furthermore, while Aristotle is not an unadulterated advocate of democracy, he does note as among its virtues that “a man should live as he likes,”<sup>36</sup> a further acknowledgement of freedom of choice in relationships.

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to say that the owner had some set of rights, privileges, powers and immunities. Moreover, one who did not own property had a set of no rights, duties, disabilities, and liabilities relative to the owner.”) *But compare* State v. Shack, 277 A.2d 369, 374 (N.J. 1971) (overturning trespass conviction of legal services attorney and poverty worker assisting migrant farm workers on ground that a property owner does not have the right to prohibit visits with farm workers in on-premises living quarters so as to deny them “opportunity to enjoy associations customary among our citizens”).

<sup>30</sup> ARISTOTLE, *supra* note 5, at 26.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 27.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 26.

<sup>35</sup> *Id.* at 60.

<sup>36</sup> *Id.* at 144.

To conclude this part of the discussion, I do not propose to try to resolve here which of the foregoing perspectives, the individualistic or the communal, is the more correct or appropriate for addressing associational issues. Indeed, the debate over that question probably cannot be resolved. In the real world, most or all societies have an ethos that incorporates some aspects of both approaches, albeit with differing emphases in different societies. Therefore, we should expect to find divergent societies resolving associational issues differently in keeping with the nuances of their mores. And within societies, we should expect to find associational issues resolved differently over time as mores evolve.

### **III. The Institution of Marriage**

To illustrate how societies resolve associational issues differently from each other and over time, let us briefly consider the institution of marriage. In the United States, the establishment of a marital relationship is widely viewed as the choice of the two parties, both of whom must agree and either one of whom may block its establishment. In this context, the party who does not want an association prevails over the party who does and, therefore, controls the outcome.

Both individualistic and collective values, flowing from cultural notions of what marriage entails, would seem to underlie this arrangement. From an individualistic perspective, to force one to marry against one's will would violate human dignity and the fundamental right to control one's destiny with regard to such personal matters. The intimacy of marriage, ideally based on love and typically involving sexual relations, is one obvious element. More collective notions are also likely at work, such as the importance of marriage based on mutual choice to the success of the nuclear family and, in turn, the perceived

importance of the nuclear family to the successful functioning of society.

Underlying all these elements are debatable value judgments. A society in which the extended family is a more important institution than the nuclear family might well see marriage based on love and mutual choice as promoting the nuclear family at the expense of the extended family. This may help explain the practice in some societies of arranged marriages, perhaps more common in the past, though still found today.<sup>37</sup> Those societies may view marriage based on intense interpersonal intimacy and mutual choice as weakening the ties to other members of the extended family and leading couples to separate themselves from it. In marriages arranged by one's family or parents, on the other hand, it is common for the new couple to live with one of their families, thereby strengthening extended family ties.

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<sup>37</sup> See, e.g., GWEN J. BROUDE, MARRIAGE, FAMILY, AND RELATIONSHIPS: A CROSS-CULTURAL ENCYCLOPEDIA 192-95 (1994) (comparing arranged marriage practices in various cultures); Xu Xiaohu & Martin King White, *Love Matches and Arranged Marriages*, NEXT OF KIN 420 (Lorne Tepperman & Susannah J. Wilson, eds. 1993) (comparing and contrasting arranged marriage practices in China and Japan). For articles on recent efforts at reform in societies with historical traditions of patriarchal marital practices, including arranged marriage, see, e.g., Michele Brandt & Jeffrey A. Kaplan, *The Tension Between Women's Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia*, 12 J.L. & RELIGION 105 (1995-96); Mark Cammack et al., *Legislating Social Change in an Islamic Society - Indonesia's Marriage Law*, 44 AM. J. COMP. L. 45 (1996); Anna M. Han, *Holding Up More Than Half the Sky: Marketization and the Status of Women in China*, 11 J. CONTEMP. LEGAL ISSUES 791 (2001); Sherifa Zuhur, *Empowering Women or Dislodging Sectarianism: Civil Marriage in Lebanon*, 14 YALE J.L. & FEMINISM 177 (2002); Shirley L. Wang, Note, *The Maturation of Gender Equality Into Customary International Law*, 27 N.Y.U. J. INT'L L. & POL. 899 (1995).

Without question, arranged marriages have often taken into account the wishes of the parties. When it does not, arranged marriage is an example of an association that one or both of the parties may not want. While ultimately it may be difficult to force an adamantly unwilling party to marry, various social pressures may be applied to induce compliance. Threats of disinheritance and ostracism have frequently been used, even in societies as individualistic as the United States, to induce compliance with parental wishes, and some societies have condoned or accepted even the killing of a recalcitrant child.<sup>38</sup>

While mutual choice is the prevailing approach to the establishment of a marriage in this society, the right to freely choose to marry has been severely limited by requirements such as being unmarried and of different genders. Such requirements reflect societal concerns, like promoting procreation or perceived moral offensiveness, that are thought to trump the value of individual choice, even with regard to a matter as intimate as marriage. For example, anti-polygamy laws might be justified as protecting women and children from perceived oppression or ensuring that there are potential partners for everyone who wants to marry. Banning same-sex marriage might be justified as promoting procreation or preventing practices that violate societal mores. Nevertheless, polygamy has been widely practiced in other societies, and there are

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<sup>38</sup> For reports on countries where “honor killings” of women are common for various reasons, including refusal to submit to arranged marriages, and on the indifference and complicity of the authorities, see, e.g., Amnesty International, *Pakistan: Honor Killings of Girls and Women*, at [http://www.amnesty.org/library\(Doc.# ASA 33/018/1999\)](http://www.amnesty.org/library(Doc.# ASA 33/018/1999)); Gendercide Watch, *Case Study: “Honour Killings and Blood Feuds,”* at [http://www.gendercide.org/case\\_honour.html](http://www.gendercide.org/case_honour.html); Human Rights Watch, *Violence Against Women and “Honor” Crimes*, at [http://www.hrw.org/press/2001/04/un\\_oral12\\_0405.htm](http://www.hrw.org/press/2001/04/un_oral12_0405.htm).

strong individual rights claims for allowing it.<sup>39</sup> The same is true for same-sex marriage, for which movements exist here and elsewhere.<sup>40</sup>

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<sup>39</sup> For divergent views regarding polygamy, *see, e.g.*, Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Provisions Against Polygamy Are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691 (2001) (arguing that anti-polygamy laws intentionally discriminate against Mormons without a legitimate secular purpose); Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C.L. REV. 1501 (1997) (arguing that anti-polygamy laws are justifiable per the contribution of polygamy to despotic and inequalitarian societies and of monogamy to the modern liberal-democratic state); Stephanie Forbes, Note, *Why Have Just One?: An Evaluation of the Anti-Polygamy Laws under the Establishment Clause*, 39 Hous. L. REV. 1517 (2003) (arguing that laws banning polygamy violate the Establishment Clause of the First Amendment per promotion of particular religious views and absence of an overriding secular purpose); Richard A. Vasquez, Note, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence*, 5 N.Y.U. J. LEGIS. & PUB. & POL'Y, 225 (2001-2002) (arguing that harms of polygamy to women and children constitute a compelling government interest justifying its prohibition).

<sup>40</sup> *See, e.g.*, *Goodridge v. Dep. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (finding that denial of benefits of civil marriage to same-sex partners infringes fundamental rights of individual liberty and equality in violation of Massachusetts Constitution); *Baker v. State*, 744 A.2d 864 (Vt. 1999) (holding that exclusion of same sex couples from benefits and protections of marriage violates Common Benefits Clause of Vermont Constitution); Clifford Krauss, *Gay Marriage Plan: Sign of Sweeping Social Change in Canada*, N.Y. TIMES, June 19, 2003, at 8A (reporting on Canada's decision to legalize same-sex marriage). For arguments in favor of same-sex marriage, *see, e.g.*, Elvia R. Arriola, *Law and the Family of Choice and Need*, 35 LOUISVILLE J. FAM. L. 691 (1996-1997); MARK STROSSER, LEGALLY WED 23-74 (1997) (arguing that bans on same sex marriages violate the Equal Protection and Due Process clauses); Cindy Tobisman, *Marriage vs. Domestic Partnership: Will We Ever Protect Lesbians' Families*, 12 BERKELEY WOMEN'S L.J. 112 (1997). For arguments against or counseling a gradual approach to the recognition of same-sex marriage, *see, e.g.*, George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. &

The free choice model is also not fully applicable to the termination of a marriage through divorce. In some societies, including the United States in earlier times, divorce has been nearly impossible to obtain, even when both parties desire it.<sup>41</sup> When divorce became generally permitted in the United States, it was ordinarily necessary to show a cause such as adultery, desertion, or cruelty.<sup>42</sup> This usually posed little problem when both parties wanted out since they could stipulate to, or fabricate, a cause.<sup>43</sup> But a requirement of cause could pose a substantial obstacle when one party wanted out and the other did not. In such instances, the party wanting the association to continue controlled if the party not wanting it was unable to

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POLITICS 581 (1999); Linda S. Eckols, *The Marriage Mirage: The Personal and Social Identity Implications of Same-Gender Matrimony*, 5 MICH. J. GENDER & L. 353 (1999).

<sup>41</sup> Most of Europe, prior to the 1800s, was largely influenced by religious doctrine proclaiming the indissolubility of marriage. Divorce was virtually unknown and annulment very hard to obtain. Couples who wanted out of marriage had to settle for living apart while remaining formally married. Likewise in colonial America, divorce was difficult to obtain and uncommon, especially in the South, although legislative divorces were occasionally granted. After independence, the situation in the South remained the same while largely restrictive judicial divorce laws were developed in some Northern states. By 1880, legislative divorce was dead and most states had general divorce laws of varying degrees of stringency. *See, e.g.*, LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 181-82, 436-40 (1973); MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW 7-27 (1972).

<sup>42</sup> Comprehensive divorce laws began to arise in the United States in the mid-1800s. Although initially a few states established fairly permissive grounds for divorce, by the late 1800s restrictive divorce laws were the norm. *See, e.g.*, FRIEDMAN, *supra* note 41, at 436-40; RHEINSTEIN, *supra* note 41, at 28-55; Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 35-44 (1966).

<sup>43</sup> *See, e.g.*, FRIEDMAN, *supra* note 41, at 439 ("collusion was a way of life"); RHEINSTEIN, *supra* note 41, at 55-63; Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 15-16 (1990).

show cause. While the party wanting out might be able to physically leave, so that the parties were no longer living together as a married couple, the formality of the marriage and its attendant legal and social obligations would still remain.

It is possible to reconcile the requirement of cause with the mutual choice model. The choice to marry in the face of the cause requirement could be seen as akin to an agreement not to sever the association without cause. This rationale would seem more convincing if the parties could choose to marry under either a regime permitting unilateral divorce or a regime requiring cause, as is currently being tried or considered in some states.<sup>44</sup> When the only available option is divorce for cause, individuals who want the benefits of marriage are induced by society to have their ability to exit the relationship limited by the wishes of the other party. This empowers the party who wants the relationship to continue.

Currently in the United States, a marital relationship is fairly easily severed through divorce because most states either have no-fault divorce or impose easily proven standards, such as incompatibility or irreconcilable differences.<sup>45</sup> Consequently, when one party wants a

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<sup>44</sup> Both Arizona and Louisiana have recently adopted "covenant marriage" statutes enabling parties to choose to marry under a system requiring traditional fault grounds for divorce rather than the generally applicable no-fault system. ARIZ. REV. STAT. §25-901 *et seq.* (1998); LA. REV. STAT. ANN. §9:272-75, 307 (1997).

<sup>45</sup> See MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 64-81 (1987) (identifying eighteen states as having divorce on no-fault grounds only, two as requiring mutual consent for no-fault divorce, and thirty states as having mixed fault and no-fault systems that impose various waiting periods for contested unilateral no-fault divorce; and comparing the United States to Western Europe); HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 1-2, 43-103 (1988) (detailing the history of the no-fault movement in the United States); Wadlington,

marriage to continue and the other wants out, the latter controls. Yet, although unilateral divorce is now fairly easy, society's requirement of support for ex-spouses and children impinges on one party's ability to terminate all aspects of the relationship against the will of the other party. Support requirements might be rationalized in a number of ways, involving both individualistic and collective concerns: on the basis of a party's having voluntarily undertaken such obligations by choosing to marry or have children; or of the perceived unfairness of allowing total exit when a less well-off spouse may have foregone opportunities for self-sufficiency in the interest of the marital or family relationship; or of a judgment that individuals should be responsible for providing for their offspring rather than leaving it entirely to the other parent or to society as a whole; or of the contribution of support requirements to the preservation of the nuclear family as an integral societal institution. In any event, support requirements depart, at least to some degree, from total freedom to exit an unwanted relationship that another party wants. In fact, support requirements may be imposed even against the wishes of both parties to a divorce, as through laws requiring divorcees to reimburse the state for welfare benefits paid to ex-spouses and children.<sup>46</sup>

In sum, despite the intimacy of the marital relationship, societies frequently intervene through law and social practice to prevent people who want to marry from doing so and to compel or induce people who do not want to marry or remain married to do so. Both individualistic and collective considerations govern the institution of marriage, and different balances are struck among and within societies.

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*supra* note 42, at 44-52 (discussing the operation of divorce laws based on incompatibility).

<sup>46</sup> See Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519 (1996).

#### IV. Associational Considerations Among Parties Within a Society

In this section I intend to flesh out more thoroughly some of the considerations relevant to deciding who should control the existence or non-existence of associations among society's members.<sup>47</sup> Assume a society is deciding (i) whether to allow, prohibit or mandate particular relationships, and (ii) who should control the outcome in case of conflict over the existence of a relationship. Every such society will have a bias, derived from its culture and mores, about the relative significance of the decision of various individual and collective considerations.<sup>48</sup> Although these biases will often produce different outcomes in similar associational contexts, the considerations that come into play may yet be the same.

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<sup>47</sup> Like the concept of society, *supra* note 3, the concept of membership is complex and variable, depending on the emphasis placed on the various factors that might be thought relevant, such as formal citizenship, voluntarily joining and/or agreeing to be a member, and presence in a society and/or participation in its activities. Since members of a society frequently receive more favorable treatment than non-members, the issue of whether someone is a societal member may be hotly contested. See *infra* notes 115-16 and accompanying text regarding the lesser rights of prospective immigrants. See also *Plyler v. Doe*, 457 U.S. 202 (1982) (Equal Protection Clause applies to undocumented alien children present within state such that state must provide free public education to citizens and lawful aliens); *Martinez v. Bynum*, 461 U.S. 321 (1983) (finding no violation of the Equal Protection Clause where state denies free public education to children residing in district for primary purpose of attending public school).

<sup>48</sup> In this society, for example, when the law is silent, the presumption is that parties are free to mutually decide to have or not to have an association. An alternative approach is possible, at least with respect to the establishment of an association; namely that all associations require prior collective approval. That the former rather than the latter is the case reflects the society's individualistic bias.

### *A. Terminating an Existing Relationship*

Since individual freedom is so highly valued in this society, let us assume that interpersonal relations are ordinarily up to the parties involved.<sup>49</sup> Also assume in case of conflict that the party not wanting a relationship ordinarily controls, unless there are sufficient countervailing considerations either to socialize the decision or to empower the other party to control. First, let us address a party desiring to terminate an existing relationship voluntarily entered into that the other party wants to continue.<sup>50</sup>

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<sup>49</sup> Like the concepts of society and membership, what it means to say that someone is involved in a relationship is subject to a variety of interpretations depending on such factors as whether they have agreed to the relationship and their degree of interdependence with others. With a common destiny, there is a sense in which everyone in the world is involved in a mutual relationship. However, the extent of the relationship may have legal significance. For example, laws requiring parental consent before a minor can obtain an abortion seem premised on the existence of a relationship with the child that warrants parental involvement in the decision, subject to the child's right to opt out of that aspect of the parent-child relationship if the child can demonstrate sufficient maturity to a judge who thereby becomes involved in the decision as a kind of surrogate parent. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992). In contrast, holding that parents have the right to deny visitation privileges to grandparents seems premised on the absence of a sufficiently strong grandparent-child relationship to overcome the parent-child relationship. *Troxel v. Granville*, 530 U.S. 57 (2000). *See also, infra* notes 115-16 and accompanying text (regarding lesser rights of prospective immigrants as against societal members).

<sup>50</sup> Where one party wants out of an existing relationship and the other does not, several resolutions are possible. One is to allow unilateral termination. A second is to allow unilateral termination subject to the requirement that the party wanting out somehow compensate the other party. A third possible resolution is to allow the party wanting the relationship to continue to specifically enforce the agreement against unilateral termination. Finally, a fourth possible resolution is to allow specific performance subject to the requirement that the party wanting

As noted above with regard to marriage, individualistic considerations do not necessarily support the right of a party wanting out always to have the absolute privilege to completely terminate an existing relationship against the will of the other party. Suppose at the inception of a relationship the parties agree that the relationship may be terminated only by mutual agreement and that neither shall have the right to terminate it unilaterally. If one party later wants out, the other who does not want out might claim that the first party has thereby voluntarily waived whatever right not to have or continue an unwanted relationship it might otherwise have had. To reject such a claim, it is necessary to treat the unilateral right to terminate an unwanted relationship as inalienable, thereby making the stipulation against unilateral termination void.

A commitment to individualism may support viewing some individual rights as inalienable, as when parting with those rights would overly undermine what it means to be a person and pervert a commitment to

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in somehow compensate the party wanting out. See Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Only the first alternative fully satisfies the individualistic claim of an absolute privilege to terminate an unwanted relationship over the other party's objection. The second alternative is next most favorable to the party wanting out, but it is inconsistent with an absolute privilege to terminate because having to compensate the other party impinges on the privilege and may at times be so costly as to induce someone to remain in an unwanted relationship. Furthermore, it entails a concession to the party wanting a relationship to continue, empowers that party in bargaining over the relationship's future, and requires that the relationship continue in the form of whatever the required compensation consists of. Still this second alternative, as well as the third and fourth which are even more favorable to the party wanting in, are all consistent with an individualistic approach to social life.

individualism.<sup>51</sup> For example, it might be claimed that people have an inalienable right to life and liberty, and thus should not be permitted to agree to allow others to kill or enslave them.<sup>52</sup> But, as the debate over physician assisted suicide shows, it is far from clear that a commitment to individualism supports making even these fundamental rights inalienable in all instances.<sup>53</sup> It is even possible to claim that inalienability itself is inconsistent with a commitment to individualism because people should be free to part with all their individual rights,<sup>54</sup> at least as long as they do so voluntarily and without coercion (assuming that to be a possible state of affairs — a point to be developed more fully below).<sup>55</sup>

The problem in the present context is that there are competing individual rights claims. Disallowing unilateral withdrawal from a relationship limits the freedom of the party wanting out, but allowing it also impacts the freedom

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<sup>51</sup> See, e.g., Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (arguing for the non-commodification of aspects of the self that are integral to personhood).

<sup>52</sup> See, e.g., JOHN STUART MILL, ON LIBERTY 95 (W.W. Norton & Co. 1975) (1859) (“The principle of freedom cannot require that [someone] should be free not to be free. It is not freedom to be allowed to alienate [one’s] freedom.”).

<sup>53</sup> See, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997) (assistance for terminally ill patients in committing suicide not a fundamental liberty interest protected by Due Process Clause); Raphael Cohen-Almagor & Monica G. Hartman, *The Oregon Death With Dignity Act: Review and Proposals for Improvement*, 27 J. LEGIS. 269 (2001); Neil M. Gorsuch, *The Right to Assisted Suicide and Euthanasia*, 23 HARV. J.L. & PUB. POL’Y 599 (2000); Christine N. O’Brien et al., *Oregon’s Guidelines for Physician-Assisted Suicide: A Legal and Ethical Analysis*, 61 U. PITT. L. REV. 329 (2000); PHYSICIAN ASSISTED SUICIDE (Robert F. Weir ed., 1997); Melvin I. Urofsky, *Justifying Assisted Suicide: Comments on the Ongoing Debate*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 893 (2000).

<sup>54</sup> See, e.g., NOZICK, *supra* note 4, at 58, 331 (arguing that a free society must allow someone to consent to being killed or enslaved).

<sup>55</sup> See *infra* notes 87-88 and accompanying text.

of the party wanting in. Thus, the assertion that a party has an inalienable right to unilaterally withdraw from any relationship, even after agreeing otherwise, must contend with the individual right claim of the party wanting the relationship to continue that it has changed its position and passed up other opportunities in reliance on the agreement. Arguing that the party wanting in has no legitimate claim of detrimental reliance, because that party should realize at the outset and thus assumes the risk that the other's right to withdraw is inalienable, is not sufficient to rebut this claim. The issue is whether individual rights considerations provide greater support for the recognition of an inalienable right of unilateral termination, or for a right to hold a party to an agreement not to unilaterally withdraw, or at least for a right to be compensated in the event thereof.

When conflicting individual rights are implicated, which will often if not always be the case, one must decide whose interests are weightier. This requires a contextual analysis of which side's interests seem stronger under the circumstances. For example, the claim for a right to unilaterally withdraw from a marriage seems stronger when, shortly after marrying, one party wants out and the other stands to suffer no more than a brief emotional hurt. The claim seems weaker, on the other hand, when one party has sacrificed a career in order to assist the other party's career and then years later, after achieving success, the other wants out and would leave the sacrificing party destitute. At a minimum, the sacrificing party would seem to have a strong claim for a right to receive support from the party wanting out of the relationship.

Now let us assume that there is no agreement not to terminate -- that the parties have voluntarily entered into a relationship without specifying whether there is a right of unilateral termination or not -- and that now one party wants out, whereas the other wants the relationship to continue. Again, it must be decided which side's interests

are weightier in context. Compare two situations: first, two parties establish a friendship, and later one party wants to end it while the other wants it to continue; second, two parties mutually undertake some joint economic venture, and later one party wants out. In American society, the right to unilaterally terminate a friendship is the norm, whereas measures are sometimes taken to induce the continued existence of business relationships, or at least to require compensation in the event of unilateral termination.<sup>56</sup>

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<sup>56</sup> For example, although courts have been unwilling to compel performance of personal service contracts, they will at times enjoin breaching parties such as entertainers and others with unique skills from working for competitors. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §367 (1981); William L. Schaller, *Jumping Ship: Legal Issues Relating to Employee Mobility in High Technology Industries*, 17 LAB. LAW. 25, 33-34 (2001). Similarly, express and, at times, implied non-competition clauses and covenants not to disclose between employer and employee or in professional associations are enforced. This enforcement is subject to a reasonableness test that depends on whether there exists a legitimate protectable interest such as trade secrets or money invested in training, or whether the purpose is simply to tie someone to the firm or the effect is to overly undermine mobility. See, e.g., Rachael S. Arnow-Richmon, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163 (2001); Gillian Lester, *Restrictive Covenants, Employee Training, and the Limits of Transaction-Cost Analysis*, 76 IND. L.J. 49 (2001); Suellen Lowry, *Inevitable Disclosure Trade Secret Disputes: Dissolutions of Concurrent Property Interests*, 40 STAN. L. REV. 519 (1988); Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383 (1993); Katherine V.W. Stone, *Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721 (2002); Sela Stroud, *Non-Compete Agreements: Weighing the Interests of Profession and Firm*, 53 ALA. L. REV. 1023 (2002). When successful, such actions, although not specifically requiring the continuation of a business relationship, may induce its continuance by preventing people who want out from establishing alternative relationships.

The two situations cannot readily be distinguished on the notion that a friendship is inherently terminable at any party's will because it depends on an emotional commitment that cannot be imposed. In fact, by forcing people to associate, it may well be possible to induce emotional commitments that one or both parties would otherwise reject, as with the bonds that develop among soldiers drafted into military service or workers brought together in the workplace.<sup>57</sup> Moreover, a successful business relationship also requires a type of emotional commitment among its associates, a commitment that is in many ways as intimate as that of a friendship.<sup>58</sup> Nor can the situations readily be distinguished by the contractual nature of the economic venture, or by the reliance and opportunity costs associated with it. A friendship too is a type of agreement. Although ordinarily more tacit, perhaps, than the usual business relationship, friendships typically entail a mutual commitment to respond to the other when asked and when able to do so. In reliance on that commitment, and to one's detriment if the commitment

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<sup>57</sup> See, e.g., CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* 3-29, 69-83 (2003); GERALD F. LINDERMAN, *THE WORLD WITHIN WAR: AMERICA'S COMBAT EXPERIENCE IN WORLD WAR II* 263-99 (1997); JOHN C. MCMANUS, *THE DEADLY BROTHERHOOD* 244-46, 273-90 (1998).

<sup>58</sup> See, e.g., DON COHEN & LAURENCE PRUSAK, *IN GOOD COMPANY: HOW SOCIAL CAPITAL MAKES ORGANIZATIONS WORK* 4 (2001) (emphasizing the importance to an organization's success of "the trust, mutual understanding, and shared values and behaviors that bind the members of human networks and communities and make cooperative action possible"); W. EDWARDS DEMING, *THE NEW ECONOMICS FOR INDUSTRY, GOVERNMENT, EDUCATION* 28-29 (2d ed. 2000) (emphasizing the importance to an enterprise's success of "giv[ing] everyone a chance to take pride in his work," "informal dialogue," "comradeship," "study-groups and social gatherings," and generally developing a spirit of cooperation).

is withdrawn, friends frequently change position and pass up other opportunities.

Perhaps collective considerations distinguish friendship from business, like the centrality of business relations to the materialistic ethic that prevails in American society and the perceived dependence upon binding contracts for the successful functioning of the economic system. Absent such considerations, attempts to impose intimate relations like friendships might be thought to offend human dignity. Yet, a society is certainly conceivable in which friendship is perceived as so integral to its success that the unilateral termination of friendships, at least without good cause, is discouraged.<sup>59</sup> Even in this highly individualistic society, people are discouraged through social pressure from cavalierly ending friendships unilaterally, such as a bad reputation that makes it difficult to establish friendships in the future.

### *B. Establishing an Initial Relationship*

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<sup>59</sup> See, e.g., Joan G. Miller et al., *Perceptions of Social Responsibilities in India and in the United States: Moral Imperatives or Personal Decisions*, 58 J. OF PERSONALITY & SOC. PSYCHOL. 33 (1990) (finding that Indians tend to view responsibilities to others, especially to friends and strangers, more in terms of moral obligations, whereas Americans tend to view them as more a matter of personal choice); Niloufer Q. Madhi, *Pukhtunwali: Ostracism and Honor Among the Pathan Hill Tribes*, 7(3/4) ETHOLOGY & SOCIOBIOLOGY 295 (1986) (reporting on the practice of ostracism, including expulsion from the tribe, as a means of deterring behavior contrary to tribal norms and of unifying the group); Paras N. Singh et al., *A Comparative Study of Selected Attitudes, Values, and Personality Characteristics of American, Chinese, and Indian Students*, 57 J. OF SOC. PSYCHOL. 123, 130 (1962) ("The American culture gives more emphasis to personal autonomy and individuality. In contrast to this, Indian and Chinese students give more emphasis to sympathy, love, affection, mutual help and family bonding, resulting in sympathetic and sacrificing attitudes.").

Thus far the analysis has been skeptical of the right of a party not wanting an association to control the outcome in all instances, at least with regard to an already existing relationship.

Now, let us turn to the inception of three hypothetical proposed associations: one both parties want but which others find objectionable; one that one party wants and the other does not; and one that neither party wants while others do.

### *1. Relationships Both Parties Want*

When both parties want to have a relationship in a society favoring the individual right of free association, preventing them from doing so would seem clearly to violate their rights, absent overriding collective considerations. Examples of such collective considerations are laws prohibiting conspiracies to overthrow the government or in restraint of trade. In other instances, however, assertions of collective considerations may not suffice to overcome the value of free association.

Consider the practice of forced separation of the races, as with mandatory segregation in the United States and South African apartheid, and as still practiced in some societies today.<sup>60</sup> Through the use of governmental power,

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<sup>60</sup> See, e.g., YAAKOV KOP & ROBERT E. LITAN, *STICKING TOGETHER: THE ISRAELI EXPERIMENT IN PLURALISM* 20-21, 30-34, 74-75, 86, 98 (2002) (discussing various government practices promoting the segregation of Arab Israelis and their separation from mainstream life and characterizing the situation as “separate but not equal”); BRENDAN MURTAGH, *THE POLITICS OF TERRITORY: POLICY AND SEGREGATION IN NORTHERN IRELAND* 34-43, 46-49, 151, 163-67 (2002) (detailing extensive segregation in Northern Ireland along religious lines, but finding, despite the use of peace lines in Belfast to separate religious enclaves so as to avoid conflict, a lack of evidence to support the use of planning instruments to achieve ethno-political objectives and

forced separation imposes the preference of those who do not want interethnic relationships on those who do. In the United States, for example, anti-miscegenation laws and laws mandating school and residential segregation prevented those blacks and whites who wanted to marry, or go to school, or live together, from choosing to have those associations.<sup>61</sup>

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characterizing government policy more as one of "benign acceptance" of separation than of design); Tracy Wilkinson, *Bosnia's Ethnic Division Relocates to the Classroom*, L.A. TIMES, October 19, 1997, at A1 (reporting on the segregation of students in schools in the Muslim-Croat Federation with "separate-but-equal" programs for Bosniak Muslim and Roman Catholic Croatian children).

<sup>61</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967) (prohibition against interracial marriage constitutes invidious discrimination based on race with respect to a fundamental individual liberty and therefore violates Equal Protection Clause); *Buchanan v. Warley*, 245 U.S. 60 (1917) (city ordinance prohibiting both blacks and whites from living in neighborhoods where other race is in the majority violates Equal Protection Clause); *Harmon v. Tyler*, 273 U.S. 668 (1927) (per curiam) (city ordinance prohibiting both blacks and whites from living in neighborhoods where other race is in the majority, except with consent of majority of other race, violates Equal Protection Clause); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (judicial enforcement of racially restrictive covenants in deeds constitutes discriminatory state action in violation of Equal Protection Clause); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (mandatory segregation of the races in public schools violates Equal Protection Clause). Compare Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (viewing the issue posed by enforced segregation as one of "denying the association to those individuals who wish it and imposing it on those who would avoid it," and opining that there is no neutral constitutional basis for favoring one claim over the other); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 57 (2d ed., 1986) (replying to Wechsler:

What, on the score of generality and neutrality, is wrong with the principle that a legislative choice in favor of a freedom not to associate is forbidden, when the consequence of such a choice is to place one of the groups of which our society is constituted in a position of

In support of laws against race mixing, the right of groups to preserve their ethnic purity might be asserted. Evaluating the merit of the ethnic purity argument ultimately demands a value judgment about which there may be disagreement. To some, the pursuit of ethnic purity amounts to racism, whereas to believers it represents ethnic pride and group solidarity.<sup>62</sup> In the United States today, judging the worth of people on the basis of race is generally perceived as wrong and as contrary to society's ethos that people are to be judged on their individual merits, such as their character and actions,<sup>63</sup> and especially so when the government makes invidious race distinctions.<sup>64</sup> While in

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permanent, humiliating inferiority . . . .)

<sup>62</sup> Racism may take different forms, and what racism consists of is contestable. A helpful way to conceptualize racism is to view it on a continuum. On an individual level, the continuum might range from overt bigotry to unconscious bias. *See, e.g.,* Taunya Lovell Banks, *Exploring White Resistance to Racial Reconciliation in the United States*, 55 RUTGERS L. REV. 903, 949-50 (2003); Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987). On a societal level it might range from laws explicitly discriminating on the basis of race to institutional racism in the form of facially colorblind structures and practices that perpetuate racial inequalities deriving from past explicit discrimination. *See, e.g.,* JOE R. FEAGIN & CLAIRECE BOOKER FEAGIN, *DISCRIMINATION AMERICAN STYLE: INSTITUTIONAL RACISM AND SEXISM* (1978); Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1721, 1806-11, 1822-30 (2000).

<sup>63</sup> As most eloquently expressed by Martin Luther King, Jr. in his "I Have A Dream" speech: "I have a dream that my four children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character." MARTIN LUTHER KING JR., *A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR.* (Clayborne Carson & Kris Shepard eds., 2001).

<sup>64</sup> *See Loving, supra* note 61. The debate over the permissibility of affirmative action, *see infra* note 68, ultimately turns on one's view of whether all race distinctions are inherently, or at least presumptively, invidious in that affirmative action amounts to impermissible discrimination against whites by denying them benefits based on race

keeping with the society's individualistic ethic people may be entitled to their personal prejudices and even to practice them to some extent, they are not to use the government as a means of imposing their views and practices on society as a whole. Thus, if some community were to attempt to reinstate the forced separation of the races for the purpose of preserving ethnic purity, even if supported by a majority of both blacks and whites, that would be unacceptable today because it clearly violates society's prevailing mores. Nevertheless, a society is conceivable, and some may exist today, in which the preservation of the group is seen as more important than the rights of individual members.<sup>65</sup>

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rather than judging them on their merits, or whether race distinctions are more permissible when the purpose is benign and seeks to eradicate the effects of racial oppression. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (affirmative action in granting of government contracts must be judged under strict scrutiny standard); *Id.* at 239 (Scalia, J., concurring in part and concurring in judgment) ("In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."); *Id.* at 241 (Thomas, J., concurring in part and concurring in judgment) ("[G]overnment-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. . . ."); *Id.* at 243 (Stevens, J., dissenting) ("There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.").

<sup>65</sup> This sentiment was reflected in the past generation in an intensification of ethnic conflict and an increased division of groups of people along ethnic lines in several parts of the world. Examples include the partition of colonial India into largely Hindu India and largely Muslim Pakistan, the creation of Israel as a religious state primarily for Jews and the resultant struggle for the establishment of a Palestinian state, the civil war in Lebanon between Arab Christians and Muslims, the Hutu genocide of the Tutsi in Rwanda, and the break-up of the Soviet Union and Yugoslavia into more ethnically homogeneous states. *See, e.g.*, SUZANNE M. BIRGERSON, *AFTER THE BREAKUP OF A MULTI-ETHNIC EMPIRE: RUSSIA, SUCCESSOR STATES, AND EURASIAN SECURITY* (2002); NOEL MALCOLM, *BOSNIA: A SHORT HISTORY* (1994); GÉRARD PRUNIER, *THE RWANDA CRISIS 1959-1994: HISTORY*

## 2. *Relationships One Party Wants*

Now, let us examine the appropriateness, in a society that generally favors free choice, of forcing on an unwanted party an association another party wants.<sup>66</sup> As

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OF A GENOCIDE (1995); EDWARD W. SAID, *THE POLITICS OF DISPOSSESSION: THE STRUGGLE FOR PALESTINIAN SELF-DETERMINATION, 1969-1994* (1994); KAMAL SALIBI, *A HOUSE OF MANY MANSIONS: THE HISTORY OF LEBANON RECONSIDERED* (1988); IAN TALBOT, *INDIA AND PAKISTAN* (2000); YUGOSLAVIA AND AFTER: *A STUDY IN FRAGMENTATION, DESPAIR AND REBIRTH* 87-115, 138-54, 196-212, 232-47 (David A. Dyker & Ivan Vejvoda eds., 1996). In many of these areas the now-divided groups, while maintaining ethnic identity and varying degrees of insularity, intermingled and interacted for many years in relative harmony. Various historical factors, not all yet fully examined, may have contributed to the recent ethnic division. For example, historical ethnic identification and nationalism; the exploitation of ethnic differences for their own ends by colonial powers or indigenous actors; the imposition of nation states from without rather than spontaneous development from within; the collapse of or failure to develop unifying structures; population growth and scarcity of resources; and the uneven development of and increasing disparities among and within various regions of the world. That the entire situation may be socially constructed does not make the ethnic divisions and the emphasis on the group any less real, just less endemic and more readily subject to change under different - more humane - social conditions.

<sup>66</sup> Here the obverse of the four alternatives discussed above, *see supra* note 50, would be first, to allow the party wanting a relationship to impose it on the unwanted party; second, to allow the relationship to be imposed but require the party wanting the relationship to compensate the unwanted party; third, to allow the unwanted party to avoid the relationship but require compensation to the party wanting the relationship; and fourth, to allow the unwanted party to avoid the relationship entirely. Only the last alternative fully favors the party not wanting the relationship, whereas the first three all concede something to the party wanting the relationship. Even the third alternative, which of the first three is least favorable to the party wanting the relationship, imposes a relationship on the unwanted party since requiring the unwanted party to compensate the other party is in itself a type of

with already existing relationships, one problem with the initiation of a relationship when the parties are not in agreement is parallel individual rights claims. Allowing someone to impose a relationship impinges on the freedom of the party not wanting it, whereas enabling the party not wanting a relationship to avoid it impacts the freedom of the party wanting the relationship. So again, a balancing of interests is required. But here, the detrimental reliance argument of the party wanting in is unavailing, since it turns on the existence of an agreement that induces the reliance. Thus, the individual right claim of a party involved in a long-term marriage, that the other party should not be able to unilaterally terminate the relationship, seems stronger than the claim that a party wanting in should be able to force an unwanted marriage on another party in the first instance.

In other contexts, however, there may be sufficient reasons for empowering one party to initiate an unwanted relationship with another. To illustrate, let us revert to the race relations example and examine possible scenarios once the mandatory separation of the races has been outlawed. Let us first assume that whites prefer segregation while blacks prefer integration, or, in other words, that blacks want a relationship that whites do not.<sup>67</sup> One context might

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relationship. And it is inconsistent with an absolute privilege to avoid an unwanted relationship since having to compensate strengthens the bargaining position of the party wanting in and may induce the unwanting party to establish a relationship that would otherwise not come about.

<sup>67</sup> A divergence of opinion exists between the black and white communities over the desirability of integration versus separation. See *infra* notes 95, 98, and 102. Historically, the leadership of the black community has also been diverse, with some like Martin Luther King, Jr. and Thurgood Marshall pushing for integration, while others like Marcus Garvey and Malcolm X were more nationalistic. See, e.g., ADAM FAIRCLOUGH, MARTIN LUTHER KING, JR. (1995); MODERN BLACK NATIONALISM: FROM MARCUS GARVEY TO LOUIS FARRAKHAN

be the desire of blacks for access to public employment or colleges previously reserved for whites. Integration might come about once public institutions begin to operate on a color blind basis and apply the same hiring and admissions criteria to both blacks and whites.<sup>68</sup>

One response to whites who object to integration in this context is that the relationship is not forced since they have willingly entered into it by accepting public employment or by choosing to attend public colleges. But since public institutions may, as a practical matter, be the only viable options for many people, there is a sense in which the relationship is less than fully voluntary. A stronger response, even acknowledging a degree of forced association, is that to satisfy white preferences for non-

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(William L. Van Deburg ed. 1997); JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY (1998).

<sup>68</sup> Achieving integration in public institutions may, on the other hand, require affirmative action that sets aside positions for blacks, or at least takes race into account in ways that promote integration. *See* Grutter v. Bollinger, 539 U.S. 306 (2003) (public law school may consider race or ethnicity as a factor in admissions process per compelling interest in attaining diverse student body provided it does not set aside slots or establish quotas for minority applicants and employs the same general standards for all applicants); Gratz v. Bollinger, 539 U.S. 244 (2003) (public university's consideration of race in admissions process not narrowly tailored to achieve compelling interest in diversity where all minority candidates received a bonus without making individualized determination of merit and per effect of bonus in making race the decisive factor such that amounts to virtual set-aside). *See also supra* note 64. One possible justification for affirmative action in this context is that without it, the advantage that whites have as a result of past racism that failed to judge blacks on their merits would become entrenched. *See, e.g.,* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993). Another justification is that merely prohibiting discrimination against blacks is insufficient in practice to assure judgments based on merit because the lingering racism of the past is difficult to prove and often operates on a subconscious or unconscious level, even when people think they are and may appear to be judging based on merit. *See* Lawrence, *supra* note 62.

integration would require the government to reinstate mandatory segregation in violation of its obligation to treat people as equals and not to discriminate against them on the basis of race.

Moving from the public to the private arena, assume that various entities (schools, clubs, professional associations, political parties, housing, public accommodations, and the like) are discriminating against blacks in accordance with the preferences of their white clientele. Assume further that laws are proposed to ban those practices, and that whites object that such laws would violate their freedom of association by forcing them to associate with blacks. They might assert that in a society valuing individual freedom, people must be allowed the latitude to hold and practice beliefs that may be offensive to others, as long as they function in the private spheres of social life and do not attempt to use the power of government to impose their beliefs on others. As strong as these claims may be in the abstract, in context there are strong individual rights considerations to the contrary.

First, the equal freedom argument is strongest when, in practice, there is genuine mutuality. It becomes weaker when mutuality is absent and the exercise of freedoms by some adversely affects the exercise of freedoms by others. For example, the mutuality argument seems quite strong with regard to people's sexual preferences, particularly when they are practiced in the privacy of one's home so that others are not forcibly exposed to them and remain free to similarly pursue their own sexual preferences.<sup>69</sup> The mutuality argument

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<sup>69</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (state statute criminalizing sexual conduct between persons of the same sex violates rights of liberty and privacy protected by the Fourteenth Amendment). *Lawrence* overruled *Bowers v. Hardwick*, 478 U.S. 186 (1986) (sodomy statute as applied to consensual sex between gay men in

collapses, however, in a society where whites control the means of achieving success and use that control to maintain their dominance by denying access to others. Against the individual freedom to choose with whom to associate must be counterbalanced the value of the individual right to equal opportunity, which may at times outweigh associational considerations.<sup>70</sup>

Second, the free association argument is stronger in the private context and weaker in the public context. The free association claim asserts the right to do in private that which the government itself could not legitimately do or mandate. A society with a strong individualistic ethic requires a distinction between the public and the private spheres of social life because if everything were viewed as public, little or nothing of individual freedom remains.<sup>71</sup>

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bedroom of home does not violate fundamental right of privacy). Compare *id.* at 213 (Blackmun, J., dissenting):

This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest,... let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.

<sup>70</sup> See *Brown*, *supra* note 61, at 493:

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

<sup>71</sup> See Kleven, *supra* note 29, at 20-21:

[A] democratic society in which people have no rights as individuals and groups, but only as members of society at large, . . . would be an undesirable state of affairs . . . because individuals and groups do have legitimate interests which any society worthy of

The distinction between the public and the private is, however, often blurred. For example, white dominance in the nominally private sphere of social life is to a great extent a byproduct of past racist action on the part of the government.<sup>72</sup> Furthermore, when racist practices in the nominally private sphere of social life become widespread, they take on a public character. There is little practical difference, for instance, between a law prohibiting blacks from living in white neighborhoods and the widespread practice of whites refusing to sell or rent to blacks.<sup>73</sup>

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being called democratic must recognize and accord.

See also Robert H. Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation*, 130 U. PA. L. REV. 1429 (1982) (discussing the distinction between public and private spheres as a means of identifying when government regulation is and is not justified, and academic critiques of the meaningfulness of the distinction).

<sup>72</sup> See, e.g., Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1849-57, 1860-78 (1994) (arguing that "even in the absence of racism, race-neutral policy could be expected to entrench segregation and socio-economic stratification in a society with a history of racism," (at 1852)); Harris, *supra* note 68, at 1715-21, 1737-57 (discussing slavery, segregation, and the racialization of the law in general in the United States); KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 195-203, 207-218, 225-30 (1985) (discussing "redlining" black and poorer neighborhoods following World War II); DESMOND KING, *SEPARATE AND UNEQUAL: BLACK AMERICANS AND THE US FEDERAL GOVERNMENT* (1995) (detailing the history of the U.S. government's involvement in fostering segregation of its workers and in federal programs through the mid 20<sup>th</sup> century, which "could not help but define in part the character of the American polity and ensure unequal treatment for Black American employees," (at 16)).

<sup>73</sup> Compare Buchanan and Harmon, *supra* note 61 (struck down city ordinances mandating racially separate neighborhoods) and Shelley, *supra* note 61 (invalidated judicial enforcement of racially restrictive covenants). Racially restrictive covenants are still a valid means of maintaining neighborhoods' ethnic purity, so long as they are informally adhered to and there is no outright refusal to sell to someone on account of race. See *id.*, at 13 ("So long as the purposes of [the

The balance between the individualistic values of free association, non-discrimination and equal opportunity depends on context and scope. To illustrate, let's compare race and religion. The freedom to practice one's religion is constitutionally protected in the United States because of the centrality of religious beliefs to people's world views, and because, historically, societies' dominant religions have used governmental power to oppress minorities and advance a single view.<sup>74</sup> Such domination is inconsistent with all of the values discussed above. Therefore, the purpose of protecting free exercise is to assure all religious groups an equal opportunity to associate freely and without discrimination, even though some of their beliefs and practices may be quite reprehensible to others.<sup>75</sup>

Furthermore, to ensure the government's neutrality toward differing religious and other world views, it may neither promote one religion over others nor religion in

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restrictive] agreements are effectuated by voluntary adherence to their terms, it would appear clear that there was no action by the State and the provisions of the [Fourteenth] Amendment were not violated."'). *See also* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) (Civil Rights Act of 1866 bars private discrimination based on race in the sale or rental of property).

<sup>74</sup> *See, e.g.,* Zelman v. Simmons-Harris, 536 U.S. 639, 717-18 (2002) (Justice Breyer's dissent from Court's decision upholding parents' use of government-funded school vouchers to enroll children in religious schools).

<sup>75</sup> *See, e.g.,* Wisconsin v. Yoder, 406 U.S. 205 (1972) (free exercise rights of Amish entitle parents to remove their children from school after eighth grade without violating state's compulsory attendance law). *But compare* Bd. of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687 (1994) (violates Establishment Clause for state to create special school district for religious group, overriding religion's free exercise claims); Oregon v. City of Rajneeshpuram, 598 F. Supp. 1208 (D.Or. 1984) (violates Establishment Clause for state to allow incorporation of city completely controlled by religious organization, overriding religion's free exercise claims).

general.<sup>76</sup> However, this separation between church and state does not prevent government, in order to promote the common good, from intervening in religious affairs when a religious practice contravenes important secular values<sup>77</sup> or from incidentally benefiting religion in the furtherance of legitimate secular objectives.<sup>78</sup> Thus, the overall picture is of a society where people in their private spheres of association enjoy a relative autonomy, which fluctuates as their private actions are perceived as more or less of public moment.

Analogously in the racial context, on the one hand we have whites who prefer to be with whites asserting the right to associate so as to practice beliefs that others find objectionable and to exclude blacks in order to do so, much like a religious group might confine membership to believers. On the other hand, we have the fundamental

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<sup>76</sup> See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987) (statute forbidding teaching of evolution unless accompanied by creationism violates Establishment Clause per purpose of promoting particular religious belief); *Wallace v. Jaffree*, 466 U.S. 924 (1984) (statute authorizing period of silence in public schools for meditation or voluntary prayer impermissibly endorses religion in violation of Establishment Clause); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963) (statute requiring Bible reading at beginning of school day violates Establishment Clause); *Engel v. Vitale*, 370 U.S. 421 (1962) (state prescribed non-sectarian prayer violates Establishment Clause).

<sup>77</sup> See, e.g., *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990) (denial of unemployment benefits due to termination for the use of peyote, a prohibited controlled substance, does not violate free exercise rights of Native Americans who use peyote in religious rituals); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding against free exercise claim prosecution of parent for violation of child labor laws for the use of child to distribute and sell religious literature).

<sup>78</sup> See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (state provision of educational vouchers used by parents to enroll children in religious schools does not violate Establishment Clause per secular purpose of improving educational opportunities and freedom of parents to select schools of their choice).

secular value that people should not be discriminated against on account of race. This value is as central to people's humanity as is the sanctity of their religious beliefs, and the need to protect it also arises from a history of oppression. If society is to accommodate both of these fundamental individual interests, then racial exclusivity can only be acceptable the narrower and more private its scope and is less acceptable the more it spills into the public arena and perpetuates historical oppression. Thus, for example, the case for racial exclusivity is far weaker for a political party or professional association than for a genuinely private club,<sup>79</sup> and is stronger when the preference is mutual and leaves avenues for those who prefer integration than when it undermines equal opportunity.<sup>80</sup>

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<sup>79</sup> Compare *Terry v. Adams*, 345 U.S. 461 (1953) (nominally private white voters' association's pre-primary selection of candidates, where primary and general elections ratify those selections, violates Fifteenth Amendment's prohibition against state abridgement of the right to vote on account of race per state entanglement in process) and *Smith v. Allright*, 321 U.S. 649 (1944) (exclusion of blacks from Democratic Party's primary elections violates the Fifteenth Amendment), with *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (no state action in violation of Equal Protection Clause regarding the granting of a liquor license to private club that excludes blacks).

<sup>80</sup> A balancing test that takes into account the extent to which assertions of free association, if protected, would perpetuate historical oppression or undermine equal opportunity, as against the extent of the impact on associational interests of requiring unwanted associations, might help explain the divergent results in a series of Supreme Court cases dealing with exclusion based on race, gender and sexual orientation. Compare *Runyon v. McCrary*, 427 U.S. 160 (1976) (application of federal non-discrimination statute to prohibit private, commercially operated, non-sectarian school from denying admission based on race does not violate free association rights of school or parents) and *Roberts v. U.S. Jaycees*, 468 U.S. 1 (1984) (state requirement that Jaycees admit women does not violate male members' freedom of association); with *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557 (1995) (application of state public accommodations law prohibiting discrimination on basis of sexual orientation so as to bar organizers of

To illustrate this point further, suppose that in the name of promoting ethnic identity, people of a common ethnic heritage congregate in a particular locale, and even take steps to preserve the ethnic character of the area and prevent outsiders from living there.<sup>81</sup> Consider two scenarios. In the first, while some people separate along ethnic lines others do not, such that there are ample communities available for people preferring ethnic homogeneity and for those preferring diversity. In the second, the vast majority of the major ethnic group in a society separate themselves, leaving those in the minority who prefer diversity no choice but to live in a minority community.

The first scenario seems less problematic than the second. In the first, some people may be deprived of the opportunity to enter some communities due to their ethnicity; for instance, people who disapprove of voluntary segregation and want into communities of a different ethnicity in order to promote integration. Yet, there are still available integrated communities that meet their associational preferences, whereas empowering them to force their way into the separate communities would

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St. Patrick's Day parade from disallowing Group to march as a group and to carry banner stating its purpose, although allowing members of Group to participate as individuals, violates organizers First Amendment right of expressive association by requiring inclusion of disfavored message) *and* *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (application of state law to prohibit Boy Scouts from expelling scout master who publicly declared his homosexuality violates First Amendment right of expressive association). Does the diversity of the results reflect less sensitivity to the interests of gays than of women and ethnic minorities?

<sup>81</sup> One approach might be the use of restrictive covenants limiting residency to members of that ethnic group, *see Shelley, supra* notes 61, 73; another might be the acquisition of a large tract of land to be collectively owned and occupied by an organization whose membership is limited to that ethnic group, *see City of Rajneeshpuram, supra* note 75.

undermine the associational preferences of those living there. In the second scenario, on the other hand, the associational preferences of most or all of the major ethnic group are met while the preferences of many minorities are not. By virtue of being deprived of the opportunity to associate with the majority, minorities may also be deprived of comparable life chances because, say, there is more money and therefore better education in majority communities, or because the majority have access in their communities to information and contacts that are unavailable in minority communities and are integral to success in life.<sup>82</sup> If so, that would contribute to the majority's perpetual dominance within the society as a whole, and thus strengthen the minority claim for being empowered to force an unwanted relationship on the majority.

### *3. Relationships Neither Party Wants*

Finally, let us consider proposed associations that none of the parties want. As with associations that both parties want, in a society generally favoring free choice, the presumption would ordinarily be that the parties control when they are in agreement, unless there are overriding collective considerations. To illustrate, let's continue with the example of race relations and examine the appropriateness of imposing integration on blacks and whites when neither want it and both prefer separation.

Suppose that, following mandatory segregation, race-conscious desegregation plans--including such measures as forced busing--are proposed for the purpose of

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<sup>82</sup> See, e.g., *Sweatt v. Painter*, 339 U.S. 629 (1950) ("The law school, the proving ground for legal training and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts").

promoting public school integration.<sup>83</sup> Suppose that both black and white parents oppose the plans, and prefer a freedom of choice approach that would enable parents to select the schools their children attend. Further suppose that, if implemented, the freedom of choice approach would result in substantially segregated schools.<sup>84</sup>

Both black and white parents might argue for freedom of choice on grounds of free association, so that everyone can decide for themselves with whom to attend school. They might also assert that just as mandatory segregation violates people's rights by preventing associations they want, conversely, so do integration plans that force people to associate who do not want to associate with each other.<sup>85</sup>

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<sup>83</sup> See *Swann v. Charlotte-Mecklenburg Board of Educ.*, 402 U.S. 1 (1971) (upholding forced busing as desegregation remedy in formerly de jure segregated system).

<sup>84</sup> See *Green v. County School Board*, 391 U.S. 430 (1968) (overthrowing freedom of choice desegregation plan in formerly de jure segregated system containing only two schools where all whites and 85% of blacks chose to attend former segregated schools).

<sup>85</sup> People may be forced together under non-race-conscious as well as race-conscious desegregation plans. For example, rather than freedom of choice or forced busing, a neighborhood school approach might be implemented and might force people who do not want to associate for racial or other reasons to be together. Indeed, where education is compulsory, even freedom of choice may force some to attend schools with others with whom they don't want to associate. However, a race-neutral neighborhood school approach that forces unwanted parties together might be thought preferable to a freedom of choice plan likely to result in a dispersal of students throughout a school district in that neighborhood schools enable greater parental involvement and expend less time and money on transportation, all of which may produce better educational outcomes. Assuming that individual rights claims do not always on principle trump collective considerations, relevant questions might be whether the evidence really supports the asserted collective concerns (bearing in mind that at times collective considerations are speculative and may require a period of experimentation to see if in fact they pan out), and whether some types of collective considerations are

One possible response is that a major purpose of public education is to help build a cohesive society through the development of widely shared basic values, like tolerance and understanding, which promote the cooperative behavior necessary for society to thrive as well as the respect for others that a society valuing individual freedom demands.<sup>86</sup> So it might be claimed that society is better off in the long run when people are forced to integrate against their wishes because forced integration reduces racial prejudice, thereby reducing the social turmoil that would otherwise occur and enhancing productivity through a greater willingness of racially diverse people to work cooperatively together.

A second response has to do with the way in which preferences are formed. Considered from the perspective of the current moment, it does appear that forced integration negates the preferences of those who prefer separation. But preferences develop over time, are the result of exposure and conditioning, can change over time and under different conditions, and might well be different

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on principle weightier than others when balanced against individual rights claims. For example, when stacked up against the freedom to associate, the benefits to society of reduced racial prejudice or of better educational performance might be thought weightier than efficiency considerations such as increased costs, although at some level the cost of protecting some individual rights might impinge on the ability to promote others or might become prohibitive as a practical matter.

<sup>86</sup> See, e.g., JOHN DEWEY, *DEMOCRACY AND EDUCATION* 94-116 (1926) (developing "a democratic conception of education"); AMY GUTMAN, *DEMOCRATIC EDUCATION* 41-47 (1987) (discussing and favoring a "democratic state of education" where "all citizens must be educated so as to have a chance to share in self-consciously shaping the structure of their society," and that to accomplish this end must "aid children in developing the capacity to understand and to evaluate competing conceptions of the good life and the good society," and must "use education to inculcate those character traits, such as honesty, religious toleration, and mutual respect for persons, that serve as foundations for rational deliberation of differing ways of life").

in the present had past exposure and conditioning been otherwise.<sup>87</sup> Thus, the current separatist preferences of both blacks and whites might be the by-product of a history of past racism and of government participation therein, and the very same people who currently prefer separation might prefer integration had history been otherwise. In a sense, then, current separatist preferences may be imposed rather than freely chosen, or at least so highly conditioned as to be virtually involuntary. It could be argued, then, that a period of forced integration is needed in order to counteract past conditioning and put people in a position to more freely choose whether to integrate or separate.<sup>88</sup> Considered from

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<sup>87</sup> See, e.g., PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE* 468 (Richard Nice, trans., 1984) (a study of how social life conditions people's tastes):

The cognitive structures which social agents implement in the practical knowledge of the social world are internalized, 'embodied' social structures. The practical knowledge of the social world that is presupposed by 'reasonable' behavior within it implements classificatory schemes..., historical schemes of perception and appreciation which are the product of the objective division into classes (age groups, genders, social classes) and which function below the level of consciousness and discourse.

<sup>88</sup> See, e.g., *GROUPS IN CONTACT: THE PSYCHOLOGY OF DESEGREGATION* (Norman Miller & Marjorie B. Brewer, eds. 1984) (containing studies in various societies and contexts of the conditions under which the "contact hypothesis," which posits that "one's behavior and attitudes toward members of a disliked social category will become more positive after direct interpersonal interaction with them," (at 2), holds true; identifying such factors as contact under egalitarian circumstances that minimize preexisting status differentials and enable cooperative behavior involving mutual interdependence and intimate interpersonal associations; but noting the absence of studies of the carryover of improved inter-ethnic relations in structured environments like schools to everyday life); Note, *Lessons in Transcendence: Forced Associations and the Military*, 117 HARV. L. REV. 1981, 1981 (2004) (arguing that forced racial association in the

this more long-term perspective, forced integration does not derogate from, but actually promotes, freedom of association.

This point is particularly significant in the case of young children who may be thought not yet capable of freely choosing with whom to associate or not, and who, due to their tender age, may be especially susceptible to conditioning by their parents. This poses a possible conflict between the individual rights of children and of parents, and raises the question of whether parents have the individual right to raise their children as they see fit even though to do so derogates from their children's individual rights.<sup>89</sup> An associational issue is at stake here because the claimed parental prerogative to control children's upbringing asserts the right to impose on children a relationship the child might not choose to have if the child were in a position to decide.

In response, it might be asserted that while some degree of parental prerogatives exist on individual rights grounds, society as a whole may intervene in the parent-child relationship so as to protect the individual rights of children as against parents.<sup>90</sup> Alternatively, it might be

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military has made it "the most successfully racially integrated institution in American society... with lasting effects on the individuals who pass through it").

<sup>89</sup> See *Casey*, *supra* note 49, at 899-900 (parental consent requirement for abortion by minor child valid provided accompanied by by-pass procedure enabling minor to obtain abortion upon judicial determination that minor is mature enough to give consent or that abortion would be in her best interests).

<sup>90</sup> For example, while the fundamental right to raise their children entitles parents to educate their children in private school as against state requirement to enroll them in public school, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), it is implicit in *Pierce* that compulsory education laws are valid and that the state may compel parents to educate their children in order to protect their best interests. See also *Prince*, *supra* note 77 (holding that parental prerogatives and free exercise of religion do not entitle parents to violate child labor laws).

asserted that society as a whole has a collective interest in raising children that is as strong as, or stronger than, the parental prerogative claim. Consequently, society has the right to intervene in, or supplant entirely, the parental upbringing of children when intervention serves the common good.<sup>91</sup>

Therefore, the fact that children are involved may strengthen the argument for the forced integration of schools. First, since children may not yet be in a position to freely choose with whom to associate, the collective interest in conditioning children to prefer integration may outweigh the parental interest in conditioning them to prefer segregation. Second, society as a whole may have a legitimate interest, as a surrogate for children, in protecting their right to receive an adequately balanced education so that they can more freely choose whether to factor race into their associational preferences as adults.<sup>92</sup>

Again, a contextual analysis is necessary in order to fully evaluate the strength of these competing considerations. In the real world, not only may current preferences be culturally conditioned, but blacks and whites

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<sup>91</sup> Compare, e.g., GUTMAN, *supra* note 86, at 22-28 (considering and ultimately rejecting the "family state" model of education whose "defining feature... is that it claims exclusive educational authority as a means of establishing a harmony - one might say, a constitutive relation - between individual and social good based on knowledge,"); PAULA RAYMON, *THE KIBBUTZ COMMUNITY AND NATION BUILDING* 53-55, 233-36 (1981) (discussing the communal living arrangements of children in Israeli kibbutzim as based on the "socialist principle that the community should replace the family" and the tension this caused for mothers who desired a more family oriented approach to child-rearing).

<sup>92</sup> See, e.g., GUTMAN, *supra* note 86; *Smith v. Bd. of Sch. Comm'rs of Mobile County*, 827 F.2d 684, 692 (11th Cir. 1987) (rejecting parental challenge to public school texts as teaching "religion of Humanism" in violation of Establishment Clause per the state's "indisputably non religious purpose...to instill in...public school children such values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance and logical decision making").

may be on unequal footing in asserting and realizing their preferences. For example, in some circumstances blacks may prefer integration but opt for separation due to social pressure from whites who control their access to a livelihood or whose outright hostility to integration poses risks of physical or emotional harm.<sup>93</sup> In addition, blacks who prefer integration may choose separation because so many whites opt for separation that integrated settings are unavailable, inaccessibly located, or prohibitively expensive.<sup>94</sup> Where either situation occurs, not only does it strengthen the arguments for forced integration just advanced, but it also implicates those raised in the

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<sup>93</sup> See, e.g., ROBERT L. CRAIN, *THE POLITICS OF SCHOOL DESEGREGATION* (1968) (a study of school desegregation in 15 cities, some of which experienced resistance as hostile as mob violence and others a more cooperative response, and generally concluding that extent of actual conflict was overblown); NATIONAL URBAN LEAGUE, *THE STATE OF BLACK AMERICA* (2001) (reporting that 32% of blacks polled said they have chosen not to move somewhere because they felt unwelcome); GARY ORFIELD, HARVARD UNIVERSITY CIVIL RIGHTS PROJECT, *HOUSING SEGREGATION: CAUSES, EFFECTS, POSSIBLE CAUSES*, at note 25 (2001) at [http://www.civilrightsproject.harvard.edu/research/metro/housing\\_gary.php](http://www.civilrightsproject.harvard.edu/research/metro/housing_gary.php) ("Black fears of violence and intimidation in some white communities are still serious obstacles to housing choice"); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (overthrowing as violation of free speech Bias-Motivated Crime Ordinance as applied to burning of cross on lawn of black family in predominantly white neighborhood).

<sup>94</sup> Since whites are still economically better off than blacks, see *infra* note 99, they may use their greater wealth to isolate themselves in communities that are beyond the means of blacks and may use private deed restrictions or zoning to maintain the price of housing at levels too high for blacks to afford. See, e.g., *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (rejecting race-based equal protection challenge to denial by suburb of Chicago with over 64,000 residents of whom only 27 were black of rezoning for low cost housing where center city blacks would likely reside absent showing of discriminatory intent or purpose).

discussion of forced integration where whites do not want it but blacks do.

On the other hand, after a period of experimentation, the result may be that forced integration does not improve, but in fact worsens, race relations and increases individual preferences for educational separation.<sup>95</sup> Or suppose blacks and whites continue to, or

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<sup>95</sup> Here the real-world data is mixed and subject to differing interpretations. *See, e.g.*, GARY ORFIELD, HARVARD UNIVERSITY CIVIL RIGHTS PROJECT, *SCHOOLS MORE SEPARATE CONSEQUENCES OF A DECADE OF RESEGREGATION 6-7* (2001) [http://civilrightsproject.harvard.edu/research/deseg/Schools\\_More\\_Separate.pdf](http://civilrightsproject.harvard.edu/research/deseg/Schools_More_Separate.pdf) (Gallup polls during 1990s showed majority and growing belief among both blacks and whites that integration improves education for both groups, while at same time both groups favored neighborhood schools.); STEVE FARKAS & JEAN JOHNSON, PUB. AGENDA FOUND., *TIME TO MOVE ON: AFRICAN-AMERICAN AND WHITE PARENTS SET AN AGENDA FOR PUBLIC* (1998) (finding that 80% of black parents and 86% of whites believe improving educational quality is more important than integration). Measured over time, white support for the principle that blacks and whites should go to the same schools has increased substantially over the years, from 1956 when 50% supported separate schools to 1995 when 96% supported integrated schools. HOWARD SCHUMAN ET AL., *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATION* 103 (1997) (reporting on and analyzing Gallup, National Opinion Research Council, and other attitudinal polls). When the issue is personalized, there has been a substantial increase in white willingness to send their children to school with blacks, although that willingness declines as the numbers change. With few black students, white willingness has been consistently high over the years; with half black students, whites were evenly divided in the late 1950s and early 1960s, but by the 1990s less than 20% voiced objections; with blacks in the majority, white objection was in the 70% range in the earlier years, whereas by the mid 1990s whites were about evenly divided. *Id.* at 140-41. On the other hand, whites have generally been unsupportive of forced integration. Whites consistently answered no more often than yes when asked whether the federal government should “see to it” that white and black children go to school together. Whites have consistently opposed forced busing, although opposition has declined somewhat from over 80% between the mid 1970s and mid 1980s to 67% opposed in 1996. *Id.* at 123-25.

increasingly, prefer separation even after the effects of historical conditioning have attenuated.<sup>96</sup> Suppose further that, as a result of governmental efforts to equalize opportunity in other areas of social life, white dominance diminishes and the economic and political power of blacks and whites becomes more equivalent. A society is certainly conceivable where ethnic groups freely choose to live and

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Black support over time for the principle of integrated schools has always been nearly unanimous, and blacks have expressed little opposition to attending school with whites no matter what the numbers. *Id.* at 240-41, 254-55. Yet black support for federal efforts to “see to it” consistently declined from over 80% in the mid 1960s to less than 60% in the mid 1990s. On the other hand, while blacks were about evenly divided between support for and opposition to forced busing when it first started in the mid to late 1970s, by the mid 1990s support for forced busing rose somewhat to about 60%. *Id.* at 248-49.

<sup>96</sup> The debate in recent years over whether previously *de jure* segregated schools should be relieved of their judicially supervised obligation to desegregate turns on differing perceptions of whether the vestiges of *de jure* segregation have in fact sufficiently attenuated, despite the persistence of *de facto* residential and school segregation, that school districts should not be held responsible for the on-going segregation. *See, e.g., Freeman v. Pitts*, 503 U.S. 467, 495-96 (1992):

Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. As the *de jure* violation becomes more remote in time and these demographic changes intervene, it becomes less likely that a current racial imbalance in a school district is a vestige of the prior *de jure* system.

*Bd. of Educ. of Okla. City Pub. Schs. v. Dowell*, 498 U.S. 237, 249-50 (1991) (standard for determining whether desegregation decree should have been terminated is whether school board “had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable.”); *Id.* at 251-52 (Marshall, J., dissenting) (“I believe a desegregation decree cannot be lifted so long as conditions likely to inflict the stigmatic injury condemned in *Brown I* persist and there remain feasible methods of eliminating such conditions.”).

go to school separately in order to preserve their ethnic identity or because they just do not get along well in those arenas, while they interrelate on equal terms in other areas of social life. Under such circumstances, the justification for forced integration weakens and can be seen as violating the individual right to choose one's associations.

The United States seems somewhere in the middle. As a result of both voluntary and forced integration, school and neighborhood segregation decreased somewhat following the demise of mandatory segregation. However, most blacks and whites still continued to attend largely segregated schools and live in largely segregated neighborhoods, and racial separation in those spheres has increased in recent years.<sup>97</sup> Overt racial prejudice has decreased somewhat,<sup>98</sup> and the avenues of opportunity have

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<sup>97</sup> Racial segregation in schools began to diminish in the late 1960s and early 1970s when courts began to vigorously enforce desegregation. The degree of racial separation of black children reached its lowest point in the mid to late 1980s, has been increasing since then, and has now returned to about the level of the earlier years. *See, e.g.*, ERICA BRANDENBURG & CHUNGMEI LEE, HARVARD UNIVERSITY CIVIL RIGHTS PROJECT, RACE IN AMERICAN PUBLIC SCHOOLS: RAPIDLY RESEGREGATING SCHOOL DISTRICTS (2002) at [http://www.civilrightsproject.harvard.edu/research/deseg/Race\\_in\\_American\\_Public\\_Schools1.pdf](http://www.civilrightsproject.harvard.edu/research/deseg/Race_in_American_Public_Schools1.pdf); ORFIELD, *supra* note 95, at 11-12, 15-16, 23-26, 28-42. These studies attribute the increased school segregation of the 1990s to the movement of whites to suburbia, the increased concentration of minorities in central cities, and the Supreme Court's deemphasis on desegregation. *See supra* note 96. Orfield also reports on high and unchanging levels of residential segregation between 1980-2000. ORFIELD, *supra* note 93, at 39-40. Despite black preference for and increasingly favorable attitudes of whites toward residential integration, *see id.* at n. 25, 44-45, 50 and *infra* note 98, segregation may be high in fact due to the wide income differentials between blacks and whites. *See infra* note 99.

<sup>98</sup> Over the years there has been a substantial increase in white willingness to vote for a black presidential candidate (from 63% "no" in 1958 to 95% "yes" in 1997) and in favorable attitudes toward

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interracial marriage (from 62% support for laws against intermarriage in 1963 to 87% opposition in 1996, and from 96% disapproval of intermarriage in 1958 to 67% approval in 1997). RACIAL ATTITUDES, *supra* note 95, at 106-07. White support for the principle of integrated education and willingness for their children to attend integrated schools have also increased substantially, although they have been generally unsupportive of forced integration. *See infra* note 95. Likewise, while still somewhat ambivalent, whites have become more supportive of residential integration. In 1963, 39% of whites strongly agreed and only 19% strongly disagreed that whites should have the right to keep blacks out of their neighborhoods; whereas by 1996, 65% strongly disagreed and only 6% strongly agreed. Similarly, white support for open housing laws grew from 34% in 1972 to 67% in 1996. RACIAL ATTITUDES, *supra* note 95, at 106-07, 123-25. And while in 1958, 45% of whites indicated they would definitely or might move if blacks moved next door and 79% if blacks moved into the neighborhood in great numbers, by 1997 the respective figures were 2% and 25%; similarly, 69% of whites preferred all or mostly white neighborhoods in 1972, whereas by 1995 the figure declined to 43%. *Id.* at 140-41. *See also* Maria Krysan, *Data Update to Racial Attitudes in America* (2002) at <http://tigger.uic.edu/~krysan/racialattitudes.htm> (reporting on polls showing a decline between 1990 and 2000 from 48% to 31% in the number of whites opposed or strongly opposed to living in neighborhoods more than half black). By way of caveat, however, surveys may not accurately reflect the extent of racial prejudice in light of evidence that at times people answer survey questions falsely, either intentionally so as to avoid responding in socially unacceptable ways or unintentionally due to non-recognition of the disconnect between their professed beliefs and their actual conduct. *See, e.g.,* ROGER TOURANGEAU, LANCE J. RIPS & KENNETH RASINSKI, *THE PSYCHOLOGY OF SURVEY RESPONSES* 269-88 (2000).

opened a bit;<sup>99</sup> but blacks are still subjected to substantial racial discrimination,<sup>100</sup> and whites still disproportionately

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<sup>99</sup> The gap in high school graduation between whites and blacks has decreased substantially over the years: in 1978, 67.9% of whites and 47.6% of blacks 25 and over had completed four or more years of high school, whereas by 1998 the gap had decreased to 83.7% for whites versus 76.0% for blacks; and for 25-29 year olds, the completion rates for whites and blacks were virtually identical, 88.1% versus 87.6%. However, while the gap has decreased over the years, the annual graduation rate for blacks continues to lag behind that of whites (73.4% versus 81.6% in 1998), and the gap actually increased a bit between 1994 and 1998. WILLIAM B. HARVEY, AM. COUNCIL ON EDUC., MINORITIES IN HIGHER EDUCATION 2000-2001, Tables 1 & 3 (2001). On the other hand, while many more blacks attend college now than before, due to a substantially lower graduation rate the gap in completion rates has not improved over the years; between 1978 and 1998 the four-or-more-years-of-college completion rate for blacks 25 years or older increased from 7.2% to 14.7%, while the rate for whites actually increased a bit more from 16.4% to 25.0%. *Id.* at Tables 3, 4, 9. Likewise, the income gap between whites and blacks continues to be substantial, has remained about the same percentage-wise for the past 40 years or so, and in gross dollars has grown substantially over that time. In 1967 mean family income for whites was \$9,116 and for blacks was \$5,916, 65% of that for whites, whereas in 1998 the figure for whites was \$62,384 and for blacks was \$38,563, 62% of that for whites. JOINT CENTER DATA BANK, JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES INCOME AND WEALTH *at* <http://www.jointcenter.org/DB/detail/income.htm#1> (last updated Aug. 5, 2003).

<sup>100</sup> *See, e.g.*, Krysan, *supra* note 98 (reporting on 2000 survey showing 64% of blacks and 33% of whites believe discrimination is a cause of racial inequality; 1999 survey showing 59% of blacks believe they do not have as good a chance as whites to get jobs for which they are qualified; and 2001 survey showing 51% and 47% of blacks believe they do not have as good a chance as whites to get, respectively, either housing they can afford or a good education, whereas almost 90% of whites believe they do); NAT'L URBAN LEAGUE, *supra* note 93 (reporting that of those blacks polled who have tried to get a mortgage, 25% said they experienced discrimination); ORFIELD, *supra* note 93, at nn.42-43 (reporting on continuing and massive discrimination against blacks in housing); U.S. EQUAL OPPORTUNITY EMPLOYMENT COMM'N, RACE-BASED CHARGES *at* <http://www.eeoc.gov/stats/race.html> (last

dominate positions of power.<sup>101</sup> Meanwhile, the integrationist push following the end of mandatory segregation seems to have waned somewhat in recent years,<sup>102</sup> and there seems to be substantial support among

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modified Feb. 6, 2003)(reporting during fiscal years 1992-2001 an annual average of more than 29,000 complaints of race-based employment discrimination, of which roughly 12%-13% on the average and 19% in 2000/2001 received meritorious resolutions).

<sup>101</sup> African-Americans comprise about 12% of the population of the United States. U.S. CENSUS BUREAU, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000 (2001). As of Jan. 31, 2000, the number of black elected officials, although at an all time high and almost seven times the number in 1970, represented less than 2% of all elected officials. DAVID A. BOSITIS, JOINT CTR. FOR POLITICAL AND ECON. STUDIES, BLACK ELECTED OFFICIALS: A STATISTICAL SUMMARY, 2000 (2002) at <http://www.jointcenter.org/whatsnew/beo-2002/beo-map-charts/BEO-00.pdf>. Additionally, blacks represent less than 5% of federal judges, less than 4% of lawyers, and own only about 4% and account for less than 1% of the profits of the nation's non-farm businesses. FED. JUDICIAL CTR. at [http://air.fjc.gov/history/judges\\_frm.html](http://air.fjc.gov/history/judges_frm.html); ABA COMM'N ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION, MILES TO GO 2000: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION 9 (2001) at <http://www.abanet.org/minorities>; U.S. CENSUS BUREAU, BLACK-OWNED BUSINESSES: 1997 (Oct. 2000).

<sup>102</sup> See, e.g., FARKAS, *supra* note 95 (reporting that both black and white parents believe educational quality to be more important than integration); NAT'L URBAN LEAGUE, *supra* note 93 (reporting on 2001 survey of black adults showing 60% believing the primary focus of black organizations should be economic opportunity, 24% political leadership, and only 7% integration). *But compare id.* (also reporting that 80% of blacks polled prefer living in racially mixed neighborhoods); ORFIELD, *supra* note 93, at n.25 (reporting on a 1997 Gallup poll showing that blacks overwhelmingly prefer integrated to all black areas); ORFIELD, *supra* note 95, at 7, 9-11 (arguing that continuing efforts to desegregate schools is consistent with black support for quality education in light of evidence that integration improves opportunities for blacks).

both blacks and whites for school vouchers and other free choice options.<sup>103</sup>

At this juncture, it is an open question whether the considerations supporting efforts to promote school integration continue to outweigh those supporting freedom of choice, as once thought. If a shift to freedom of choice were to result in schools and communities available both for those blacks and whites preferring ethnic homogeneity and for those preferring diversity, and if it were to contribute to equalized opportunity for blacks, then freedom of choice would promote both associational and egalitarian values. However, freedom of choice would produce a stark conflict between these values and therefore be of more dubious merit if it were to result in an inferior education and fewer opportunities for blacks.

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<sup>103</sup> The degree of public support for vouchers may depend on the wording of the question. In a 2003 Kaiser/Pew poll, 37% of the respondents favored and 24% opposed government vouchers for private or public schools, while 40% reported they didn't know enough to have an opinion, *at* [http://www.publicagenda.org/issues/major\\_proposals\\_detail.cfm?issue\\_type=education&list=14](http://www.publicagenda.org/issues/major_proposals_detail.cfm?issue_type=education&list=14). In a 2003 Gallup/Phi Delta Kappa poll 38% favored and 60% opposed allowing the choice of private schools at public expense, while in a 2003 CBS News/New York Times poll 47% agreed with and 49% disagreed with tax-funded vouchers for private or religious schools, *at* [http://www.publicagenda.org/issues/major\\_proposals\\_detail.cfm?issue\\_type=education&list=15](http://www.publicagenda.org/issues/major_proposals_detail.cfm?issue_type=education&list=15). The support for vouchers appears to be somewhat greater among blacks than whites, although the support among both groups may be declining. In polls conducted by the Joint Center for Political and Economic Studies, in 1998, 48.1% of blacks and 41.3% of whites supported vouchers, whereas in 1997 the figures were 55.8% for blacks and 47.2% for whites. *See* JOINT CTR. DATA BANK, NATIONAL OPINION POLL 1996-2000 *at* [www.jointcenter.org/DB/detail/NOP.htm#Education](http://www.jointcenter.org/DB/detail/NOP.htm#Education) (last updated Aug. 5, 2004). And the NAT'L URBAN LEAGUE, *supra* note 93, reported that 41% of blacks polled in 2000 supported vouchers, but only 34% in 2001.

## V. Associational Issues When Society Is a Party

Now let us address associational conflicts when society itself is a party. First, consider situations when some party wants out of an existing relationship with a society, using emigration and secession as examples. Currently, international law guarantees the right of people to freely leave their countries, and most countries adhere to this norm.<sup>104</sup> This right came about only after an intense international campaign and over the objections of countries (mostly underdeveloped or from the Communist bloc) who feared that free emigration would harm them by the loss of people whom they devote their resources to educate and train and who might contribute to national development.<sup>105</sup>

Individualistic considerations support the right to freely emigrate, which is tantamount to empowering people who do not want to associate with their countries to unilaterally terminate that relationship.<sup>106</sup> This is akin to allowing a party to a marriage to freely exit and is, in fact, more favorable than the common practice under permissive divorce laws that allow unilateral termination but often require the relationship to continue through the imposition of support obligations. Analogously, some countries allow people to emigrate only after completing military or other

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<sup>104</sup> See Thomas Kleven, *Why International Law Favors Emigration Over Immigration*, 33 U. MIAMI INTER-AMER. L. REV. 69, 71-73 (2002). The right to leave is guaranteed by the Universal Declaration of Human Rights, Art. 13, the International Covenant on Civil and Political Rights, Art. 12(1)(2), and various regional treaties.

<sup>105</sup> For a history of the international recognition of the right to freely emigrate, see ALAN DOWTY, *CLOSED BORDERS: THE CONTEMPORARY ASSAULT ON FREEDOM OF MOVEMENT* 111-41 (1987).

<sup>106</sup> For a more thorough discussion of the individualistic and collective considerations relating to freedom of movement in the international context, see Kleven, *supra* note 104, at 74-83.

mandatory public service and for professionals, like doctors, only after practicing for a time.<sup>107</sup>

Such limitations represent a balancing of interests between the claimed individual right to associate or not with whom one chooses and collective considerations like compensating society for the benefits one has received during the association. Looking at society as analogous to another person with whom a party might have an association, compensation might be justified in individualistic terms. The receipt of benefits from a society can be seen as giving rise to a tacit agreement to perform expected social obligations in return, or to an implied contract to do so lest the party otherwise be unjustly enriched at society's expense. As noted above, Locke comes surprisingly close to using such reasoning to posit that thereby someone becomes permanently tied to a society so that one cannot later sever the relationship without society's consent.<sup>108</sup> Furthermore, societies are certainly conceivable where people are seen, akin to Aristotle's view, as being irrevocably tied to their society by virtue of birth, much like a family.

Although current international practice regarding emigration is not so collectively tilted, such is not the case with secession. When a group of people occupying a particular portion of a country desire to withdraw and either form their own nation or join another, the current international standard and practice is that a nation's sovereignty over its territory entitles it to prevent secession

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<sup>107</sup> See generally BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, U.S. DEP'T OF STATE, 1999 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES Feb. 2000, at <http://www.state.gov/g/drl/rls/hrrpt/1999>. Cuba, for example, requires doctors and other professionals to practice 3 to 5 years before being eligible for an exit permit.

<sup>108</sup> LOCKE, *supra* note 4 and accompanying text.

without its consent.<sup>109</sup> There is, though, a free association claim here, analogous to that of an emigrant's claim not to have to remain in a society against one's will; or analogous to the claim of religious or other groups within a society to the right to a relatively autonomous sphere.

Again, the explanation for this divergence seems one of context and scope, based on factors that heighten the significance of collective considerations when a portion of a country secedes. In the case of secession, people, land, and other resources are lost, intensifying the harmful

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<sup>109</sup> I refer here to the ability of part of an established international state to freely secede without the consent of the State – bearing in mind that since international law is still not very highly developed and is still heavily intertwined with power politics among nations, it is difficult to be definitive about it. That said, the principles of self-determination and non-intervention in the internal affairs of a State would seem to imply that a State's laws govern when parts of a State may withdraw. If a State's law permits withdrawal, even unilaterally, then there is consent. If not, then it would seem that a State ordinarily has the right to prevent a unilateral secession, by force if necessary, and that other states are ordinarily obliged not to intervene (except perhaps to prevent the excessive use of force or in those instances when there is a right to secede). See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 84-106, 114-18, 215-18 (1979). While a part of a State might assert that unilateral secession is justified by its own right of self-determination, the State's right of self-determination would ordinarily seem to be overriding, except perhaps in the case of oppression or misgovernment of an area. *Id.* at 86, 100, 115-17 (referring to "the possibility that the principle [of self-determination] will apply to territories which are so badly misgoverned that they are in effect alienated from the metropolitan State," but suggesting that the concept is highly controversial and applicable, if at all in modern times, only to Bangladesh). See also *infra* notes 111, 119. Now as a practical matter part of a State may be strong enough to successfully secede without consent, to establish de facto self-governance and other incidents of statehood, and to receive recognition as a State by the international community. Here it would seem more appropriate to say not that the new State had a right to secede but that the international community has acknowledged practical reality and ratified the successful secession after the fact. See CRAWFORD, *supra*, at 248-66.

impact on the rest of society. While the cumulative effect of individual emigration can be substantial over time, secession may cause an immediate and tremendous impact with which society has more difficulty coping.<sup>110</sup> Unlike group autonomy within a society, secession entails a more complete departure from the association, whereas relatively autonomous groups within a society are still subject to its ultimate authority.

Still, if freedom of association is to be taken seriously as a fundamental individual and group right, the interests of territories that want to secede from a society must be considered. Here, the rationale for the secession is relevant. A portion of a society desiring secession because it is being oppressed by the rest of society would have a stronger claim than one that desires secession in an effort to gain control over the bulk of a society's resources or to engage in some practice like slavery that contravenes society's fundamental values.<sup>111</sup> If society is not willing to let a territory go, then it may have the obligation to accommodate the desire for separation by providing opportunities for relative autonomy, like decentralizing

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<sup>110</sup> Societies do at times suffer immediate mass emigrations in times of famine, war or internal strife, frequently resulting from oppression within the societies themselves. *See, e.g., infra* note 119 (regarding the mass migration of millions of Hindus and Moslems between India and Pakistan following partition); Susanne Schmeidl, *Conflict and Forced Migration: A Quantitative Review*, in GLOBAL MIGRANTS, GLOBAL REFUGEES 62 (Aristide R. Zolberg & Peter M. Benda, eds., 2001).

<sup>111</sup> For commentary on the right to secede, *see, e.g.,* Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991)(arguing for right to secede when territory illegally annexed but not on grounds of nationality or group cohesiveness alone); Alan Buchanan, *Federalism, Secession, and the Morality of Inclusion*, 37 ARIZ. L. REV. 53 (1995)(arguing for right to secede of groups suffering severe injustices at the hands of the state but otherwise no general right to secede); Robert W. McGee, *The Theory of Secession and Emerging Democracies: A Constitutional Solution*, 28 STAN. J. INT'L L. 451 (1992)(arguing for a right to secede).

society into states or provinces with their own governments and powers.<sup>112</sup>

Now let us address situations when some party wants to establish an association with a society, using immigration and the merger of societies as examples. Current international practice regarding immigration is opposite from emigration. While a party is substantially free to leave and sever the relationship with one's country, there is no comparable right to enter and become a member of another society. Pursuant to the principle of national sovereignty, societies have the virtually unfettered right to refuse entry to outsiders.<sup>113</sup> Similarly, a society's national sovereignty entitles it to reject mergers sought by other societies.<sup>114</sup>

The principle of national sovereignty is analogous to an individual's absolute right to refuse associations with others. Just as there is reason to question the absoluteness of such a right when its exercise would oppress others or harm society, however, so the principle of national

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<sup>112</sup> See, e.g., Hurst Hannum, *Rethinking Self-Determination*, 34 VA. J. INT'L L. 1, 66:

In most instances, self-determination should come to mean not statehood or independence, but the exercise of what might be termed 'functional sovereignty.' This functional sovereignty will assign to sub-state groups the powers necessary to control political and economic matters of direct relevance to them, while bearing in mind the legitimate concerns of other segments of the population and the state itself.

<sup>113</sup> See Kleven, *supra* note 104, at 71.

<sup>114</sup> Before the world-wide extension of the nation-state system, a state's acquisition of territory by conquest or cession (typically under threat of force) from indigenous peoples not inhabiting a recognized state was commonplace. See CRAWFORD, *supra* note 109, at 173-74. In modern times, forcible annexation or consolidation would clearly seem to violate the principles of self-determination and non-intervention. *Id.* at 106-07, 112-13.

sovereignty may overly protect nations' self-determination against legitimate competing considerations. On the other hand, there may be situations when a society is justified in rejecting or limiting associations with outsiders in its pursuit of collective self-determination. Again, a balancing of interests is required, taking into account context and scope.

Consider several scenarios, beginning with immigration. Because it is virtually absolute, the principle of national sovereignty entitles nations to treat outsiders in ways that would violate the fundamental rights of its own members. In American society, for example, while the government may not discriminate on the basis of race against its members (i.e., citizens and those allowed to enter), it may indiscriminately do so, and did for much of the twentieth century, when dealing with prospective immigrants.<sup>115</sup> Members of this society have the right to travel and settle where they please, and states and localities may not refuse to accept them in their communities.<sup>116</sup> Yet with regard to immigration, a nation's right to collective self-determination overrides almost all competing considerations.<sup>117</sup>

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<sup>115</sup> See Kleven, *supra* note 104, at 86-87. Some commentators believe the U.S.'s immigration practices are still racist, if not as explicitly so as in the past. See *id.* at note 58.

<sup>116</sup> See *Saenz v. Roe*, 526 U.S. 489 (1999)(invalidating statute limiting welfare benefits during first year of residency); *Shapiro v. Thompson*, 394 U.S. 618 (1969)(invalidating statutes denying welfare assistance to residents of less than one year); *Edwards v. Cal.*, 314 U.S. 160 (1941) (invalidating statute prohibiting the transport of indigents into the state).

<sup>117</sup> The only exception is that if someone can find their way into a country, they may not be deported to another country where they would face persecution. U.N. Convention Relating to the Status of Refugees, Art. 31-33 (adopted July 28, 1951 and entered into force Apr. 22, 1954).

This leaves little room for individualistic values in situations where human dignity is at stake. Suppose a minority of the world's population occupies a disproportionate share of the available land, wherein is located a disproportionate share of the world's resources, and as a result enjoys a disproportionately high standard of living. And suppose people are suffering due to burgeoning overpopulation and other crises to which well-off societies may have contributed through colonial exploitation and environmental degradation.<sup>118</sup> Under

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<sup>118</sup> The world's population, now at about 6 billion, is expected to reach between 8 and 11 billion by 2050, and most of the population growth will be in the less developed parts of the world. *World Population Prospects: The 2000 Revision*, U.N. Population Div., at 5, at [http://www.un.org/esa/population/publications/wpp2000/wpp2000\\_volume3.htm](http://www.un.org/esa/population/publications/wpp2000/wpp2000_volume3.htm). The relationship between population growth and poverty is unclear due to the many variables. Does population growth in underdeveloped areas cause poverty, such that what is needed are efforts to control population growth to alleviate poverty? Or does poverty cause population growth, such that development is needed to reduce poverty which will lead to reduced population growth? The answer seems to be sometimes one, the other and both, and sometimes neither because other causal factors like environmental degradation are also at play. See, e.g., Alain Marcoux, *Population and Environmental Change: from Linkages to Policy Issues*, Sustainable Dev. Dep't, Food & Agric. Org. of the U.N. (Jan. 1999), at <http://www.fao.org/sd/WPdirect/WPre0089.htm>; Geoffrey McNicoll, *Population and Poverty: The Policy Issues*, Sustainable Dev. Dep't, Food & Agric. Org. of the U.N. (Jan. 1999), at <http://www.fao.org/sd/WPdirect/WPre0088.htm>. Some argue that poorer countries should be responsible for solving their own developmental and poverty problems. However, to the extent that poverty does cause population growth and that the countries experiencing the greatest population growth are poor as a result of past and present exploitation by the richer nations, then the argument that the richer nations should somehow assist either through helping to relieve the population strain or with economic development and family planning becomes stronger. See, e.g., ANDRE G. FRANK, CAPITALISM AND UNDERDEVELOPMENT IN LATIN AMERICA (1967); WALTER

these circumstances, according to the well-off societies the absolute privilege to refuse admittance based on the right of national self-determination seems one-sided. Indeed, it seems unlikely that nations would be accorded such a right under a more highly developed international order, and its existence today demonstrates the dominant power of the world's wealthy nations over the rules of the game.

Similar considerations compete in the context of societal mergers. To illustrate, consider the following two hypotheticals: first, India proposes a reconsolidation with Pakistan into a single unified nation; second, Puerto Rico proposes that it be admitted to the United States as a state. Although under current international practice both Pakistan and the United States have the absolute right to reject these associations, there are competing considerations and arguable differences between the two situations.

One difference is that while India and Pakistan were unified under British colonialism, that relationship was severed,<sup>119</sup> whereas as a territory of the United States,

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RODNEY, HOW EUROPE UNDERDEVELOPED AFRICA (1981); Edward Goldsmith, *Development as Colonialism*, in *THE CASE AGAINST THE GLOBAL ECONOMY* 253 (Jerry Mander & Edward Goldsmith eds., 1996). Moreover, a more communal view of the world as an interdependent community might suggest that the world's richer nations have a duty to aid the less well-off, whatever the cause of the disparities. See, e.g., MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 31-51 (1983) (discussing the "duty to aid").

<sup>119</sup> The division of the subcontinent into separate nation-states along largely religious/ethnic lines (India being largely Hindu and Pakistan largely Muslim) is an outgrowth of both the area's pre-colonial history and also the impact of British domination of the subcontinent between the middle of the 19<sup>th</sup> and 20<sup>th</sup> centuries. See, e.g., TALBOT, *supra* note 65, at 1-133. Despite Indian efforts to bring about a unified, multi-ethnic, secular nation in which Hindus would be the substantial majority, Pakistani/Muslim separatism led to partition and the establishment of India and Pakistan (with a western and eastern portion on opposite sides of India) as separate nation-states in 1947,

Puerto Rico is arguably a member of the society<sup>120</sup> and is seeking the full-fledged statehood accorded to other members.<sup>121</sup> To analogize to interpersonal relationships,

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accompanied by the mass migration of millions of mostly Muslims from India to Pakistan and of mostly Hindus from Pakistan to India. *Id.* at 134-61. Both countries have experienced struggles among various minority religious and ethnic groups. In Pakistan, Bengali separatism led to the break away of Pakistan's eastern wing and the formation of Bangladesh as an independent nation in 1971. *Id.* at 252-59. India has experienced Sikh ethno-nationalism and demands for internal autonomy as well as secession in the Punjab region. *Id.* at 265-73. And India and Pakistan have been at loggerheads since independence. *See infra*, note 122.

<sup>120</sup> U.S. interest in Puerto Rico stems back to the earliest days of the nation. Following the Spanish-American War, Spain ceded Puerto Rico to the U.S. in 1899, and Puerto Rico was made and has since remained a dependent territory of the U.S. JOSÉ TRÍAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* 21-29 (1997). In 1900, a civil government under the ultimate control of the U.S. was established. *Id.* at 36-43. In 1917, Puerto Ricans were granted American citizenship. *Id.* at 67-76. In 1951, following a referendum approving it and subject still to ultimate U.S. authority, Puerto Rico became self-governing and the Commonwealth of Puerto Rico was established; and in 1952, the citizenry adopted and Congress approved Puerto Rico's Constitution. *Id.* at 107-18. Throughout its history as a territory, Puerto Rico's economy has been integrated into and dependent on that of the U.S. James L. Dietz & Emilio Pantojas-García, *Puerto Rico's New Role in the Caribbean: The High-Finance/Maquiladora Strategy*, in *COLONIAL DILEMMA: CRITICAL PERSPECTIVES ON CONTEMPORARY PUERTO RICO* 103 (Edwin Meléndez & Edgardo Meléndez eds., 1993); Edwin Meléndez, *Politics and Economic Reforms in Post-War Puerto Rico*, *Id.* at 79.

<sup>121</sup> Puerto Rico's status has been part of a long-standing debate. MONGE, *supra* note 120. Within Puerto Rico, there have been three non-binding plebiscites: in 1967, 1993 and 1998. In all three, there has been substantial support for statehood, ranging from 39% in 1967 to almost 47% in 1998. Independence has received minimal support, below 5%. In 1967 and 1993, commonwealth status outpolled statehood, although by a much larger margin in 1967 (60% to 39%) than in 1993 (49% to 46%). *See* 1998 Status Plebiscite Vote Summary, available at <http://electionspuertorico.org/1998/summary.html>; Estado Libre Asociado de Puerto Rico, *Escrutinio del Plebiscito del 23 de Julio*

one might say that India and Pakistan were at one time married, divorced, and are now independent parties deciding whether to renew the marriage; whereas, the United States and Puerto Rico are now *de facto* married as at common law, and Puerto Rico wants that status legitimized in order to receive all the benefits of a formal marriage.

A second difference is that the history of the relations between Pakistan and India differs from that of the United States and Puerto Rico, and the impact of a merger on Pakistan and the United States differs. India and Pakistan split primarily because of internal conflict between Hindus and Muslims, and there is on-going animosity between the two.<sup>122</sup> Pakistani Muslims would be a small and disfavored minority in a unified country, and even if India agreed to a relatively autonomous provincial status for Pakistanis, they would have a legitimate fear of oppression. On the other hand, Puerto Rico is arguably already part of this society, has many of the responsibilities

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de 1967, available at <http://electionspuertorico.org/archivo/1967.html>. Interpreting the results of the 1998 plebiscite is difficult because statehood and independence were competing with two commonwealth-like alternatives – one similar to the present status of subjection to the ultimate authority of Congress and the other consisting of full self-governance subject to undefined economic and defense ties to the U.S. and with U.S. citizenship only for those already having it and their descendents. Both alternatives received less than 1% support and neither received 50% of the vote. See Manuel Alvarez-Rivera, *Elections in Cuba, 1998 Plebiscite Status Definitions*, at [http://eleccionespuertorico.org/home\\_en.html](http://eleccionespuertorico.org/home_en.html).

<sup>122</sup> The on-going animosity has resulted in four wars and several near wars, and has revolved largely around the Kashmir region of India, whose population is largely Muslim and which both countries claim. The causes of the conflict are varied and contested, and include not only the religious/ethnic factor but also both countries' efforts at nation-building and other geo-political factors as well. See, e.g., SUMIT GANGULY, *CONFLICT UNENDING: INDIA-PAKISTAN TENSIONS SINCE 1947* (2001).

(e.g., military service, subjection to U.S. law) but not all the benefits (e.g., seats in Congress, the right to vote for President) of statehood,<sup>123</sup> and may have lost other opportunities to flourish had it remained independent. Under these circumstances, Pakistan seems to have a stronger claim than the United States to avoid an unwanted relationship with the other party. Furthermore, if the United States were unwilling to admit Puerto Rico as a state, it would seem obligated, after forcing it into an unwanted relationship in the first place, to allow Puerto Rico to become an independent nation if it so chooses.

## VI. Conclusion

While the casual remark that people should be free to choose with whom to associate or not to associate may often be an appropriate response, I have tried to show that in many contexts it is not. At times it may be appropriate for society to prevent associations harmful to a party or society as a whole, and at times it also may be appropriate to impose associations on parties, even highly intimate associations, when they have made commitments that others have relied on or when it serves the common good. Moreover, these considerations may be implicated when society itself is a party to a contested relationship.

Inevitably, when associational conflicts arise, there will be assertions of individual and group rights and of collective interests on all sides, and it will be necessary to assess the strength of the competing considerations in social context. Rather than attempting to thoroughly categorize the relevant contexts and considerations, I have tried to establish that the notion of free choice in

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<sup>123</sup> MONGE, *supra* note 120, at 162-64; *InfoPlease: Puerto Rico*, at <http://infoplease.com/ipa/AO113949>.

associations is overly simplistic and to show that associational conflicts are ubiquitous in social life and relate to issues, like marriage, race relations, and membership in society, that are central to human dignity and the well-being of society.

As always when there is conflict over such issues, there may be many perspectives and passionate disagreement over the appropriate outcome and who should be empowered to decide. The struggle for power in social life is on-going, and associational conflicts are at the heart of the struggle.

***The Sullivan Decision\****

Anthony Lewis\*\*

Professor Stephens,<sup>124</sup> ladies and gentlemen, thank you for letting me join in this great celebration of a great case. *New York Times Co. v. Sullivan*<sup>125</sup> was, and remains, one of the most remarkable judicial decisions of my lifetime. In commenting on it, I must begin with a confession. I watched the case from its beginnings. I worked for *The New York Times* when the libel action was brought, and I covered the case in the Supreme Court. Professor Herbert Wechsler, who briefed and argued the case, was a revered teacher of mine. In the forty years since the case was decided, I have written and talked about it innumerable times.

But – now the confession – over those years I have found, again and again, that I did not altogether understand the decision. That has been true from the beginning. Recently, I had occasion to look back at the story I wrote on March 9, 1964, which appeared on the front page of *The Times* the next morning. To my chagrin, I found that in significant part I had gotten it wrong. It was only much

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\* Keynote Address, "Head Their Rising Voices: *New York Times v. Sullivan*—40 Years Later," The University of Tennessee College of Law, February 27, 2004.

\*\* Mr. Lewis is a Pulitzer Prize winning author and columnist. He reported on the *Sullivan* case for *The New York Times* and later wrote *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991), which Judge Alex Kozinski called a "tour de force" that "no responsible journalist will be without."

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<sup>125</sup> 376 U.S. 254 (1964).

later in teaching the case that I began to penetrate its mysteries.

The *Sullivan* decision had diverse, far-reaching consequences. It revolutionized the law of libel in the United States. It gave new meaning – broader meaning – to the constitutional protections of freedom of speech and freedom of the press, and it removed a serious threat to the civil rights movement, whose success in the 1960s so greatly changed this country.

The sweeping character of Justice Brennan's opinion of the Court is signaled by its opening words. "We are required in this case," it begins, "to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct."<sup>126</sup> Of course, no one can require the Supreme Court to decide anything. That opening declaration is a bit like that of another revolutionary decision, *Erie Railroad v. Tompkins*,<sup>127</sup> which in 1938 stripped the federal courts of their power to make common law on state questions. Justice Brandeis's opinion began: "[t]he question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved."<sup>128</sup> This, however, was not the question presented by the parties. It was the question that the Justices, especially Justice Brandeis, wanted to decide.

Please forgive the digression. I want only to point out that the scope of what the Supreme Court decided in *New York Times v. Sullivan* – the grand scale, the grand style – was a choice made by the Justices, and very much by the author of the Court's opinion, Justice Brennan.

To appreciate how great an impact the case had on American law and American society, we have to take

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<sup>126</sup> *Id.* at 256.

<sup>127</sup> 304 U.S. 64 (1938).

<sup>128</sup> *Id.* at 82.

ourselves back to the year when the libel action started, 1960. We have to understand two things about that time: what the state of race relations was, and what limits the United States Constitution put on libel judgments. The events of 1960 came six years after the Supreme Court, in *Brown v. Board of Education*,<sup>129</sup> had held racial segregation to be unlawful in public education. Yet, in that year not a single black child attended a public school with white children in Alabama, Georgia, Mississippi, Louisiana, or South Carolina. The state universities remained segregated in those same states. Blacks were prevented from voting in large parts of the Deep South by force or trick. In 1960, only four percent of black citizens of voting age had managed to register to vote in Mississippi, and only 14 percent in Alabama.

Those were the realities that Martin Luther King, Jr. and his colleagues were trying to change, along with segregation in the rest of life, in hospitals and cemeteries and department stores. Dr. King had an idea, an optimistic one. He thought that most Americans, if confronted with the ugliness and brutality of racism, would disapprove. It was true that most Americans at that time were actually unfamiliar with the realities of racism. Dr. King set out to confront them with those realities. The press, both print and broadcast, had an essential part to play if Dr. King's optimistic strategy was to work. It was the media that would show Americans the ugly reactions to the civil rights movement: the snarling police dogs, the assaults on black and white passengers on interstate buses when they reached terminals in Alabama, the sheriffs who threatened would-be black voters. Newspapers and magazines did a good job of reporting those episodes, and television had an even greater impact.

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<sup>129</sup> 347 U.S. 483 (1954).

Professor Alexander Bickel of the Yale Law School, after the confrontations over school desegregation in New Orleans and Little Rock, wrote that racial segregation had been an abstraction to most Americans. The riots, he said, “showed what it means concretely. Here were grown men and women furiously confronting their enemy: two, three, a half dozen scrubbed, starched, scared and incredibly brave colored children. The moral bankruptcy, the shame of the thing, was evident.”<sup>130</sup>

I need not go into the advertisement in the *Times*, or Commissioner Sullivan’s claim that he was libeled by it, although it did not mention his name when it denounced “Southern violators” of the Constitution. This audience knows all about that. I simply do what Justice Holmes once said was necessary: elucidate the obvious. The purpose of that libel action, and of others that were brought soon after, was to frighten the national press out of covering the civil rights movement in the South.

It was a serious threat. An all-white jury awarded Commissioner Sullivan all the damages he claimed \$500,000. Another jury returned a verdict for the same amount in another official’s libel action over the advertisement. Altogether, *The Times* was going to owe over \$2,500,000 in libel damages from the ad – and no doubt more in suits over new stories in the paper. It was enough to put the paper out of business in those days.

Other lawsuits targeted magazine and broadcast entities. After the judgment for Commissioner Sullivan, the *Montgomery Advertiser* headlined a story: “State Finds Formidable Legal Club to Swing at Out-of-State Press.”<sup>131</sup> That brings me to the second thing that has to be understood about the year 1960: the state of libel law.

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<sup>130</sup> ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

<sup>131</sup> Rex Thomas, *State Finds Formidable Legal Club To Swing At Out-Of-State Press*, MONTGOMERY ADVERTISER, Sept. 25, 1960, at A1.

There were no constitutional constraints then – none – on libel judgments. Libel was entirely a matter of state law, regarded from the beginning as being outside the First Amendment. No libel award, however outlandish, had ever been found to violate the Federal Constitution. An associate at the law firm that for years had represented *The New York Times* wrote an article for the paper's house organ, *Times Talk*, about how the lawyers planned to appeal the judgment for Commissioner Sullivan. He did not mention the First Amendment.

In hindsight, it all looks so obvious. Here was a lawsuit aimed at cutting off publication of a comment on a central political issue. How could it more directly engage the First Amendment? But that perspective is plain only in hindsight. At the time, Commissioner Sullivan's lawyer, Roland Nachman, thought the First Amendment was a March hare, not worth pursuing. The Alabama Supreme Court dismissed it in a sentence. When Professor Wechsler raised the idea of a First Amendment argument with *Times* executives, some of them were wary of such a novel idea. But Professor Wechsler boldly told the Supreme Court in his brief that this was a classic test of First Amendment values. "This is not a time," he said, "there never is a time – when it would serve the values enshrined in the Constitution to force the press to curtail its attention to the tensest issues that confront the country . . . ." <sup>132</sup>

The challenge to Professor Wechsler was the long history of universal acceptance that libel fell outside the reach of the First Amendment. He answered that history with another history, the history of the struggle against the Sedition Act of 1798, which made it a crime to criticize the President. "Though the Sedition Act was never passed on by this Court," Wechsler wrote, "the verdict of history

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<sup>132</sup> Herbert Wechsler, Brief for the Petitioner, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) ((Nos. 39, 40) available at 1963 WL 66441,\*68).

surely sustains the view that it was inconsistent with the First Amendment.”<sup>133</sup>

Justice Brennan put that history at the heart of his opinion. “Although the Sedition Act was never tested in this Court,” he wrote, “the attack upon its validity has carried the day in the court of history.”<sup>134</sup> With that, he and the Court in effect held unconstitutional a statute that had expired 163 years earlier, in 1801. It was the great controversy over the Sedition Act, Justice Brennan said, with James Madison leading the attack, that “first crystallized a national awareness of the central meaning of the First Amendment,”<sup>135</sup> that is, the right of Americans to criticize officials whom they choose to govern them.

That is one constitutional theme in the *Sullivan* opinion. It is buttressed by pages of quotation from some of the great free speech opinions in American law. They show, Justice Brennan said, “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.”<sup>136</sup>

To this Justice Brennan added a second ground, not so often noticed, but I think extremely important. Officials have a privilege not to be sued over statements made in the course of their duties. An analogous privilege is needed by “the citizen-critic of government. It is as much his duty to criticize as it is the official’s duty to administer.”<sup>137</sup> The idea comes straight from Justice Brandeis, who once said the most important office in a democracy was the office of citizen.

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<sup>133</sup> *Id.* at 47.

<sup>134</sup> 376 U.S. at 276.

<sup>135</sup> *Id.* at 273.

<sup>136</sup> *Id.* at 270.

<sup>137</sup> *Id.* at 282.

From today's standpoint, again, the enshrining of the right to criticize government as a central meaning of the First Amendment seems unchallengeably correct. But we think that in good part because of *New York Times v. Sullivan*. It was the first opinion for a majority of the Supreme Court that so broadly spread the mantle of free expression. Many of the ringing words about freedom that we remember by, for example, Justices Holmes and Brandeis, appeared in dissenting and concurring opinions. It was Holmes in dissent who said, "we should be eternally vigilant against attempts to check the expression of opinion that we loathe and believe to be fraught with death . . . ." <sup>138</sup>

Notice also that Holmes spoke of freedom for "opinion." The *Sullivan* case involved something very different: facts. False facts, because *The Times* admitted and the Court found that there were errors in the advertisement that was the subject of this libel action. Justice Brennan said the lesson to be drawn from the Sedition Act controversy was that "neither factual error nor defamatory content," nor a combination of the two, "suffices to remove the constitutional shield from the criticism of official conduct. . . ." <sup>139</sup>

Now, ladies and gentlemen, we have to confront one of the mysteries of the Court's opinion in *New York Times v. Sullivan*. Through all of the discussion about the Sedition Act, the quotations from Madison and Brandeis, Justice Brennan seemed to be taking an absolute view of the right to criticize government. Madison certainly did, saying that "abuse" by the press must be accepted as part of the price of freedom. <sup>140</sup> Indeed, at the oral argument of the case, Justice Brennan asked whether there were "any limits whatever" to the right to criticize officials. Professor

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<sup>138</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).

<sup>139</sup> *Id.* at 273.

<sup>140</sup> *Id.* at 271.

Wechsler answered that, “if I take my instruction from James Madison” there were none. Justice Brennan said: “You say, then, the First Amendment gives, in effect, an absolute privilege to criticize....”<sup>141</sup>

But that is not the holding of the *Sullivan* case. Justices Black, Douglas, and Goldberg urged that outcome, calling for absolute immunity for attacks on officials. The opinion of the Court, however, stopped well short of absolute immunity. It held that a public official could not recover damages for a defamatory falsehood “unless he proves that the statement was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>142</sup> That is the famous *Sullivan* formula, allowing the libel plaintiff to recover damages if he can show that he was defamed by a falsehood that was deliberate – a knowing lie – or reckless.

Why did Justice Brennan and the Court stop short of total freedom to criticize? Why did they leave a loophole for official libel actions that has led to much litigation about what kind of falsehood is “reckless?” (The Court in time said it was a statement published despite subjective awareness of probable falsity.)

Some have speculated that Justice Brennan really preferred the absolute Madisonian position but drew back in order to carry a majority of his colleagues with him. I am sure that was not the case. In the draft opinion he showed to his law clerks a few weeks after argument – the first of eight drafts – he noted Wechsler’s argument that Madison would have:

barred sanctions against defamatory criticism of  
public officials reflecting upon their official

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<sup>141</sup> Audio tape: Oral Argument of *N.Y. Times v. Sullivan*, U.S. Supreme Court (Jan. 6, 1964), at

<http://www.oyez.org/oyez/resource/case/277/audioresources>.

<sup>142</sup> *Id.* at 279-80.

conduct even when tainted with express malice. We do not think that the Amendment reaches so far . . . . The line may surely be drawn to exclude from constitutional protection the statement which is not criticism, or intended as such, but, in the guise of criticism, is deliberate, malevolent and knowing falsity, or utterance reckless of the truth . . . .<sup>143</sup>

This was the age of Senator Joe McCarthy and anti-Communist demagoguery.

In another libel case decided shortly after *Sullivan*, *Garrison v. Louisiana*,<sup>144</sup> Justice Brennan's opinion of the Court explained why absolute immunity for defamatory false statements about officials was an unwise idea:

At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration . . . . [T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.<sup>145</sup>

So there we have what is known as the *Sullivan* rule, a substantial but incomplete immunity for unpleasant comments on public officials.

But Justice Brennan did not leave it there. He went on in his opinion to test the facts of the case against the

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<sup>143</sup> See ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (Random House, 1991).

<sup>144</sup> 379 U.S. 64 (1964).

<sup>145</sup> *Id.* at 75.

new rule, and found that the evidence in the record could not constitutionally support a judgment for Commissioner Sullivan. That was a highly unusual step. When laying down a new or reformulated constitutional rule, the Supreme Court would ordinarily remand the case to the lower court to determine the rule's application to the facts of the particular case. The reason for departing from the ordinary is not in doubt. Justice Brennan feared that the Alabama officials who had sued over the *Times* advertisement would demand a new trial and try to show that the statements in the ad were knowingly or recklessly false. Justice Black, who came from Alabama, warned that Sullivan and the others would persuade a jury to find knowing or reckless fabrication. (In fact, Sullivan did not seek a trial.)

In the course of measuring the evidence against the constitutional standard, Justice Brennan did something quite extraordinary. After finding no deliberate or reckless falsehoods on the part of *The Times*, he said: "We also think the evidence was constitutionally defective in another respect: it was incapable of supporting the jury's finding that the allegedly libelous statements were made 'of and concerning' [Commissioner Sullivan]."<sup>146</sup> In other words, by finding that an ad without his name could be understood to defame Sullivan, the jury and the Alabama courts violated the Constitution.

Think about that. It is an independent ground of decision, unconnected to the whole argument about the Sedition Act and the right to criticize officials. But then the Supreme Court could have rested on that ground without more. It could have decided the case and reversed the judgment against *The New York Times* without taking the bold step of laying down a new constitutional rule for libel. The case would still be meaningful. The Alabama Supreme

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<sup>146</sup> 376 U.S. at 288.

Court had said it was logical to impute criticism of Sullivan from general statements about police wrongdoing in the ad. Justice Brennan's opinion stated that it would allow criticism of government to be transmuted into personal libel, and that this country has no such thing as libel of the government. But it would hardly be the great decision it was.

Why did Justice Brennan and the Court not rest on that narrower ground? I think we have to conclude that the Court thought it was the moment for a decision that would ensure open channels of information about the racial crisis. Justice Brennan did not frame his opinion in terms of Dr. King's hope – the hope of arousing Americans to understand the evils of racism. It is, in fact, a singularly detached opinion. But the Court knew what was at stake.

One profound result of the decision in *New York Times Co. v. Sullivan* was to keep the channels of information about the civil rights movement and its opponents open. Dr. King's statement about how Americans would react to racism when they saw it naked proved to be correct. Americans pressed for federal legislation guaranteeing the right to vote and other rights. By the end of 1966, two years after the *Sullivan* decision, that legislation was on the books. It led to profound changes in American politics and society. I can, perhaps, sum them up with a small story.

Ralph McGill was the great editor of the *Atlanta Constitution*. He fought against racism for years, often in lonely circumstances. Some years after the passage of the civil rights laws, a friend came to his office and asked McGill to come with him. They went to a hall where black elected officials in the South were meeting. Ralph stood in the back of the hall, and tears rolled down his face.

The decision remade the law of libel in this country. Today, virtually every libel action engages the First Amendment in some way. What was once a matter of state

law has become a federal specialty. More broadly, this has become a much freer country in terms of what we can speak and publish.

Of course that freedom was not the sole result of the *Sullivan* case. There has been a gradual trend toward outspokenness, gathering momentum in the last fifty years. It is hard to believe now that the Supreme Court, during and after World War I, upheld criminal convictions for political criticism of the President. I think freedom to say and write what we will is stronger in America now than ever, and greater than in any other country. The *Sullivan* case was a spur to that trend.

Not everyone welcomes the world of uninhibited, caustic, sometimes unpleasantly sharp criticism of public officials. I have debated politicians on the subject, and they can be explosively negative. The dissenting view these politicians hold is that *Sullivan* has become a license for shoddy journalism, transforming it into a profession where legal excuses are sought for falsehood. They argue that the atmosphere of continuous attack and investigation makes political life hard to bear and discourages the thoughtful and sensitive from going to it.

I cannot dismiss that argument out of hand. I think the standards of journalism are less than lofty. We live in a world in which an Internet purveyor of trash can put a totally false rumor about a Presidential candidate on his website, and tabloids around the world pick it up as "news." I doubt, though, that this sensationalism and lack of ethics can be traced to *New York Times v. Sullivan*, or even to the zeal of today's journalists to look for official wrongdoing.

Rather, the main source of that investigative zeal lies in two transforming events: Vietnam and Watergate. The leading columnists, Washington bureau chiefs, and the like used to consider themselves on the same team as high officials. I well remember how chummy my superiors at

the *Times* were with Secretaries of State and the like, and it was not evil. They shared premises, such as the need to win the Cold War, and they respected officials' good faith and superior knowledge.

Vietnam ended all that. Practically all of us in the business came to doubt the superior knowledge of officials about the war. In fact, David Halberstam and Neil Sheehan and other young correspondents there knew more about the war than Presidents did. Good faith? You had to wonder about that, too.

Then came Watergate, with its lies and criminality. It made us forever skeptical about official truth. One can hardly blame that on the *Sullivan* case.

Am I, then, an unambiguous admirer of all that *Sullivan* wrought? No, I am not. I think the Supreme Court made a mistake when it extended the rule of the case – the need to prove knowing or reckless falsification – from public officials to public figures. The Court defined public figures as either people generally well-known, like movie stars, or people who have “thrust themselves into the vortex” of public controversy, as Justice John Marshall Harlan memorably put it.<sup>147</sup>

The first step to enlarge the sphere of the *Sullivan* case was taken by the Supreme Court in 1967, when it decided *Time, Inc. v. Hill*,<sup>148</sup> a privacy case. James Hill and his family lived in a suburb of Philadelphia. Three escaped convicts invaded their home and held the Hills hostage for 19 hours but treated them well. The press covered the story intensely, to the distress of the family and especially of Mrs. Hill, who greatly valued privacy. To escape the glare of publicity, they moved to Connecticut and sought obscurity.

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<sup>147</sup> *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 146 (1967).

<sup>148</sup> 385 U.S. 374 (1967).

Two years later, a play entitled “The Desperate Hours” appeared on Broadway. It depicted a reign of terror by convicts who held a family hostage and included brutality and sexual threats. The play was set in Indianapolis. *Life* magazine ran a feature on the opening and photographed the actors in the Hills’ former home near Philadelphia. *Life* described the play, with all its terror, as a reenactment of what had happened to the Hills. The *Life* story devastated the Hill family and caused Mrs. Hill to suffer a psychiatric breakdown. Thereafter, Mr. Hill sued Time, Inc., the publisher of *Life*, under the New York privacy statute, claiming that the article placed his family in a false light. He was awarded a modest \$30,000 in damages by the New York courts, but the Supreme Court reversed. The Court’s opinion, penned by Justice Brennan, said the judgment was constitutionally flawed because Mr. Hill had not been required to prove that *Life*’s falsification had been knowing or reckless.

What did James Hill, a private person, have to do with the reasoning of *New York Times v. Sullivan*, or with the Sedition Act controversy and its lesson that the central meaning of the First Amendment is the right to criticize those who govern us? My answer is—nothing. I think the Court, in *Time, Inc. v. Hill*,<sup>149</sup> applied the compelling logic of *Sullivan* in a situation where it was quite inapposite.

As someone who thinks privacy is a crucially important value in our increasingly intrusive society, I also regret the Court’s failure in the *Hill* case to give privacy the weight it deserves. That was brought poignantly home years after the decision. It happens that Richard M. Nixon argued the case for Mr. Hill. His one-time law partner and White House counsel, Leonard Garment, published an article about the case in *The New Yorker* in 1989. He

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<sup>149</sup> *Id.*

disclosed, with James Hill's permission, that in 1971 Mrs. Hill had committed suicide.

Leonard Garment's article followed the disclosure in Professor Bernard Schwartz's book, *The Unpublished Opinions of the Warren Court*,<sup>150</sup> of what went on inside the Supreme Court during its consideration of the *Hill* case. After it was first argued, the Justices voted, 6 to 3, to affirm the New York court's judgment in favor of Mr. Hill. The opinion was assigned to Justice Abe Fortas, who used the occasion for two distinctive purposes: an eloquent definition of privacy, and a savage attack on journalistic ethics. As to the latter, Justice Fortas decried what he called life's "needless, heedless, wanton and deliberate injury."<sup>151</sup> He wrote that "magazine writers and editors are not, by reason of their high office, relieved of the common obligation to avoid inflicting wanton and unnecessary injury."<sup>152</sup> Perhaps his sarcastic language helped to bring about a switch in the Justices' votes; after a second round of oral argument, the Court issued a 5-4 decision in favor of Time, Inc. A compelling dissent by Justice Harlan opined that the "marketplace of ideas" would not function in a case like this because James Hill would have a hard time finding a platform to answer *Life* magazine.<sup>153</sup> The case showed, wrote Justice Harlan, "the dangers of unchallengeable untruth."<sup>154</sup>

The more common extension of the *Sullivan* rule is to libel actions brought by people who, though not officials, are regarded as public figures. The consequences can be curious. Wayne Newton, a Las Vegas entertainer, was deemed a public figure when he sued for libel. Other

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<sup>150</sup> BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE WARREN COURT* (1985).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> 385 U.S. at 407-08.

<sup>154</sup> *Id.* at 408.

singers and actors have had to meet the *Sullivan* test because they were famous. But what, if anything, did they have to do with government or public affairs? I should, perhaps, add that my question would be different if the actor were Arnold Schwarzenegger. The public figure category would be more logical if it were limited to people who have thrust themselves into the vortex of public controversy. The Supreme Court may have taken an unacknowledged step toward that limitation when it said in 1986 that a public figure who brings a libel action has to meet the *Sullivan* test only if the suit concerns a "public issue."<sup>155</sup>

Despite my doubts about public figures and privacy, I think the decision in *New York Times v. Sullivan* has been a great liberating force in American law and life. I may feel especially strongly on the subject because I spent nine years of my life in England, where the old common law of libel reigns in good part unchanged. In libel cases, the burden of proof is on the defendant, usually a newspaper, to prove that the challenged statement is true. That can be an impossible burden to meet, so most newspapers give up and settle when sued. Under *Sullivan*, as the Supreme Court made clear in 1986, the burden is on a libel plaintiff to prove falsity.

In Britain the plaintiff does not have to show any fault on the part of the defendant. A newspaper writer and editor may have made strenuous, good-faith efforts to check everything before publishing an article, but if there is an inadvertent error in the published article that defames someone, that person can recover damages. Under *Sullivan*, of course, a public official or public figure has a high degree of fault to prove: knowing or reckless falsification. Under the 1974 Supreme Court decision in

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<sup>155</sup> *Phila Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775 (1986).

*Gertz v. Welch*,<sup>156</sup> even a purely private plaintiff has to show at least that there was negligence on the part of the defendant in publishing a falsehood. Innocent mistake is not subject to penalty.

Ladies and gentlemen, I said at the start that over the years I realized from time to time that I had not altogether understood the decision in *New York Times v. Sullivan*. No doubt I still have some learning to do. With its grand sweep and its mysterious turnings, Justice Brennan's opinion is a challenge for all time – and what a thrilling challenge it is.

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<sup>156</sup> 418 U.S. 323 (1974).



## ***The Writ of Habeas Corpus After Cone v. State***

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## I. Introduction

In *Cone v. Bell*,<sup>1</sup> the U.S. Court of Appeals for the Sixth Circuit overruled the District Court's denial of a prisoner's habeas corpus petition. The Sixth Circuit held that the jury relied on an unconstitutional statutory aggravating factor in its decision to impose the death sentence. Accordingly, the Sixth Circuit remanded the case with instructions to grant the habeas corpus petition, thereby vacating Cone's death sentence.<sup>2</sup>

After convicting Gary Bradford Cone of two counts of first degree murder for brutally killing an elderly couple, the jury sentenced Cone to death.<sup>3</sup> The jury found four aggravating factors were present, including, in particular, that the murders were "especially heinous, atrocious and cruel."<sup>4</sup> In his habeas corpus petition, Cone argued that the terms "heinous, atrocious and cruel" were unconstitutionally vague.<sup>5</sup> On appeal, the Sixth Circuit was asked to decide whether Cone's death sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>6</sup>

Before addressing Cone's Eighth Amendment challenge, the Sixth Circuit resolved two key preliminary

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<sup>1</sup> *Cone v. Bell*, 359 F.3d 785 (6th Cir. 2004).

<sup>2</sup> *Id.* at 799.

<sup>3</sup> *Id.* at 787; *Cone v. Bell*, 243 F.3d 961, 965 (6th Cir. 2001).

<sup>4</sup> *Cone*, 243 F.3d at 965; see TENN. CODE ANN. § 39-13-204(i) (2003) (citing 12 aggravating factors that a jury can consider in deciding whether to impose death penalty when defendant has been convicted of first degree murder). Many courts refer to the "especially heinous, atrocious and cruel" factor as the "HAC aggravator," and I will also refer to it as such throughout this note.

<sup>5</sup> See *Cone*, 243 F.3d 961 (affirming district court's refusal to issue writ of habeas corpus).

<sup>6</sup> *Cone*, 359 F.3d at 787.

issues.<sup>7</sup> First, the court held that under Tennessee law, the Tennessee Supreme Court implicitly reviews a death sentence for arbitrariness, regardless of whether the challenge is explicitly asserted by the petitioner.<sup>8</sup> Second, the court held that although the petitioner did not explicitly raise an Eighth Amendment claim in his first petition for post-conviction relief, the issue had been implicitly reviewed by the Tennessee Supreme Court. Accordingly, Cone's Eighth Amendment challenge had not been "procedurally defaulted" and, therefore, was a valid consideration for the court.<sup>9</sup>

After resolving the preliminary issues, the Sixth Circuit analyzed Cone's primary Eighth Amendment claim. Granting Cone's habeas corpus petition, the court held that the Tennessee Supreme Court's implicit decision regarding the constitutionality of the HAC aggravator was contrary to "clearly established" United States Supreme Court precedent existing at the time of Cone's state court conviction.<sup>10</sup> By vacating Cone's death sentence, the Sixth Circuit furthered the primary purpose of the writ of habeas corpus – to ensure that a petitioner's imprisonment is lawful.

Astonishingly, three years earlier, in 2001, the Sixth Circuit had concluded that it was unnecessary to address Cone's vagueness challenge when it determined he was entitled to habeas relief. Taken together these decisions emphasize that, when reviewing a state prisoner's sentence and conviction for the purposes of a habeas corpus petition, the Federal courts *must* exercise the utmost care and diligence.

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<sup>7</sup> *Id.* at 790-91.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 797.

## II. The Development of Habeas Relief for State Prisoners Sentenced to Death

### *A. Writ of Habeas Corpus: A Historical Perspective*

A writ of habeas corpus is most often used to examine the legality of the petitioner's imprisonment.<sup>11</sup> The writ of habeas corpus originated in England in the thirteenth century. As is evidenced by its inclusion in the Constitution, the Founders clearly recognized the importance of the writ of habeas corpus.<sup>12</sup> Initially, only a federal prisoner could petition a court for habeas corpus relief.<sup>13</sup> However, in 1867, the Habeas Corpus Act extended the writ to include state prisoners and enabled federal courts to grant the writ in "all cases where any person may be restrained of his or her liberty in violation of the [C]onstitution."<sup>14</sup> Although the federal habeas corpus statute has undergone numerous amendments since its enactment, the "jurisdictional grant" endured.<sup>15</sup>

Today, 28 U.S.C. §§ 2241-2255 gives federal courts the authority to grant habeas corpus relief.<sup>16</sup> The current version of Section 2254 contains revised procedural guidelines that a court must follow in granting the writ to state prisoners.<sup>17</sup> Congress, however, did not pass

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<sup>11</sup> BLACK'S LAW DICTIONARY 715 (7th ed. 1999).

<sup>12</sup> U.S. CONST. art. I, §9 cl. 2 ("The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."); Stuart E. Walker, Note, *"What We Meant Was . . ." The Supreme Court Clarifies Two Ineffective Assistance Cases in Bell v. Cone*, 54 MERCER L. REV. 1271, 1275 (2003).

<sup>13</sup> Walker, *supra* note 12.

<sup>14</sup> *Id.* Act of Feb. 5, 1867, ch. 28 § 1, 14 Stat. 385.

<sup>15</sup> *Williams v. United States*, 401 U.S. 362, 375 (2000).

<sup>16</sup> Walker, *supra* note 12.

<sup>17</sup> 28 U.S.C. § 2254 (2004).

legislation outlining these substantive guidelines until April 24, 1996, when it enacted the Antiterrorism and Effective Death Penalty Act (hereinafter the "AEDPA").<sup>18</sup> The AEDPA limited the circumstances under which a federal court may grant habeas relief to a state prisoner.<sup>19</sup> The most substantial change effectuated by the AEDPA regarding federal habeas relief came in the form of an amendment to 28 U.S.C. § 2254, which provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim— (1) resulted in a decision that was *contrary to, or involved an unreasonable application of, clearly established Federal law*, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."<sup>20</sup>

*B. From Teague to Williams: The Evolution of Federal Habeas Corpus Practice*

Prior to the AEDPA amendments, state prisoners had greater latitude from which to appeal their convictions. More specifically, habeas relief was not limited only to

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<sup>18</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of title 28 of the U.S. Code).

<sup>19</sup> *Id.*

<sup>20</sup> 28 U.S.C. § 2254(d) (emphasis added).

decisions that were either “contrary to” or “unreasonable applications of clearly established Federal law.”

### 1. *Teague v. Lane Sets the Stage*

The limitation on habeas relief originated with the United States Supreme Court’s holding in *Teague v. Lane*.<sup>21</sup> In *Teague*, during the process of jury selection, the prosecutor utilized all ten of his preemptory challenges to exclude potential black jurors. Subsequently, the defendant, a black man, was convicted of attempted murder and other related offenses by an all-white jury.<sup>22</sup> On appeal, the petitioner argued that he had been “denied [ ] the right to be tried by a jury that represented a fair cross section of the community.”<sup>23</sup>

In ruling on *Teague*’s habeas claim, the Court clarified when a “new rule” should be applied retroactively and when a petitioner’s claim for habeas relief is procedurally barred in collateral review cases.<sup>24</sup> According to the Court, “[a] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.”<sup>25</sup> Hence, the Court adopted Judge Harlan’s view of retroactivity for collateral review cases and found two narrow exceptions to the general rule that “new rules” should not be applied retroactively.<sup>26</sup>

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<sup>21</sup> *Teague v. Lane*, 489 U.S. 288 (1989).

<sup>22</sup> *Id.* at 292-93.

<sup>23</sup> *Id.* at 293.

<sup>24</sup> *See, e.g., Harris v. Reed*, 489 U.S. 255, 263 (1989) (holding that “a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case ‘clearly and expressly’ states that its judgment rests on a state procedural bar”).

<sup>25</sup> *Teague*, 489 U.S. at 301.

<sup>26</sup> *Id.* at 307; *Mackey v. United States*, 401 U.S. 667, 682 (1971).

According to the Court, a “new rule” should be applied retroactively “if it places ‘certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe’” or “if it requires the observance of ‘those procedures that . . . are implicit in the concept of ordered liberty.’”<sup>27</sup> Ultimately, the Court “noted the fundamental importance of finality to our system of criminal justice and commented that ‘[w]ithout [it], the criminal law is deprived of much of its deterrent effect.’”<sup>28</sup>

## 2. *Williams v. Taylor Aligns the Supreme Court with the Post-AEDPA Writ*

Eleven years later, in *Williams v. Taylor*,<sup>29</sup> the Supreme Court thoroughly analyzed the scope of habeas corpus relief, when it interpreted the amended version of 28 U.S.C. § 2245(d)(1)<sup>30</sup> for the first time. Williams, a state prisoner convicted of capital murder, collaterally attacked his conviction, arguing that his attorney failed to discover mitigating evidence during sentencing.<sup>31</sup> After exhausting his state court remedies, Williams sought a writ of habeas corpus in district court.<sup>32</sup>

<sup>27</sup> *Teague*, 489 U.S. at 307 (quoting *Mackey*, 401 U.S. at 693).

<sup>28</sup> Walker, *supra* note 12, at 1277 (quoting *Teague*, 489 U.S. at 309).

<sup>29</sup> *Williams*, 529 U.S. at 362; *see also* *Ramdass v. Angelone*, 530 U.S. 156, 168 (2000) (“On review of state decisions in habeas corpus, state courts are responsible for a faithful application of the principles set out in the controlling opinion of the [Supreme] Court.”).

<sup>30</sup> 28 U.S.C. § 2254(d)(1) (2004) (“An application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – resulted in a decision that was *contrary to*, or involved an *unreasonable application of clearly established Federal law*, as determined by the Supreme Court of the United States.”) (emphasis added).

<sup>31</sup> *Williams*, 529 U.S. at 370-71.

<sup>32</sup> *Id.* at 372.

The federal trial judge granted the petition, holding that Williams's sentence was unconstitutional because it was reasonable to conclude that his punishment would have been different but for his counsel's failure to discover the mitigating evidence.<sup>33</sup> The Fourth Circuit reversed the district court's decision, however, holding "that a federal court may issue habeas relief only if 'the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable.'"<sup>34</sup> Ultimately, the Supreme Court granted Williams's petition for habeas relief concluding that "the Virginia Supreme Court rendered a 'decision that was contrary to, or involved an unreasonable application of, clearly established Federal law.'"<sup>35</sup>

Writing for the majority, Justice Stevens noted that the "AEDPA codifie[d] *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final."<sup>36</sup> While *Teague* prohibited a reliance on "new rules,"<sup>37</sup> the AEDPA expanded that premise, mandating that habeas relief be granted only if the claim's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."<sup>38</sup> Consequently, the AEDPA did not simply codify the *Teague* holding. Rather, it expressly limited the application of the *Teague* holding to those cases where a

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<sup>33</sup> *Id.* at 373.

<sup>34</sup> *Id.* at 376 (quoting *Williams v. Taylor*, 163 F.3d 860, 865 (4th Cir. 1998)).

<sup>35</sup> *Williams*, 529 U.S. at 399.

<sup>36</sup> *Id.* at 380.

<sup>37</sup> *Teague*, 489 U.S. at 301.

<sup>38</sup> 28 U.S.C. § 2254(d)(1); 110 Stat. 1214 (codified in scattered sections of title 28 of the U.S. Code).

lower court unreasonably applied Supreme Court precedent existing at the time of the petitioner's state court conviction.<sup>39</sup>

Additionally, the *Williams* Court carefully considered the standard of review applicable to habeas corpus proceedings. In particular, the Court analyzed the phrases "contrary to" and "unreasonable application" as they are used in § 2254(d)(1).<sup>40</sup> Ultimately, the majority relied on the Webster's Dictionary to define the phrase "contrary to" as meaning "in conflict with."<sup>41</sup> The majority stated that the phrase was broad enough "to include a finding that the state-court 'decision' [wa]s simply 'erroneous' or wrong."<sup>42</sup> Furthermore, the majority noted that "there is nothing in the phrase . . . that implies anything less than independent review by the federal courts."<sup>43</sup>

In a concurring opinion, Justice O'Connor faulted the majority's failure "to give independent meaning to both the 'contrary to' and 'unreasonable application' clauses of [28 U.S.C. § 2254(d)(1)]."<sup>44</sup> Justice O'Connor reasoned that Section 2254(d)(1) provides two distinct types of cases where a state prisoner can obtain federal habeas relief, assuming the state court claim is adjudicated on the merits.<sup>45</sup> Justice O'Connor emphasized that "[u]nder the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) 'contrary

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<sup>39</sup> *Williams*, 529 U.S. at 380.

<sup>40</sup> 28 U.S.C. § 2254(d)(1) (mandating that court only grant writ if petitioner's state court conviction resulted in decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law").

<sup>41</sup> *Williams*, 529 U.S. at 388.

<sup>42</sup> *Id.* at 389.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 404 (O'Connor, J., concurring) (referring to the "contrary to" and "unreasonable application" clauses of 28 U.S.C. § 2254(d)).

<sup>45</sup> *Id.* at 404-05.

to...clearly established Federal law’...or (2) ‘involved an unreasonable application of...clearly established Federal law.’<sup>46</sup> The concurring opinion illustrated two scenarios in which a state court decision is “contrary to” Supreme Court precedent.<sup>47</sup> Similarly, the concurring opinion also identified two scenarios in which a state court decision involves an “unreasonable application” of Supreme Court precedent.<sup>48</sup>

### *3. The Court Remains True to the Purpose of Habeas Corpus Relief as Envisioned in 1867*

Although the AEDPA modified the scope of habeas relief, the purpose of the writ remains intact. Today, the writ of habeas corpus continues to ensure that criminal sentences are properly imposed. More specifically, in analyzing a state prisoner’s sentence, federal courts often must examine both the constitutionality of the sentencing guidelines as well as the jury’s interpretation of these guidelines.

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 405-06:

First, a state-court decision is contrary to this Court’s precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court’s precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours.

<sup>48</sup> *Id.* The first scenario arises when a “state court identifies the correct legal rule . . . but unreasonably applies it to the facts.” The second scenario, on the other hand, occurs when a “state court either unreasonably extends a legal principle . . . to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.”

*C. Vague Aggravating Circumstances and Eighth Amendment Rights*

The Eighth Amendment of the U.S. Constitution forbids the infliction of "cruel and unusual" punishment.<sup>49</sup> For more than thirty years, the Supreme Court has been committed "to guiding sentencers' discretion so as to 'minimize the risk of wholly arbitrary and capricious action,' and to achieve principled distinctions between those who receive the death penalty and those who do not."

<sup>50</sup> In accordance with the Supreme Court's commitment, many state legislatures have enacted statutory aggravating circumstances to limit the factfinder's discretion in imposing the death penalty.<sup>51</sup>

To avoid being labeled unconstitutionally vague, "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."<sup>52</sup> Therefore, the proper analysis of a vagueness claim focuses on whether the challenged aggravating

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<sup>49</sup> U.S. CONST. amend. VIII; *see also* TENN. CONST. art. I, § 16.

<sup>50</sup> *Tuilaepa v. Proctor*, 512 U.S. 967, 995 (1994) (Blackmun, J., dissenting); *see also* *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980) (concluding that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty").

<sup>51</sup> *Zant v. Stephens*, 462 U.S. 862, 872 (1983); *see, e.g.*, TENN. CODE ANN. § 39-13-204(i).

<sup>52</sup> *Zant*, 462 U.S. at 877; *see also* *Proffitt v. Florida*, 428 U.S. 242, 258 (1976) (noting that because "the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty," arbitrariness and capriciousness in imposing the death penalty are eliminated).

circumstance adequately informs the jury as to what it must find in order to impose the death penalty.<sup>53</sup>

The constitutionality of a death sentence hinges on two primary issues: (1) whether the defendant is eligible for the death penalty and (2) whether the defendant should receive a death sentence.<sup>54</sup> For example, a defendant convicted of murder is eligible for the death penalty if the factfinder determines that at least one aggravating circumstance is present.<sup>55</sup> Additionally, the aggravating circumstance must not apply to every defendant convicted of murder<sup>56</sup> and must not be unconstitutionally vague.<sup>57</sup> Assuming the defendant is eligible for the death penalty, the sentencer must then decide whether the defendant *should* be sentenced to death.<sup>58</sup> In this part of the analysis, “[w]hat is important . . . is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.”<sup>59</sup>

While the eligibility determination “fits the crime within a defined classification,”<sup>60</sup> the selection determination “requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant’s

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<sup>53</sup> *Maynard v. Cartwright*, 486 U.S. 356, 361-62 (1988).

<sup>54</sup> *Tuilaepa*, 512 U.S. at 971-72.

<sup>55</sup> *Id.* at 971-72; *see, e.g., Lowenfield v. Phelps*, 484 U.S. 231, 244-46 (1988); *Zant*, 462 U.S. at 878.

<sup>56</sup> *Id.* at 972; *see Arave v. Creech*, 507 U.S. 463, 474 (“If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm.”).

<sup>57</sup> *Tuilaepa*, 512 U.S. at 972; *Godfrey*, 446 U.S. at 428 (“If a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty.”).

<sup>58</sup> *Tuilaepa*, 512 U.S. at 972.

<sup>59</sup> *Zant*, 462 U.S. at 879.

<sup>60</sup> *Tuilaepa*, 512 U.S. at 879.

culpability.”<sup>61</sup> Ultimately, “[w]hen only a narrow subclass of murderers can be subjected to the death penalty, the risk of cruel and unusual punishment . . . is diminished.”<sup>62</sup>

To overcome a vagueness challenge, the statutory HAC aggravator used to impose the death penalty must contain a limiting construction.<sup>63</sup> In other words, the plain language of the statutory HAC aggravator must inherently limit the application of the death penalty.<sup>64</sup> In general, however, the aggravator is inherently vague because it is hard to imagine a person who would not believe that murder itself is “especially heinous, atrocious, or cruel.”<sup>65</sup> Therefore, in order to uphold the integrity of the Eighth Amendment’s prohibition against cruel and unusual punishment, a decision to impose the death sentence must be “based on reason rather than caprice or emotion.”<sup>66</sup>

The Tennessee Supreme Court first addressed the HAC aggravator in *State v. Dicks*.<sup>67</sup> In *Dicks*, the jury found Jeffrey Stuart Dicks guilty of first degree murder for killing a store owner during the commission of a crime.<sup>68</sup> During sentencing, the jury found that three aggravating circumstances and zero mitigating circumstances were present and, therefore, recommended that Dicks receive the death penalty.<sup>69</sup> In particular, the jury deemed the murder “especially heinous, atrocious or cruel in that it involved depravity of mind.”<sup>70</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 982 (Stevens, J., concurring).

<sup>63</sup> *Maynard*, 486 U.S. at 363.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

<sup>67</sup> *State v. Dicks*, 615 S.W.2d 126 (Tenn. 1981).

<sup>68</sup> *Id.* at 127.

<sup>69</sup> *Id.* at 128.

<sup>70</sup> *Id.*

Upon review, the Tennessee Supreme Court applied a narrow interpretation of Tennessee's HAC aggravator,<sup>71</sup> defining "especially heinous, atrocious or cruel" as a "conscienceless or pitiless crime which is unnecessarily tortuous to the victim."<sup>72</sup> Adhering to the United States Supreme Court decision in *Proffitt v. Florida*,<sup>73</sup> which interpreted a similar Florida statutory aggravator, the Tennessee Supreme Court rejected Dicks's argument that the Tennessee statutory HAC aggravator was unconstitutionally vague..<sup>74</sup>

#### *D. Cone's Crime Spree and the Ensuing Criminal Proceedings*

On August 9, 1980, Cone's crime spree began when he robbed a jewelry store in Memphis, Tennessee.<sup>75</sup> While attempting to drive away, Cone was spotted by police and a high speed chase ensued.<sup>76</sup> Cone abandoned his car in a residential neighborhood, shot both a police officer and a citizen, and attempted to shoot a third person who refused to give Cone his car.<sup>77</sup> The following day, Cone again appeared in the same residential area and pulled a gun on a woman after she refused to let him use her phone.<sup>78</sup> The two-day crime spree concluded after Cone broke into an elderly couple's home and brutally murdered the couple after they refused his demands for help.<sup>79</sup> Cone was later

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<sup>71</sup> TENN. CODE ANN. § 39-13-204(i)(5).

<sup>72</sup> See *Dicks*, 615 S.W.2d at 132 (quoting *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973)).

<sup>73</sup> *Proffitt v. Florida*, 428 U.S. 242, 255-56.

<sup>74</sup> *Dicks*, 615 S.W.2d at 132.

<sup>75</sup> *Cone*, 243 F.3d at 965.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

arrested and charged with two counts of first degree murder for the elderly couple's deaths.<sup>80</sup>

After the jury convicted Cone of first degree murder as well as several other offenses committed during the two-day crime spree, Cone appealed directly to the Tennessee Supreme Court, challenging both his conviction and death sentence.<sup>81</sup> Pursuant to TENN. CODE ANN. § 39-2-205, the Tennessee Supreme Court conducted a mandatory review of Cone's death sentence, which was consolidated with Cone's direct appeal.<sup>82</sup> After reviewing the four aggravating factors the jury relied upon during Cone's sentencing, the court concluded:

(1) that the evidence supported the finding that Cone had been convicted previously of one or more felonies involving violence; (2) that the evidence supported the finding that the murders were "especially heinous, atrocious, or cruel in that they involved torture or depravity of mind"; (3) that the evidence supported the finding that the murders were committed for the purpose of preventing a lawful arrest or prosecution; and (4) that the evidence was *insufficient* to support the jury's affirmative finding that the petitioner "knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during [the] act of murder."<sup>83</sup>

Accordingly, the Tennessee Supreme Court affirmed both the first degree murder convictions and

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*; see TENN. CODE ANN. § 39-13-206(a)(1) (2003).

<sup>82</sup> TENN. CODE ANN. § 39-2-205 (1982) (current version at TENN. CODE ANN. § 39-13-206).

<sup>83</sup> *Cone*, 359 F.3d at 788 (citing *State v. Cone*, 665 S.W.2d 87, 94-95 (1984) (emphasis in original)).

Cone's death sentence.<sup>84</sup> In doing so, the court also "considered the validity of the aggravating circumstances relied on by the jury in imposing the death penalty."<sup>85</sup>

On June 22, 1984, Cone filed his first state post-conviction petition alleging that his constitutional rights were violated due to prosecutorial misconduct and ineffective assistance of counsel at trial.<sup>86</sup> The trial court denied the petition, and the Tennessee Court of Criminal Appeals affirmed the denial of habeas relief.<sup>87</sup> The Tennessee Supreme Court denied Cone's request for an appeal.<sup>88</sup>

Five years later, in his second state post-conviction petition, Cone again alleged numerous violations of his constitutional rights, including "an *Eighth Amendment* claim that the language of the HAC aggravator considered by the jury in the sentencing phase was unconstitutionally vague."<sup>89</sup> The trial court determined that Cone's second state post-conviction petition asserted claims that were barred under Tennessee's post-conviction statute because

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.* At the time of Cone's conviction, the death penalty could only be imposed if the prosecution proved beyond a reasonable doubt that at least one of twelve aggravating factors existed. See TENN. CODE ANN. § 39-2404(i) (1981) (current version at TENN. CODE ANN. § 39-13-204(i)). After finding Cone guilty of two counts of first degree murder, in addition to other crimes, the jury found four of the aggravating factors listed in Section 2404(i), including (1) the defendant's previous conviction of one or more felonies involving the use or threat of violence; (2) the defendant "knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder;" (3) the murder was committed to avoid or prevent the defendant's arrest; and (4) the murder was "especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." Cone, 359 F.3d at 788.

<sup>86</sup> *Id.* at 788-89.

<sup>87</sup> *Id.* at 789.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* (emphasis added).

they had either been waived or previously determined.<sup>90</sup> The Tennessee Court of Criminal Appeals affirmed the trial court's holding. The Tennessee Supreme Court denied Cone's application for permission to appeal, and the United States Supreme Court denied Cone's petition for writ of certiorari.<sup>91</sup>

Still unsatisfied with the courts' determinations regarding the constitutionality of his death sentence, Cone filed a petition for habeas corpus relief in federal district court.<sup>92</sup> Cone again argued that the HAC aggravator relied upon by the jury in imposing the death penalty was unconstitutionally vague and, therefore, violated his Eighth Amendment rights.<sup>93</sup> The district court denied Cone's petition. On appeal, however, the Sixth Circuit granted the writ of habeas corpus, holding that Cone had been "unconstitutionally denied the effective assistance of counsel at sentencing."<sup>94</sup>

In reaching its initial decision to grant habeas relief, the Sixth Circuit found it unnecessary to address Cone's cruel and unusual punishment argument.<sup>95</sup> The U.S. Supreme Court, however, later reversed the Sixth Circuit's grant of the writ and remanded the case for further proceedings.<sup>96</sup> On remand, the Sixth Circuit noted that the "Tennessee Supreme Court's 'implicit decision,' upon mandatory review of Cone's death sentence, was that the HAC aggravator relied upon by Cone's jury in imposing the death sentence was not arbitrary, and consequently, not unconstitutionally vague. The court held that this

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<sup>90</sup> See TENN. CODE ANN. § 40-30-111 (1990) (*repealed by Post-Conviction Procedure Act*, ch. 207 §1) (1995).

<sup>91</sup> *Cone*, 359 F.3d at 789.

<sup>92</sup> *Cone*, 243 F.3d 961. Thus, Cone had exhausted Tennessee's appeal and post-conviction procedures.

<sup>93</sup> *Cone*, 359 F.3d at 789.

<sup>94</sup> *Cone*, 359 F.3d at 789; *Cone*, 243 F.3d at 965.

<sup>95</sup> *Cone*, 359 F.3d at 789; *Cone*, 243 F.3d at 975.

<sup>96</sup> *Cone*, 359 F.3d at 795.

“implicit” Tennessee Supreme Court decision “was contrary to clearly established U.S. Supreme Court precedent as announced in *Maynard*<sup>97</sup> and *Shell*<sup>98</sup> and made applicable to Cone’s case via the rule of retroactivity explained in *Stringer*.”<sup>99</sup>

Having determined that the HAC aggravator was unconstitutional, the final issue hinged on whether the jury’s reliance on the invalid aggravating factor constituted harmless error.<sup>100</sup> The Sixth Circuit concluded that the invalid aggravators “had [a] substantial and injurious effect or influence”<sup>101</sup> on the jury’s imposition of the death sentence.<sup>102</sup> As a result, the Sixth Circuit reversed the district court’s decision and remanded the case instructing the district court to “issue a writ of *habeas corpus* vacating the petitioner’s death sentence due to the jury’s weighing of an unconstitutionally vague aggravating factor at sentencing.”<sup>103</sup>

#### *E. Determining the Constitutionality of the HAC Aggravator*

The fundamental issue in *Cone* involves the “constitutionality of the jury’s finding that the murders

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<sup>97</sup> *Maynard*, 486 U.S. at 356.

<sup>98</sup> *Shell v. Mississippi*, 498 U.S. 1 (1990) (per curiam).

<sup>99</sup> The Sixth Circuit concluded that the U.S. Supreme Court remanded the case for the court to consider the constitutional challenge to the HAC aggravator raised by Cone in his petition for habeas corpus relief. *Cone*, 359 F.3d at 797.

<sup>100</sup> *Id.* The harmless error standard is “whether the error had substantial injurious effect or influence in determining the jury’s verdict.” *Coe v. Bell*, 161 F.3d 320, 334 (6th Cir. 1998) (holding that Sixth Circuit could perform a harmless-error analysis to determine whether a jury’s reliance on the unconstitutional HAC aggravator required habeas relief) (quotations omitted).

<sup>101</sup> *Coe*, 161 F.3d at 334.

<sup>102</sup> *Cone*, 359 F.3d at 799.

<sup>103</sup> *Id.*

were ‘especially heinous, atrocious, or cruel.’”<sup>104</sup> Before Cone’s conviction was finalized, “[n]o Supreme Court case ha[d] addressed the precise language at issue.” However, after Cone’s conviction, numerous decisions examining the constitutionality of similar statutory language “indicate clearly that the language of the HAC aggravator the jurors used to sentence Cone to death . . . is unconstitutionally vague.”<sup>105</sup>

The importance of the HAC aggravator’s constitutionality is grounded in the belief that punishment should not be arbitrary or capricious, but should be proportionate to the criminal act. In the advent of the AEDPA amendments to federal habeas corpus relief, Cone argued that his death sentence was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”<sup>106</sup> Consequently, Cone’s habeas corpus petition is of the utmost importance, and the judicial system was required to carefully examine any and all constitutional challenges raised. Furthermore, if Cone were “restrained of his . . . liberty in violation of the constitution,”<sup>107</sup> the purpose of habeas relief, as envisioned by our forefathers, would be seriously undermined.

### **III. What Does *Cone v. Bell* Add to the Evolution of Habeas Corpus Relief?**

Since the AEDPA amendments to the writ of habeas corpus took effect in 1996, courts hearing habeas petitions have been given a kind of “instruction manual.” Courts only grant habeas corpus relief to state prisoners if the state

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<sup>104</sup> *Id.* at 788.

<sup>105</sup> *Id.* at 795.

<sup>106</sup> 110 Stat. 1214 (codified in scattered sections of title 28 of the U.S. Code).

<sup>107</sup> 14 Stat. 385.

court adjudication of the claim “resulted in a decision that was *contrary to*, or involved an *unreasonable application of clearly established Federal law*, as determined by the Supreme Court.”<sup>108</sup> Therefore, in light of the Supreme Court’s holdings in *Maynard*, *Shell* and *Stringer*, the jury’s reliance on the HAC aggravator in imposing the death penalty upon Cone clearly violated his constitutional rights, a fact that was evident when the Sixth Circuit first heard Cone’s habeas petition in 2001. According to the Sixth Circuit:

Normally, post-*Cone* decisions would be immaterial, but . . . the Supreme Court’s fairly recent application . . . of the ‘non-retroactivity’ of new constitutional rules, in the context of an *Eighth Amendment* vagueness challenge to a death penalty instruction, makes several post-*Cone* Supreme Court decisions not only material, but controlling.<sup>109</sup>

After Cone’s conviction, the Court addressed whether the language “especially heinous, atrocious, or cruel” was unconstitutional in *Maynard v. Cartwright*.<sup>110</sup> In short, the Supreme Court determined that the vagueness ruling of

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<sup>108</sup> 28 U.S.C. § 2254(d)(1)(emphasis added).

<sup>109</sup> *Cone*, 359 F.3d at 795; see *Stringer v. Black*, 503 U.S. 222 (1992) (addressing the “new rule” non-retroactivity doctrine in regard to *Godfrey* and *Maynard*); see, e.g., *Maynard*, 486 U.S. at 363-64 (holding Oklahoma’s HAC aggravator unconstitutionally vague); *Shell v. Mississippi*, 498 U.S. 1 (1990) (per curiam) (holding aggravating factor containing language “heinous, atrocious, or cruel” unconstitutional). But see *Walton v. Arizona*, 497 U.S. 639, 654 (1990) (holding “Arizona’s ‘especially heinous, cruel or depraved’ aggravating factor not facially vague”) (emphasis added).

<sup>110</sup> *Maynard*, 486 U.S. at 356.

*Godfrey*, decided before Cone's conviction, was not limited to the precise language at issue in that case.<sup>111</sup>

Therefore, "[i]n applying the language before [the Court] in *Maynard*, [the] Court did not 'break new ground.'"<sup>112</sup> Because the *Maynard* case did not "break new ground," *Godfrey* clearly established the unconstitutionality of the HAC aggravator in the early 1980's.<sup>113</sup> Although there are no "Supreme Court decisions that [are] 'on all fours' with the instruction in Cone's case . . . *Stringer*'s statement that *Maynard*'s invalidation of Oklahoma's HAC aggravator was an 'old rule' dictated by *Godfrey*, points ineluctably to the conclusion that *Godfrey* represents a 'clearly established' Supreme Court precedent dictating that Tennessee's HAC aggravator is unconstitutionally vague."<sup>114</sup> Therefore, Cone was entitled to habeas corpus relief because the jury's reliance on the HAC aggravator was "contrary to clearly established" Supreme Court precedent existing at the time of Cone's sentencing.<sup>115</sup>

#### **IV. Habeas Corpus – A Procedural Safeguard for Imposing the Death Penalty?**

While some might argue that affording prisoners sentenced to death numerous procedural means to challenge their sentences does little to deter future crime, "the utter finality of the death penalty may [also] cruelly frustrate the cause of justice."<sup>116</sup> Therefore, the writ of habeas corpus acts as a procedural safeguard to ensure that the sentencer does not apply the death penalty in an arbitrary or capricious manner. For, "[o]nce the prisoner

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<sup>111</sup> *Stringer*, 503 U.S. at 228-29.

<sup>112</sup> *Id.* (citing *Butler v. McKellar*, 494 U.S. 407, 412 (1989)).

<sup>113</sup> *Cone*, 359 F.3d at 796.

<sup>114</sup> *Id.* at 796-97.

<sup>115</sup> See 28 U.S.C. § 2254(d)(1).

<sup>116</sup> *Dicks*, 615 S.W.2d at 136 (Brock, C.J., dissenting).

has been put to death by the state there can be no relief granted although later developments in the evidence of the case or of the controlling law may show, conclusively, that the penalty was mistakenly inflicted.”<sup>117</sup> Consequently, it is crucial that prisoners sentenced to death are afforded an opportunity to seek habeas relief to ensure that death is a proper and proportionate punishment.

When the Sixth Circuit first addressed Cone’s petition for habeas corpus, it did not determine whether the HAC aggravator was unconstitutional.<sup>118</sup> After the Supreme Court reversed the Sixth Circuit’s grant of habeas relief, however, the Sixth Circuit had to confront this constitutional challenge.<sup>119</sup> In failing to dispose of the issue the first time around, the Sixth Circuit wasted valuable time and resources. There is no doubt that this was all in an effort to ensure that Cone was not put to death unless his trial and sentence had been properly adjudicated. Yet the question remains – was Cone really entitled to habeas corpus relief? The answer is yes. Cone was entitled to habeas corpus relief from the moment the jury recommended the death penalty.

Although the jury recommended that Cone be sentenced to death in 1984, the Sixth Circuit did not grant habeas corpus relief until 2004. Why did the court not get it right the first time? Cone challenged the constitutionality of the HAC aggravator in his initial habeas proceedings in 2001, but the Sixth Circuit never addressed this constitutional challenge once it determined that Cone was entitled to habeas relief on his ineffective assistance of counsel claim. Had the court ruled on both issues in 2001, the habeas proceeding may not have reached the Supreme Court only to be remanded again to the Sixth Circuit.

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<sup>117</sup> *Id.*

<sup>118</sup> *Cone*, 243 F.3d at 961.

<sup>119</sup> *Cone*, 359 F.3d at 789.

The Supreme Court requires that “a jury be given guidance . . . when the death penalty is a possible punishment.”<sup>120</sup> This requirement stems from the idea that “death remains as the only punishment that may involve the conscious infliction of physical pain . . . , [and] mental pain is an inseparable part . . . of punishing criminals by death, for the prospect of ending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death.”<sup>121</sup> Additionally, the time between the sentence and the actual execution is compounded by a prisoner’s right to habeas corpus relief. Given this option, few prisoners idly await execution. Instead, they file numerous post-trial proceedings, including a habeas corpus petition. The question then becomes – is this all merely an effort to postpone impending death or to prove that the death sentence is improper under the circumstances of a given case?

It has been almost twenty years since Cone was sentenced to death for the brutal murders of an elderly couple. Unfortunately, the importance of the jury’s determination that the murders committed by Cone fit into the category of “especially heinous, atrocious, and cruel” and that the death penalty was the proper punishment has diminished. Cone’s case is so far removed from the actual events of August 9, 1980, that it has become lost in a mess of legal minutia that now focuses on Cone’s life instead of the elderly couples’ deaths.

If nothing else, Cone’s case should illustrate the diligence with which federal courts should analyze habeas corpus petitions in the future. If the Sixth Circuit analyzed the constitutionality of the HAC aggravator in 2001, or better yet, if the Tennessee Supreme Court properly

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<sup>120</sup> *Gregg v. Georgia*, 428 U.S. 153, 192 (1976).

<sup>121</sup> *Furman*, 408 U.S. at 288 (Brennan, J., concurring).

analyzed the HAC factor in 1984, Cone might be serving a life sentence without parole.<sup>122</sup>

The Tennessee Supreme Court arrived at a conclusion that was opposite to existing Supreme Court precedent when it "implicitly reviewed" Cone's death sentence and found that the HAC aggravator was constitutional.<sup>123</sup> In short, the HAC aggravator does not "achieve principled distinction between those who receive the death penalty and those who do not."<sup>124</sup> The Tennessee's HAC aggravator does not narrow the class of people eligible for the death penalty because any murder may be deemed "especially heinous, atrocious or cruel" and, therefore, a finding of the same is totally arbitrary. Furthermore, the HAC aggravator relied upon in *Cone* is unconstitutional because neither the aggravating circumstance's plain language nor the court's attempt to limit the construction thereof adequately informed the jury of what it needed to find in order to punish Cone by death.

Even assuming that Tennessee's HAC aggravator was constitutional and did not apply to every first degree murder committed *and* that, therefore, Cone was "eligible" for the death penalty, he should not have received the death penalty. In the end, as the Sixth Circuit seemed to conclude, the jury relied on emotion in deciding to recommend a death sentence. For that reason, the sentence was capricious.<sup>125</sup> As a result, the Sixth Circuit correctly determined that the unconstitutionality of the HAC aggravator had an injurious effect on the jury's sentence

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<sup>122</sup> See *Cone*, 243 F.3d at 961; *Cone*, 665 S.W.2d at 87.

<sup>123</sup> See n.46 *supra*.

<sup>124</sup> See *Tuilaepa*, 512 U.S. at 995.

<sup>125</sup> The narrow construction articulated in *Dicks* is also arbitrary because it does not define what is meant by "unnecessarily tortuous" in the same way that the HAC aggravator does not define what is "especially heinous, atrocious or cruel."

and properly instructed the district court to grant Cone's habeas corpus petition, reversing his death sentence.

## V. Conclusion

The death penalty is an unnecessary punishment because "[s]ociety would be adequately protected from the condemned murderer by his permanent imprisonment."<sup>126</sup> Since the Tennessee and federal courts should have rectified this constitutional issue at least three years ago, *Cone* properly illustrates what can happen when a court does not get it right the first time. In the aftermath of the Sixth Circuit's decision, federal courts analyzing habeas corpus petitions should *always* examine *all* of a petitioner's arguments. After all, when a state prisoner petitions the federal courts for a habeas corpus petition, a life hangs in the balance.

NICOLE M. GRIDA

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<sup>126</sup> *Dicks*, 615 S.W.2d at 138 (Brock, C.J., dissenting).

