Mine and Thine Distinct: What *Kelo* Says About Our Path

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Susette Kelo's pink Victorian house in the quaint Connecticut town of New London seemed a strange place to find the Hobbesian "war of all against all." She purchased the house in 1997, and renovated it "from the concrete in the basement to the shingles on the roof," into a pleasant, two-bedroom, one-bathroom, waterfront home.[1] Still, when city officials notified her that the city wanted to bulldoze it and replace it with a convention center to accompany the nearby Pfizer pharmaceutical plant, Mrs. Kelo began a case that would touch on some of the most important issues in the political philosophy of the American Constitution. In the end, the United States Supreme Court held, five to four, that the city could take her home and transfer it to a private developer for private profit,[2] despite the fact that the Fifth Amendment only allows government to take property "for public use."[3] The general economic effects of private development, wrote Justice Stevens, satisfied the "public use" requirement, because "public use" only means that political leaders believed the condemnation might benefit the public in some way: "The disposition of this case therefore turns on the question whether the City's development plan serves a 'public purpose.'"[4] Since "[p]romoting economic development is a traditional and long accepted function of government," the city's redevelopment plan was constitutional,

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1 Kirstin Downey, *Revitalization Projects Hinge on Eminent-Domain Lawsuit*, WASHINGTON POST, May 21, 2005, at E01; *see also* Dana Berliner, *Eminent Domain Without Limits? IJ Asks U.S. Supreme Court to Decide*, INSTITUTE FOR JUSTICE, Aug. 2004, http://www.ij.org/publications/liberty/2004/13_4_04_d.html; Patti Waldmeir, *Case for The Public Good Collides with Private Rights*, FINANCIAL TIMES (U.K.), Feb. 14, 2005, at 20.

2 Kelo v. City of New London, 125 S. Ct. 2655, 2668 (2005).

3 U.S. CONST. amend. V.

4 *Kelo,* 125 S. Ct. at 2663.

and Susette Kelo and her neighbors could be forced to give up their property to another private party for private development.[5]

Kelo v. New London is the result of a crisis in American political philosophy—but not a new one. Consider the contrast between the views of private property expressed by two Supreme Court decisions separated by a century and a half. In 1829, the Supreme Court said:

> We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced.[6]

But in 1978, Justice William Brennan held that the Fifth Amendment does not require compensation when a person's property rights are taken for "some public program adjusting the benefits and burdens of economic life to promote the common good."[7] Because "[g]overnment hardly could go on" if government were required to pay for all the property it takes from citizens, "in a wide variety of contexts . . . government may execute laws or programs that adversely affect recognized economic values"[8] without repaying the owners.

The journey from Justice Story to Justice Brennan, and from there to Justice Stevens' decision in *Kelo,* was not an inevitable one. As Justice Clarence Thomas pointed out in his dissent in *Kelo*, "[s]omething has gone seriously awry with this Court's interpretation of the Constitution."[9] In what follows, I hope to explain how we have reached this point, and why I think there is reason for optimism in spite of the *Kelo* decision.

In Part I, I examine the evolution of concepts of sovereignty in Anglo-American law and political philosophy. Eminent domain is an attribute of sovereignty, and attitudes toward the scope and source of sovereignty are therefore essential to understanding the purpose and limits of eminent domain. In Part II, I describe the rise of two distinct visions of American sovereignty in the age leading up to the Progressive Revolution that occurred at the opening of the twentieth century. I follow in Part III with a discussion of how the Progressives came to embrace the vision of sovereignty advanced by William Blackstone and Thomas Hobbes, to the exclusion of the Lockean understanding of sovereignty that had served as the foundation of the Constitution.

5 *Id.* at 2665.
6 Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 658 (1829).
7 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124–25 (1978).
8 *Id.* at 124 (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922)).
9 *Kelo,* 125 S. Ct. at 2685 (Thomas, J., dissenting).

Part IV follows the consequent expansion of eminent domain through the New Deal period, and Part V concludes with some optimistic thoughts about the future of eminent domain in the wake of the *Kelo* decision.

I. EMINENT DOMAIN AS AN ATTRIBUTE OF SOVEREIGNTY

Eminent domain is the government's power to force a person to sell his property to the government. Long described as one of the most extreme forms of government coercion, the term itself dates back to the seventeenth century, when Hugo Grotius and other civil law writers explained that it was an essential aspect of the king's sovereign authority.[10] Legal scholar Samuel von Pufendorf explained that it was simply a part of the sovereign's right to conscript the resources of the realm for defensive purposes.[11] This authority was considered an essential component of sovereignty—that is, of the right to govern. Of course, debates in political philosophy have always centered around the nature and limits of this right.

During the period leading up to the twentieth century, Anglo-American political and legal theory developed two competing visions of sovereignty. One view, traceable to the works of Thomas Hobbes and William Blackstone, held that political authority was essentially absolute, not limited by any pre-political standards of right and wrong.[12] The other view, traceable to the work of John Locke, and including such thinkers as James Madison, held that government authority was based on the *rightful*, and therefore limited, consent of the governed, and thus the state could never legitimately exceed the boundaries of individual rights.[13] The clash between these two theories set the stage for the Progressive Revolution and, ultimately, the controversy over eminent domain that would be enunciated in the *Kelo* decision

10 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE 388 (A.C. Campbell trans., Adamant Media Corp. 2005) (1625).

11 SAMUEL VON PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 166–67 (James Tully ed., Michael Silverthorne trans., Cambridge Univ. Press 1991) (1673) ("[I]n a national emergency sovereigns may seize and apply to public use the property of any subject which the crisis particularly requires, even if the property seized far exceeds [the subject's taxes]. For this reason, however, as much of the excess as possible should be refunded to him from the public treasury or by a levy on the rest of the citizens.") The Tennessee Constitution, among others, reflects the connection between the power of eminent domain and the power of military conscription: "[N]o man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor." TENN. CONST. art. I, § 21.

12 WILLIAM BLACKSTONE, 1 COMMENTARIES *156–57; THOMAS HOBBES, LEVIATHAN 134–141 (Michael Oakeshott ed., Macmillan Publ'g Co. 1962) (1651).

13 JOHN LOCKE, TWO TREATISES OF GOVERNMENT 375 (Peter Laslett ed., Cambridge Univ. Press 1963) (1690).

and its dissents.

A. Hobbes on Sovereignty

In his famous book *Leviathan*, written in 1651, the philosopher Thomas Hobbes sought to explain the nature and source of political authority by imagining what the world would look like without government—something he called the state of nature. In such a world, Hobbes argued, people would be engaged in a constant war for limited resources. In the absence of an overseeing government authority, there would be "no propriety, no dominion, no *mine* and *thine* distinct; but only that [would] be every man's, that he can get: and for so long, as he can keep it."[14] The strong would prey upon the weak, and would, in turn, be preyed upon by still stronger individuals. But, perhaps surprisingly, Hobbes concluded that such a state of affairs would not be *unjust*. Without government to police the activities of the people, there would be no rules of justice by which such plunder and pillage could be described as *wrong,* because without politics, "nothing can be unjust. . . . Where there is no common power, there is no law: where no law, no injustice."[15] Before government comes along, might literally makes right.

Life in such a world would be so miserable, of course—"solitary, poor, nasty, brutish, and short"[16]—that the people create government to protect themselves. But because the people are not subject to pre-political interpersonal rules of conduct, they are not limited in the sorts of governments they may establish. When creating government, the people give the sovereign all of their freedoms; but in the desperate scramble for survival in the state of nature, "every man has a right to everything; even to one another's body."[17] This power they grant to the government, meaning that the sovereign has, essentially, the same "right to everything." For Hobbes, political society is "radically conventional"[18]: because the sovereign's acts are the very *definition* of justice, it is meaningless to argue that the sovereign may act unjustly.[19]

14 HOBBES, *supra* note 12, at 101.

15 *Id.*

16 *Id.* at 100.

17 *Id.* at 103.

18 Lawrence Berns, *Thomas Hobbes*, *in* HISTORY OF POLITICAL PHILOSOPHY 396, 400 (Leo Strauss & Joseph Cropsey eds., Univ. of Chicago Press 1987) (1963).

19 *See id.* at 407 ("The sovereign is not bound to obey the civil laws, for they are only his commands and he can release himself from them at his pleasure.")

B. Locke on Sovereignty

John Locke's influential *Two Treatises of Civil Government* built upon—and simultaneously rejected important parts of—Hobbes' theory. Locke agreed that, in the absence of government, the people would be exposed to plunder and injury by the strong, and that government was essentially an institution for preventing such plunder. But Locke differed from Hobbes on an important point. For Locke, "[t]he *State of Nature* has a Law of Nature to govern it," and "Reason . . . is that law."[20] This law "teaches . . . that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions."[21] This law was binding on people even in the absence of political authority. And since the law prohibits people from stealing from each other, or harming one another, it also prohibits the people from delegating to the government the power to commit such acts, "[f]or no Body can transfer to another more power than he has in himself; and no Body has an absolute Arbitrary Power over . . . any other, to . . . take away the Life or Property of another."[22] Instead, people create government to protect them from the wrongful acts of others. Unfortunately, just as criminals will steal and plunder in the state of nature, so clever wrongdoers will find ways to gain control over the government and use its coercive powers to continue committing wrongful acts. When government joins in such acts, it has exceeded its legitimate bounds and is engaged in tyranny. Locke's insight—that government must obey the same moral rules that apply to the individuals who comprise it—means that government's authority is limited by the pre-political rights of individuals.

C. Blackstone on Sovereignty

In his *Commentaries on the Laws of England,* William Blackstone explicitly rejected the theory of limited political authority advanced by "Mr Locke, and other theoretical writers."[23] Instead, he defined sovereignty as "uncontrolable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal";[24] it is "absolute despotic power";[25] "a

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20 LOCKE, *supra* note 13, at 289.

21 *Id.*

22 *Id.* at 375. *See also* ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 6 (1974) ("Moral philosophy sets the background for, and boundaries of, political philosophy. What persons may and may not do to one another limits what they may do through the apparatus of a state, or do to establish such an apparatus.")

23 1 BLACKSTONE, *supra* note 12, at *157.

24 *Id.* at *156.

supreme, irresistible, absolute, uncontrolled authority"[26] which "can, in short, do every thing that is not naturally impossible."[27]

Blackstone may not have endorsed Hobbes' theory in so many words, but his description of sovereignty has much in common with Hobbes'. Although he grudgingly respected Locke's contention that there are pre-political rules of right and wrong, he nevertheless rejected the notion that sovereignty is *limited* by any such rules.[28] "So long . . . as the English constitution lasts," Blackstone concluded, "we may venture to affirm, that the power of parliament is absolute and without control."[29]

D. The American Founders on Sovereignty

In this respect at least, the American founding represented a rejection of Blackstone's views.[30] Relying on Locke, the Founders argued that the natural moral law forbade the creation of any government that committed theft, or any similar violation of natural rights.[31] In Jefferson's words, "the people in mass. . . . are inherently independent of all *but moral* law."[32] Even the Declaration of Independence itself holds that the united colonies may only "do . . . things which independent states may *of right* do"[33]—not absolutely anything, but only those political acts that fell within the boundaries of natural moral law. The American founding recognized no such thing as absolute sovereignty in the Blackstonian sense. As Madison wrote:

> [T]he sovereignty of the society as vested in & exercisable by the majority, may do anything that could be *rightfully* done by the unanimous concurrence of the members; the reserved rights of individuals . . . in becoming parties to the original compact being beyond the legitimate reach of sovereignty, whenever vested or however viewed.[34]

25 *Id.*

26 *Id.* at *49.

27 *Id.* at *156.

28 *See* Herbert J. Storing, *William Blackstone*, *in* HISTORY OF POLITICAL PHILOSOPHY 622, 626 (Leo Strauss & Joseph Cropsey eds., Univ. of Chicago Press 1987) (1963) (describing the broad power inherent in Parliament and its theoretical, but impracticable, limitations).

29 1 BLACKSTONE, *supra* note 12, at *157.

30 Thomas Jefferson and James Wilson both explicitly rejected Blackstone's work because of its emphasis on "the existence of despotic government." Julian S. Waterman, *Thomas Jefferson and Blackstone's Commentaries*, 27 ILL. L. REV. 629, 649–52 (1933).

31 *See* HARRY V. JAFFA, A NEW BIRTH OF FREEDOM 50–51 (2000). Obviously, the terrible exception to this was slavery. It was an exception, however, which the framers recognized. THOMAS G. WEST, VINDICATING THE FOUNDERS 1–19, 39 (1997).

32 THOMAS JEFFERSON, Letter to Judge Spencer Roane (Sept. 6, 1819), *in* WRITINGS 1425, 1426 (Merrill D. Peterson ed., 1984) (1819) (emphasis added).

33 THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776) (emphasis added).

34 9 JAMES MADISON, *Sovereignty* (1835), *reprinted in* THE WRITINGS OF JAMES MADISON 568, 570–71 (Gaillard Hunt ed., 1910).

The concept of individual rights therefore served to chain political powers within the same moral law that applied to individuals.[35]

In a brilliant essay entitled "Property," James Madison made the Founders' position on property rights clear. Beginning with a quotation from Blackstone, Madison wrote that the word property "in its particular application means 'that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.'"[36] But "[i]n its larger and juster meaning, it embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage*."[37] For Madison, Blackstone's definition of property was not "just" enough because it did not recognize that the legitimate sovereignty of a government was limited by each person's right to the control of his own life. A "juster" definition of property, therefore, would include a person's rights over "his opinions," and "the safety and liberty of his person." Government "is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own*."[38] Madison's differences with Blackstone rested on fundamentals; while Blackstone wrote eloquently about the English government's protections for property rights,[39] his view of the foundation of government's authority—that the government could violate the natural rights of individuals—rendered property fundamentally insecure. Indeed, the property that people had in their religious opinions, among other things, had been notoriously insecure under the English monarch. Americans had thrown off that monarchy because it had often perverted the entire concept of government into just

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35 THOMAS JEFFERSON, Letter to James Madison (Sept. 6, 1789), *in* WRITINGS, *supra* note 32, at 959, 960 ("What is true of every member of the society individually, is true of them all collectively, since the rights of the whole can be no more than the sum of the rights of individuals.") For the foundations of the Lockean understanding of property rights, see Eric R. Claeys, *Public-Use Limitations And Natural Property Rights*, 2004 MICH. ST. L. REV. 877 (2004); Adam Mossoff, *What Is Property? Putting The Pieces Back Together*, 45 ARIZ. L. REV. 371 (2003); Adam Mossoff, *Locke's Labor Lost,* 9 U. CHI. L. SCH. ROUNDTABLE 155 (2002). The founders, to put it simply, did not believe, as many moderns do, that property rights are created by the state, or that the state can legitimately alter its property rights rules in a way that deprives people of their property.

36 JAMES MADISON, *Property* (1792), *reprinted in* WRITINGS 515, 515 (Jack N. Rakove ed., 1999). It seems Madison was quoting from memory; the actual text states property is "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 BLACKSTONE, *supra* note 12, at *2.

37 *Id.*

38 *Id.*

39 *See* 1 BLACKSTONE, *supra* note 12, at *135–36.

another unjust scheme for allowing the strong to despoil the weak. Thus, Madison ultimately rejects Blackstone's view of sovereignty as inconsistent with Blackstone's own definition of property rights.

In an edition of Blackstone's *Commentaries* published in 1803, Virginian lawyer St. George Tucker added an appendix and several passages directly challenging Blackstone's characterization of sovereignty, along Madisonian lines. The Blackstonian view of sovereignty must be altered, Tucker wrote, in accordance with "the new lights which the American revolution has spread over the science of politics."[40]

> [T]he American revolution has formed a new epoch in the history of civil institutions, by reducing to practice, what, before, had been supposed to exist only in the visionary speculations of theoretical writers. . . . [The Constitutions of a] number of the states in the union, and . . . that instrument, by which the union of the confederated states has since been completed, . . . the powers of the several branches of government are defined, and the excess of them, as well in the *legislature*, as in the *other* branches, finds limits, which cannot be transgressed without offending against that greater power from whom all authority, among us, is derived; to wit, the PEOPLE.[41]

Tucker distinguished between the sovereignty of the people and the powers of the legislature; the "essential difference between the British government and the American constitutions," he wrote, quoting Madison, is that while "parliament is unlimited in it's [sic] power, or, in their own language, is omnipotent," American legislatures are

> altogether different. The people, not the government, possess the absolute sovereignty. The legislature, no less than the executive, is under limitations of power. . . . [T]he great and essential rights of the people, are secured against legislative, as well as against executive ambition. They are secured, not by laws paramount to prerogative; but by constitutions paramount to laws.[42]

Despite this rejection of Blackstone's theory of an inherent "despotic power," many American lawyers came to admire Blackstone, particularly because of his excellent writing style. Thomas Jefferson fretted about this in one of his final letters: "You will recollect that before the revolution, Coke Littleton was the universal elementary book of law students . . . ." He wrote to Madi-

40 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. A at 3 (1803).

41 *Id.* at 4.

42 2 TUCKER, *supra* note 40, app. G at 19–20. Tucker is quoting from Madison's *Report on the Alien and Sedition Acts*, also known as his Report on the Virginia Resolutions (Jan. 7, 1800), *reprinted in* WRITINGS, *supra* note 36, at 608, 645.

son:

> You remember also that our lawyers were then all whigs. But when his black-letter text, and uncouth but cunning learning got out of fashion, and the honied Mansfieldism of Blackstone became the student's hornbook, from that moment, that profession (the nursery of our Congress) began to slide into toryism, and nearly all the young brood of lawyers now are of that hue.[43]

As Blackstone's popularity grew, the concept of unlimited sovereignty became increasingly common in legal circles, to the dismay of several of the founders.[44]

II. TAKING FROM *A* AND GIVING TO *B*

Two distinct legal "parties," if one might call them that, emerged during the nineteenth century. One, following Locke's theories of natural law, held that government's powers were limited by its nature, even if a state's constitution did not explicitly limit legislative authority. This view rested on what Randy Barnett has recently called the "presumption of liberty,"[45] which held that the government could only do those things specifically allowed to it; in Madison's words, "[i]n Europe, charters of liberty have been granted by power. America has set the example . . . of charters of power granted by liberty."[46] The other view, following Blackstone, held that sovereignty was unlimited, except for whatever express limits could be found in the state's constitution. Under this "presumption of power," the legislature could do whatever was not forbidden.

This profound debate found its first eloquent expression in the dispute between Justices Samuel Chase and James Iredell in *Calder v. Bull*,[47] a 1798 Supreme Court case arising from a dispute over a will. The probate court had ruled the will invalid, so that Caleb Bull could recover; the Connecticut legislature then passed a new law granting a new hearing, to which the litigants had not previously been entitled, and the court reversed itself. Calder challenged this law, on the ground that it was an *ex post facto* law, and the Supreme Court rejected the challenge, holding

43 THOMAS JEFFERSON, Letter to James Madison (Feb. 17, 1826), *in* WRITINGS, *supra* note 32, at 1512, 1513–14.

44 *See* Waterman, *supra* note 30, at 649–52. In particular, Blackstone's view that absolute sovereignty was primary and the rights of the people secondary was popular among defenders of slavery. WILLIAM W. FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA 160–62, 171 (1966).

45 RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

46 JAMES MADISON, *Charters* (Jan. 19, 1792), *reprinted in* WRITINGS, *supra* note 36, at 502, 502.

47 3 U.S. (3 Dall.) 386 (1798).

that the *ex post facto* clause only applied to criminal laws. In the course of the decision, Justice Chase rejected the notion of "the omnipotence of a State Legislature, or that it is absolute and without control."[48] Embracing the Lockean position, Chase insisted that there were unwritten, but valid limitations on the sovereignty of the state:

> The people of the United States erected their Constitutions, or forms of government, to establish justice, to promote the general welfare, to secure the blessings of liberty; and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it. . . . There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact; cannot be considered a rightful exercise of legislative authority. . . . A few instances will suffice to explain what I mean. A law that punished a citizen for an innocent action . . . a law that makes a man a Judge in his own cause; *or a law that takes property from A. and gives it to B*: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it. . . . To maintain that our Federal, or State, Legislature possesses such powers, if they had not been expressly restrained; would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments.[49]

Chase was following the Lockean tradition that government must never be taken over by a faction that exploits the state's coercive powers for their own private benefit; doing so would violate the natural rights of the victims, and transform government from a protective association into a mechanism for legalized robbery.

Justice Iredell strongly disagreed. Iredell rejected the arguments of "some speculative jurists" who contended "that a legislative act against natural justice must, in itself, be void."[50] Embracing the Blackstonian presumption of power, he wrote that if a government "were established, by a Constitution, which imposed no limits on the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact,

48 *Id.* at 387–91.
49 *Id.* at 388–89 (emphasis omitted) (emphasis added).
50 *Id.* at 398 (Iredell, J., concurring).

would be lawfully enacted, and the judicial power could never interpose to pronounce it void."[51] Citing Blackstone's *Commentaries*, Iredell argued that a court would have no authority to intervene even if the legislature created a law that allowed a person to be the judge in his own case—the very definition of injustice—unless there were specific constitutional language prohibiting it.[52] If a state were to "pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice."[53]

The fact that the majority in *Kelo* quoted from Justice Iredell's decision,[54] while the dissents both quoted from Justice Chase's,[55] demonstrates the degree to which this debate has served as one of the most fundamental—if not *the most* fundamental—controversy in the history of American constitutional law.[56]

For those who followed Chase's Lockean interpretation, government action taking property from *A* and giving it to *B* was the *quintessential* abuse of government.[57] Government existed to protect the natural rights of each person equally, and particularly the right of property. Without government, property owners would be at risk from bullies who might try to take their property; government was supposed to prevent this. But if a group of unusually clever thieves managed to gain control of government's coercive power, they might use it to commit theft anyway. This is what Madison meant when he wrote, "[i]n a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger . . . ."[58] Thus Chase, like Madison, was drawing a distinction between *law* and acts of *mere force*. *Law* meant government—acting with the consent of the governed—using coercion in the service of the public good; while mere *force* meant government coercion in the service of the private benefit of the governing authority. To the latter, the people could not justly consent at all.

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51 *Id.*

52 *Id.* at 398–99.

53 *Id.* at 399.

54 *See* Kelo v. City of New London, 125 S. Ct. 2655, 2667 n.19 (2005).

55 *See id.* at 2671 (O'Connor, J., dissenting); *id.* at 2680 (Thomas, J., dissenting).

56 *See generally* Timothy Sandefur, *Freedom and the Burden of Proof*, 10 INDEP. REV. 139 (2005).

57 *See, e.g.,* Vanhorne's Lessee v. Dorrance, 2 U.S. (2 Dall.) 304, at 311, 28 F. Cas. 1012 (C.C.D. Pa. 1795); Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 658 (1829).

58 The FEDERALIST NO. 51, at 324 (James Madison) (Clinton Rossiter ed., 1961).

Those who followed Blackstone, on the other hand, though they often recognized that such abuses were regrettable, denied that they were inherently *illegitimate*, or that the judiciary had any authority to do anything about them. And some positively defended the practice of government redistribution of wealth.

Two nineteenth-century cases, decided within a few years of each other, reveal the importance of this dichotomy, and its effect on private property rights.[59] In *Sharpless v. Mayor of Philadelphia*,[60] the Pennsylvania Supreme Court ruled that the city could spend tax dollars to buy bonds in a privately-run railroad. This scheme was challenged on the grounds that it essentially took from *A*—the non-consenting taxpayers—and gave to *B*—the private owners of the for-profit railroad. Taking the Blackstonian position, the *Sharpless* court explained that there were no theoretical limits on the power of the legislature: "In the beginning," wrote Chief Justice Jeremiah Black,[61]

> the people held in their own hands all the power of an absolute government. The transcendant [sic] powers of Parliament devolved on them by the revolution. Antecedent to the adoption of the federal constitution, the power of the states was supreme and unlimited. If the people of Pennsylvania had given all the authority which they themselves possessed, to a single person, they would have created a despotism as absolute in its control over life, liberty, and property, as that of the Russian autocrat.[62]

The people had chosen, for prudential reasons, to put certain limits in the state constitution, but where those limits did not explicitly apply, the people's elected representatives were still free to employ this "despotism" as they chose. The state constitution should be construed "liberal[ly] in favor of the government," so that "the state may do whatever is not prohibited."[63] Thus, while the legislature could not violate the federal Constitution, or the express provisions of the state Constitution, it was "entitled to the full and uncontrolled possession" of a "vast field of power, granted to the legislature by the general words of the constitution, and not reserved, prohibited, or given away to others." The legislature's use of this general, undefined power "can be limited

59 In addition to the two cases discussed, see Wynehamer v. People, 13 N.Y. 378, 390–92 (1856), which addresses, but does not decide, this conflict.

60 21 Pa. 147 (1853).

61 Black went on to serve as Attorney General and Secretary of State for President Buchanan, a position where he served as an unembarrassed defender of slavery. Black later drafted President Johnson's message vetoing the Reconstruction Act. Susan Colman, *Black, Jeremiah Sullivan, in* 1 GREAT AMERICAN LAWYERS: AN ENCYCLOPEDIA 58, 58–62 (John R. Vile ed., 2001).

62 *Sharpless,* 21 Pa. at 160 (citations omitted).

63 *Id.*

only by their own discretion."[64] After quoting Justice Iredell's opinion in *Calder*, and asserting that "[t]o aid, encourage, and stimulate commerce . . . is a duty of the sovereign, as plain and as universally recognised as any other,"[65] Black upheld the government's authority to support a private, for-profit enterprise by taxation. Moreover, the court indicated that private corporations doing a "public duty" could be vested with the power of eminent domain.[66]

By contrast, only four years later, the California Supreme Court embraced the Lockean view in *Billings v. Hall*.[67] That case struck down the "Settler's Act," a law which required any absentee landholder who wished to evict a squatter to pay the squatter the value of any improvements on the land. If the owner refused to pay, he would forfeit his land to the squatter. "It has been erroneously supposed, by many," wrote Justice Hugh C. Murray,[68]

> that the Legislature of a State might do any act, except what was expressly prohibited by the Constitution. . . . Some [i.e., followers of Blackstone] contend that the very existence of government depends upon the supreme power being lodged in some branch of the government, from which there is no appeal, and, if laws are passed which are immoral, or violate the principles of natural justice, the subject is bound to obey them. Others [i.e., followers of Locke] contend that there are boundaries set to the exercise of the supreme sovereign power of the State, that it is limited in its exercise by the great and fundamental principles of the social compact, which is founded in consent, express or implied; that it shall be called into existence for the great ends which that compact was designed to secure, and, hence, it cannot be converted into such an unlimited power, as to defeat the end which mankind had in view, when they entered into the social compact.[69]

After quoting Locke's explanation of the natural limits on sovereignty, Murray concluded—somewhat optimistically—that "[w]hatever doubt may have formerly existed on this subject, the question has been settled, by an overwhelming weight of authority, in this country, that the spirit of free institutions is at war with such a principle" as legislative supremacy.[70] Since the Constitution gave government no "power to take the property of A

64 *Id.* at 161.
65 *Id.* at 170.
66 *Id.*
67 7 Cal. 1 (1857); *see also* Timothy Sandefur, *A Natural Rights Perspective on Eminent Domain in California: A Rationale for Meaningful Judicial Scrutiny of "Public Use,"* 32 SW. U. L. REV. 569 (2003) (discussing the history of California's public use clause at length) [hereinafter Sandefur, *Natural Rights Perspective*].
68 *Billings*, 7 Cal. at 10. Chief Justice Murray is today remembered for his shocking racist opinion in *People v. Hall*, 4 Cal. 399 (1854).
69 *Billings*, 7 Cal. at 10.
70 *Id.* at 13.

and give it to B,"[71] the legislature could not transfer land from a landowner to a squatter in this way. "It is a law as immutable as those of nature, that States and nations, like individuals, are bound to obey the principles of natural justice in all their dealings with their subjects and others . . . ."[72]

This debate continued to the beginning of the twentieth century. Less than twenty years after *Billings*, the California Supreme Court reversed itself in a passionate opinion called *Stockton & Visalia Railroad v. Common Council of Stockton*.[73] Like *Sharpless*, the *Stockton & Visalia Railroad* case challenged government's authority to invest taxpayer money in a private railroad. Progressive Chief Justice William T. Wallace relied on *Sharpless* when he declared that the legislature "is politically omnipotent, except in those particulars in which its power has been limited, qualified, or absolutely withdrawn by the provisions of the Federal or the State Constitution."[74] But no such absolute limitation existed in the Constitution with regard to spending tax money to support a private business. True, the Constitution prohibited the taking of property except for public use, but "[n]o constitutional definition of the words 'public use' is . . . given in that instrument,"[75] and the Constitution left its definition to the legislature, not the courts. "The resolve of a legislative body, by which . . . private property taken, is, therefore, necessarily a legislative determination, that a public use is to be promoted . . . and such a determination is the determination of a merely political question by the political department of the Government."[76]

Only three years later, however, the United States Supreme Court would hold that for government to finance a private, for-profit railroad through tax dollars was unconstitutional. In *Loan Association v. Topeka*,[77] the Court held that taxation was supposed to serve the public welfare, not the private welfare. If government's coercive power were to be used for private benefit, it would be force, not law, and would violate the Fourteenth Amendment's requirement of "due process of law." There are certain private rights "in every free government beyond the control of the State," explained Justice Samuel Miller.[78]

> The theory of our governments, State and National, is opposed to

71 *Id.* at 13–14.
72 *Id.* at 15.
73 41 Cal. 147 (1871).
74 *Id.* at 161.
75 *Id.* at 168.
76 *Id.*
77 87 U.S. (20 Wall.) 655 (1874).
78 *Id.* at 662.

> the deposit of unlimited power anywhere. . . .
>
> There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. No court, for instance, would hesitate to declare void a statute which enacted that A. and B. who were husband and wife to each other should be so no longer, but that A. should thereafter be the husband of C., and B. the wife of D. Or which should enact that the homestead now owned by A. should no longer be his, but should henceforth be the property of B.[79]

Since government was designed to protect these rights against arbitrary or wrongful deprivation, any government act which violated such rights was not a *law*, but an act of *mere force:*

> To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.[80]

Since the tax was a use of government's coercive power for the benefit of private parties, rather than the general public, it was not a *law*, and thus deprived citizens of their property without due process of *law*.

C. Cracks in the Foundation: Railroads and The Mill Acts

The earliest controversies over the public use requirement in eminent domain law arose over the two great power sources of the eighteenth and nineteenth centuries: water power and steam power. In a series of laws passed early in American history, government permitted riparian landowners to dam up streams on their property—thus flooding the land of neighboring landowners—to run sawmills or gristmills. These "Mill Acts" were challenged as violations of the rule against taking the property of *A* and giving to *B*,[81] and several courts struck down the laws for this reason.

Others upheld the Mill Acts on the theory that the private operator of the mill was not actually reaping any monopoly advantage. This was because Mill Acts often required the operator to serve the public equally, and regulated the rates that the operator could charge. In *Ryerson v. Brown*,[82] for example, the

79 *Id.* at 663.
80 *Id.* at 664.
81 *See* Sandefur, *Natural Rights Perspective, supra* note 67, at 599–601.
82 35 Mich. 333, 338 (1877).

Michigan Supreme Court held that it was "essential" to the constitutionality of these Acts "that the statute should require the use to be public in fact; in other words, that it should contain provisions entitling the public to accommodations." Mills were thus public utilities, even though operated by private companies, and could legitimately exercise the eminent domain power.

This rule was especially important because it was during this period that the whole idea of a private, for-profit corporation was being devised. In previous generations, the term "corporation" had referred to a quasi-governmental entity: a body of citizens performing some public function with a charter from the crown.[83] Even economic trade was conducted in this manner, because in the mercantilist system, the government granted permission and set the terms on which traders could conduct their profession. A "corporation" in the early part of American history usually meant a government-backed company with exclusive rights to carry on a particular business or function. For this reason, the generation of the American Founders tended to use the terms "corporation" and "monopoly" synonymously.[84]

This began to change during the nineteenth century. To terminate the privileged character of corporations, states chose not to abolish them, but to equalize the terms on which corporate charters were granted.[85] Corporations began to lose their special status because private entrepreneurs could now easily form private, for-profit corporations with no connection to the government, except for a charter granted as a ministerial function to any applicant meeting the requirements.

The privatization of the corporation during the nineteenth century was a gradual, vitally important development in American law. It had severe repercussions in the law of eminent domain because of railroads. While tollroads and turnpikes had often been built by public corporations—and such corporations had routinely been permitted to use the eminent domain power—railroads were less like public corporations and more like wholly private business enterprises. Early cases allowed railroads to use eminent domain by simple analogy to turnpike or tollroad construction. But that analogy became weaker as railroads became increasingly private. In *Swan v. Williams,*[86] the Michigan

83 *See* ROBERT HESSEN, IN DEFENSE OF THE CORPORATION ch. 1, ch. 3 (1979).

84 *See* William Letwin, *Congress and the Sherman Antitrust Law: 1887–1890*, 23 U. CHI. L. REV. 221, 226–29 (1956).

85 HESSEN, *supra* note 83, at 29–33. *See also* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 321 (1991); PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 50 (1997).

86 2 Mich. 427 (1852).

Supreme Court tried to solve the confusion by dividing corporations into three major classes:

> 1st. Political or municipal corporations, such as counties, towns, cities and villages, which, from their nature, are subject to the unlimited control of the Legislature; 2d. Those associations which are created for *public benefit*, and to which the government delegates a portion of its sovereign power, to be exercised for public utility, such as turnpike, bridge, canal, and railroad companies; and 3d strictly *private* corporations, where the *private interest* of the corporators is the primary object of the associations, such as banking, insurance, manufacturing and trading companies . . . .
>
> The object of *strictly private* corporations is to aggregate the capital, the talents, and the skill of individuals, to foster industry and encourage the arts. Private advantage is the ultimate, as well as the immediate object of their creation, and such as results to the public is incidental, growing out of the general benefits acquired by the application of combined capital, skill, and talent to the pursuits of commerce and of trade, and the necessities and conveniences of the community.[87]

While public corporations or associations for public benefit might exercise the eminent domain power, the *Swan* court explained, it could "not for a moment be contended" that "private property can be taken by the government from one and bestowed upon another for private use."[88] Railroads fell within the second category of corporations, and could exercise the eminent domain power for the same reasons that the Mill Acts had been sustained: because the law secures to the public the right to use the railroad as a common carrier, and because it regulated the rates that the railroad could charge.[89]

The theory that railroads were public entities because of their common carrier status was questionable from the outset. Railroad travel was certainly not *free*, and the owners of railroad companies often became immensely wealthy, in part at the expense of landowners who lost their property. Still, the theory made some sense at a time when business enterprises were rarely subject to regulation.[90] The theory also made economic

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87 *Id.* at 434.

88 *Id.* at 435.

89 *See id.* at 437–40.

90 In fact, when, in the 1876 case of *Munn v. Illinois*, 94 U.S. 113 (1876), the Supreme Court upheld a state's authority to regulate the prices charged by private businesses, Justice Stephen Field dissented on the grounds that price regulations were only allowed when "some right or privilege is conferred by the government or municipality upon the owner, which he can use in connection with his property," such as the power of eminent domain. *Id.* at 146 (Field, J., dissenting). *See also* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 88 (1872) (Field, J., dissenting) (noting that when government grants private parties "franchises of a public character," which include delegating "the exercise of the sovereign right of eminent domain," it may "determine . . . the conditions upon which

sense. As Richard Epstein pointed out, condemnations create a surplus benefit to the condemnor by transferring property at a rate below the market price.[91] When the condemnor is allowed to appropriate that surplus entirely to himself, principles of equality are violated, and economic efficiency (secured by stable property rights and rewards for productive behavior) is replaced with a severe rent-seeking problem. Regulating the rates charged by a utility that employs eminent domain ensures that it will not simply appropriate that surplus to itself, but will return it equally to the public at large.

Despite these advantages, the railroad and Mill Act cases set a dangerous precedent: privately run corporations, run for private profit, could be vested with the power of eminent domain because they conferred general public advantages on the community. In one of the earliest railroad cases, *Bloodgood v. Mohawk & Hudson Railroad*,[92] one judge sounded the warning: "It has never been allowed to be a rightful attribute of sovereignty in any government professing to be founded upon fixed laws, however despotic the form of the government might be, to take the property of one individual or subject, and bestow it upon another."[93] For government to assume such a power was to abandon the principles of the founding:

> [N]o approved writer on public law will be found to go as far as [Thomas] Hobbes in vindicating the unqualified right of the sovereign to assume at will the property of the subject. Every other writer is disposed to recognize a distinction between right and power as applied to sovereign and subject, and to acknowledge that a rightful government must be founded on some other principle than that of mere force.[94]

That principle was the equal protection of each person's right to property, but condemnations for for-profit railroad corporations endangered this principle. As for the theory that the public derived some general advantage from the construction of the railroad, this was not enough: "If an incidental benefit, resulting

[the eminent domain power] shall be enjoyed," including business regulations).

91 RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 163–64 (1985).

> If the sum of all wealth in the state of nature is 100 and that in society is 150, then there is a potential surplus of 50, which must be distributed. . . . When the state acquires private property for public use, the public use requirement should ensure the "fair" allocation of surplus by preventing any group from appropriating more than a pro rata share. Takings for private use are therefore forbidden because the takers get to keep the full surplus, even if just compensation is paid.

Id.

92 18 Wend. 9 (N.Y. 1837).

93 *Id.* at 56.

94 *Id.* at 57.

to the public from the mode in which individuals in pursuit of their own interest use their property, will constitute a public use of it . . . , it will be found very difficult to set limits to the power of appropriating private property."[95]

Nevertheless, the common carrier rationale prevailed and grew with the passing years. Eventually, it was even applied to electric power lines and telephone wires, and the legal fictions required to keep up this rationale became increasingly difficult to defend by the early twentieth century.[96] It was at this time that the massive philosophical shift, known as the Progressive Movement, took the next important step in eroding the public use limitation.

III. PROGRESSIVISM AND THE REGULATORY WELFARE STATE

A. The Progressives' Abandonment of Locke

Lockean political philosophy, as represented by *Loan Ass'n v. Topeka*, prevailed in the courts during what is today called the "*Lochner* era," but it came to a gradual end with the rise of Progressivism, a political movement seeking a broad range of social and economic reforms through government regulation. Although Progressivism defies easy definition, its central theme was the abandonment of classical liberal concepts of individual rights and natural liberty, and their replacement with notions of collective decision-making.[97]

The Progressives shared four main ideas that would reshape the legal profession's understanding of sovereignty along Blackstonian and Hobbesian lines, and ultimately expand the reach of eminent domain far beyond the Founders' beliefs. The first was the idea that rights are really just permissions granted by the government. The second was that the Constitution is a "living document," which changes to suit the exigencies of the moment. The third, closely allied with the second, was the idea that courts should avoid interfering when legislatures enact laws restricting individual rights. The fourth was the idea that government exists, not to secure individual rights—which, again, had come to be seen as permissions created by government—but to shape society into the form that the collective found pleasing.

The Progressive attitude toward individual rights was well described by one of its epigones, Justice Louis Brandeis, when he wrote, "in the interest of the public and in order to preserve the

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95 *Id.* at 65.

96 *See* Philip Nichols, Jr., *The Meaning of Public Use in the Law of Eminent Domain*, 20 B.U. L. REV. 615, 621–23 (1940).

97 *See* ERIC FONER, THE STORY OF AMERICAN FREEDOM 140 (1998).

liberty and the property of the great majority of the citizens of a State, rights of property and the liberty of the individual must be remoulded, from time to time, to meet the changing needs of society."[98] Government's primary role was now viewed as the shaping of society rather than the protection of human beings; it was to provide people with the necessities of comfortable living,[99] and to employ its coercive powers not merely to protect but to create individual personalities.[100] Government, no longer seen as a potential threat to freedom, autonomy, and dignity, was seen as the *creator* of these values, and in creating them, the government was justified in manipulating individual choice. For the Progressives, in fact, legal restrictions on liberty, or redistributions of property, were not really limits on freedom, but expansions of the newly defined concept of freedom. When it came to property rights, this concept of freedom sought to replace the time-honored notion of the owner's right to do what he or she pleased with his or her own property, with the owner's entitlement to participate in collective decision-making with regard to all other property in the area. As Eric Claeys puts it, "[e]ach local owner loses substantial freedom to control the use of his own parcel of land, but gains the opportunity to vote on how his neighbors ought to use *their* properties."[101] Thus, Progressive attitudes toward property rights included frequent violations of the rights of individuals, but because society took precedence over the individual, rights would have to yield to the "public good."

Where previous generations saw private property as a natural right which government was obliged to protect, the Progressives believed the right to property was merely a creation of positive law. As Louis Menand puts it, the Progressives saw freedoms as "socially engineered spaces where parties engaged in specified pursuits enjoy protection from parties who would otherwise naturally seek to interfere . . . . [R]ights are created not for the good of individuals, but for the good of society. Individual

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98 Truax v. Corrigan, 257 U.S. 312, 376 (1921) (Brandeis, J., dissenting).

99 *See* John Dewey, *The Future of Liberalism,* 32 J. PHIL. 225 (1935).

> [F]ull freedom of the human spirit and of individuality can be achieved only as there is effective opportunity to share in the cultural resources of civilization. . . . Any liberalism that does not make full cultural freedom supreme and that does not see the relation between it and genuine industrial freedom as a way of life is a degenerate and delusive liberalism.

Id.

100 Thomas G. West, *Progressivism and the Transformation of American Government, in* THE PROGRESSIVE REVOLUTION IN POLITICS AND POLITICAL SCIENCE: TRANSFORMING THE AMERICAN REGIME 13, 16 (John Marini & Ken Masugi eds., 2005).

101 Eric R. Claeys, *Zoning and Progressive Political Theory, in* THE PROGRESSIVE REVOLUTION IN POLITICS AND POLITICAL SCIENCE, *supra* note 100, at 287, 292.

freedoms are manufactured to achieve group ends."[102] Rather than reflecting any natural, moral entitlement, property was simply the invention of the state, and the state could alter the rules at will.[103] The Progressives employed this newfound authority in the pursuit of a slew of social projects.[104]

It would be difficult to exaggerate the degree to which Progressivism was alienated from the basis of American constitutionalism. The Progressives believed that the Lockean principles of the founding had been based on theories of knowledge that had now been disproved by, among other things, the science of evolution. Lockeanism had held that humans are endowed with a particular, special nature, a characteristic quality that distinguishes man from all the rest of nature. This unique spark was also the source of inalienable, individual rights. But under the influence of philosophers such as Hegel,[105] the Progressives "put an end to the idea that . . . there exists some order, invisible to us, whose logic we transgress at our peril."[106] Hegel's followers came to argue that the distinctions between humans and the rest of nature were artifices created by History and social consensus. Moral orders, economic orders, and even, in extreme cases, physical orders,[107] were held to be matters of mere convention by thinkers who contended that the human will could master what were once conceived of as objective truths. Harnessing this willpower on a collective scale was the main purpose of Progressive politics.[108]

In fact, such collective will was not only the source of political legitimacy, but the very source of individual identity.[109] The

102 LOUIS MENAND, THE METAPHYSICAL CLUB 409 (2001).

103 *See, e.g.,* CHARLES EDWARD MERRIAM, A HISTORY OF AMERICAN POLITICAL THEORIES 311 (Russell & Russell 1968) (1903) ("The present tendency . . . in American political theory is to disregard the once dominant ideas of natural rights and the social contract . . . . [R]ights are considered to have their source not in nature, but in law.").

104 *See generally* MICHAEL MCGERR, A FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870–1920 (2003); RICHARD HOFSTADTER, THE AGE OF REFORM (1955). *See also* KEVIN STARR, INVENTING THE DREAM: CALIFORNIA THROUGH THE PROGRESSIVE ERA 199–282 (1985).

105 *See generally* Mathias Reimann, *Nineteenth Century German Legal Science*, 31 B.C. L. REV. 837 (1990); Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WIS. L. REV. 1431 (1990).

106 MENAND, *supra* note 102, at 439.

107 *See generally* ZHORES MEDVEDEV, THE RISE AND FALL OF T.D. LYSENKO (1969) (detailing the life of Soviet biologist Lysenko, who contended that biological characteristics were matters of convention, rather than nature).

108 *See* JOHN A. MARINI, THE POLITICS OF BUDGET CONTROL 187 (1992).

109 *See id.* *See also* Dewey, *supra* note 99, at 227.

> [Progressive] liberalism knows that an individual is nothing fixed, given ready-made. It is something achieved, and achieved not in isolation, but the aid and support of conditions, cultural and physical, including in "cultural" economic, legal, and political institutions as well as science and art. Liberalism knows that social conditions may restrict, distort, and almost prevent the development of individuality. It therefore takes an active interest in the working of

good state did not take the nature of individuals as a given, nor did it recognize any rights originating in human nature, let alone any pre-political standards of justice. Those who relied on such concepts were, in Oliver Wendell Holmes' phrase, "churning the void in hope of making cheese."[110] Rather, morality, human nature, and individual rights were generated and shaped only by the conscious, focused will of the collective society. This vision placed a disturbing emphasis on the power of political leaders, as Woodrow Wilson's description of "leaders of men" makes clear: "Men are as clay in the hands of the consummate leader."[111]

The second Progressive idea was the notion of a "living constitution."[112] In this conception, the Constitution's restrictions on government power had to be "redefined" and "remolded" to meet the modern need for government regulation. One contemporary admirer of Justice Oliver Wendell Holmes described his jurisprudence this way:

> Holmes came to the bench in 1882, when the transition from individualism to collectivism in England was in progress. . . . [He] was too learned in the history of the law to be blind to the fact that the socialistic trend in American political thought would finally demand extensive paternal legislation in no uncertain terms; and that when this demand became strong enough serious consequences might follow the failure of the courts to acquiesce . . . .
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> . . . [T]he necessity for the establishment of a benevolent attitude towards social reform was apparent . . . . [yet] the Constitution was

> social institutions that have a bearing, positive or negative, upon the growth of individuals who shall be rugged in fact and not merely in abstract theory. It is as much interested in positive construction of favorable institutions, legal, political, and economic, as it is in the work of removing abuses and overt oppressions.

Id.

110 OLIVER WENDELL HOLMES, JR., Letter to Alice Stopford Greene (Aug. 20, 1909), *in* THE ESSENTIAL HOLMES 115, 116 (Richard A. Posner ed., 1992). Another interesting indication of Holmes' fundamentally Hobbesian understanding of sovereignty comes in his comment on sovereign immunity: suing the government, he said, "seems to me like shaking one's fist at the sky, when the sky furnishes the energy that enables one to raise the fist." HOLMES, JR., Letter to Harold Laski (Jan. 29, 1926), *in* THE ESSENTIAL HOLMES, *supra*, at 234, 235. *Cf.* Berns, *supra* note 18, at 407, noting that, for Hobbes,

> [o]pposing the sovereign's will in any particular case would be opposing the ground of all property and, hence, self-defeating. When citizens are allowed to sue the supreme authority, the question cannot be whether the sovereign or his ministers had a right to do what was done, but rather what it was that the sovereign in fact willed in this matter.

111 6 WOODROW WILSON, *Leaders of Men* (1890), *reprinted in* The PAPERS OF WOODROW WILSON 646, 650 (Arthur S. Link ed., 1969).

112 This term first appeared in Arthur W. Machen Jr., *The Elasticity of the Constitution,* 14 HARV. L. REV. 200, 205 (1901), but was popularized in HOWARD LEE MCBAIN, THE LIVING CONSTITUTION (1927). *See also* R. G. Tugwell, *That Living Constitution*, THE NEW REPUBLIC, June 20, 1928, at 120; G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 356 n.25 (2000).

> regarded as almost immutable. . . . [N]o further [Amendment] might be looked for short of a popular upheaval.
>
> Next to amendment of the Constitution, the most feasible means of giving validity to new principles was to change the interpretation of the provisions under which the inevitable social legislation would be held invalid. "Liberty of contract" and the broad powers of review assumed by the courts under the 5th and 14th Amendments were the elements which barred the way to reform,—and it is against these interpretations that Justice Holmes' most significant attacks have been directed.[113]

It was not that Holmes was a socialist—in fact, he was not[114]—but that Holmes and his allies adopted a view of the judiciary that drastically curtailed its role in limiting legislative power. This was the third Progressive idea—the concept of judicial restraint. "If my fellow citizens want to go to Hell," Holmes is reputed to have said, "I will help them. It's my job."[115] Holmes abandoned older principles of natural, inherent limits on legislative authority, which he saw as mere superstitions.[116] He went even further in favor of the legislature than Blackstone had. As a true follower of Hobbes,[117] Holmes believed that rights do not derive from the nature of human beings, but are simply permissions granted by society and revocable at will; the judiciary exceeds its proper bounds if it intervened at such a moment. Holmes' ultra-democratic principles were so extreme that he wrote in his most famous opinion that "the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion,"[118] even though it is difficult to imagine what else the word could possibly mean. Most fundamentally, where previous generations had held that a political society was based on a general assent to certain common principles,[119] Holmes argued that the Constitution was not based on any principles of political philosophy *at all*. Holmes wrote, "a constitution is not intended to embody a particular economic the-

113 DORSEY RICHARDSON, CONSTITUTIONAL DOCTRINES OF JUSTICE OLIVER WENDELL HOLMES 41 (1924), *in* 42 JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE 319, 359 (1924).

114 *See* MENAND, *supra* note 102, at 65.

115 Walter Berns, *The Supreme Court as Republican Schoolmaster: Constitutional Interpretation and the "Genius of the People," in* THE SUPREME COURT AND AMERICAN CONSTITUTIONALISM 3, 11 (Bradford P. Wilson & Ken Masugi eds., 1998) (quoting Letter from Oliver Wendell Holmes Jr. to Harold Laski (Mar. 4, 1920), *in* 1 HOLMES–LASKI LETTERS, at 194 (Mark de Wolfe Howe ed., 1963)).

116 *See, e.g.,* Oliver Wendell Holmes, *Natural Law,* 32 HARV. L. REV. 40 (1918).

117 *See, e.g.,* Ben W. Palmer, *Hobbes, Holmes and Hitler*, 31 A.B.A. J. 569 (1945).

118 Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

119 *See, e.g.,* VA. CONST. § 15 (1776) ("[N]o free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles.").

ory . . . . It is made for people of *fundamentally* differing views."[120] This was a departure from the entire history of Western political philosophy, and particularly the Declaration of Independence, which held that political society is only possible among people of fundamentally *shared* views.[121]

Perhaps paradoxically, the concept of judicial restraint was deeply allied to the idea of a "living constitution." Courts could take a passive, seemingly non-partisan role in cases involving legislative entrenchments on previously protected rights, thus pursuing an air of objectivity while in fact advancing Progressive ideals, or at least allowing the advancement of Progressive activism in legislatures. By abandoning the fundamentally shared views of American constitutionalism—which had once helped anchor American legislatures to philosophical principles—Holmes and his followers allowed the ship of state to drift toward the goals to which Progressives were steering, all while professing personal detachment from the project.

One of those who preferred to steer was Louis Brandeis. In 1936, in a flattering portrait of Brandeis entitled *Brandeis and the Modern State*, Professor Alpheus Thomas Mason praised the justice for having recognized that "[p]roperty has a social function to perform; it is a means, not an end in itself," and that when property interferes with "that fundamental freedom of life for which property *is only a means*. . . . it should be controlled [by the government]."[122] Like Blackstone, Brandeis' focus was primarily on mechanisms of social organization, not on the individual liberty that America's Founders believed such mechanisms ought to serve. Thus the state's power to regulate the economy "is not conditioned upon the existence of economic need but flows from the broader right of Americans to preserve and to establish such institutions, social and economic, as seem to them desirable."[123] Notions of government preserving individual liberty were simply outdated: Mason praised Brandeis' "conviction that eighteenth century individualistic philosophy of rights and property is no longer a creed adequate for modern life,"[124] even while he voiced some slight concern that Brandeis' "principles exhibit an element of collectivism so strong as somewhat to embarrass those who

120 *Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting) (emphasis added).

121 *See* THE DECLARATION OF INDEPENDENCE, 1 Stat. 1 (1776) ("[G]overnments are instituted among men, deriving their just powers from the consent of the governed . . . as to them shall seem most likely to affect their safety and happiness.").

122 ALPHEUS THOMAS MASON, BRANDEIS AND THE MODERN STATE 211–12 (Sherman F. Mittell ed., 1936) (1933) (internal quotation marks omitted) (quoting Ernest Poole, *Brandeis*, 71 THE AMERICAN MAGAZINE, Feb. 1911, at 481, 493).

123 *Id.* at 211.

124 *Id.* at 232–33.

endorse his libertarian doctrines."[125] Mason noted that Brandeis' "zeal for social justice and his belief in the genuine worth of the individual sometimes cause him to favor even drastic regulation of those very liberties which many consider it the primary purpose of the Bill of Rights to protect."[126] Holmes, Mason argued, professed no opinion as to the desirability of economic redistribution, but "[i]f Mr. Justice Brandeis sustains social legislation, it is because he believes it desirable and expedient as well as constitutional."[127] Whatever their differences, Holmes and Brandeis shared a fundamental premise with Hobbes and with Blackstone: that there were no pre-political limits on what government might do in the "interests of society."

Significantly, the use of eminent domain expanded greatly during the Progressive era. Since government was no longer seen as a device for protecting equal rights, projects which once would have been considered beyond the state's authority were now seen as perfectly legitimate. The government's role was not to police the boundaries of rights, "restrain[ing] men from injuring one another," as the Founders had believed;[128] it was to take an active role in forming a better society in general. Thus, the Progressives adopted a wide variety of government programs for manipulating society, including zoning,[129] mandatory government schooling,[130] racial segregation,[131] government control over the money supply,[132] eugenics programs,[133] and even the Pledge of Allegiance.[134] And it was during this period that the term "blight" first came to be applied to neighborhoods, to describe areas that failed to perform economically to standards that the government preferred.[135] As the reach of sovereignty expanded, so, too, did the power of eminent domain. In *Rindge Co. v. County of Los Angeles*,[136] the Supreme Court upheld the condemnation of land for public recreation, because "[p]ublic uses are not

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125 *Id.* at 206.

126 *Id.* at 222.

127 *Id.* at 224.

128 THOMAS JEFFERSON, *First Inaugural Address*, *in* WRITINGS, *supra* note 32, at 492, 494.

129 *See* Claeys, *supra* note 101, at 292.

130 *See* MCGERR, *supra* note 104, at 109–11.

131 *See id.* at 182–218.

132 *See id.* at 163–64.

133 *See id.*at 214.

134 *See* RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 108 (2006).

135 *See generally* Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain,* 21 YALE L. & POL'Y REV. 1 (2003); Eric R. Claeys, *Euclid Lives? The Uneasy Legacy of Progressivism in Zoning,* 73 FORDHAM L. REV. 731, 751–53 (2004). The first use of the term "blight" to describe a dilapidated neighborhood was in Pritz v. Messer, 149 N.E. 30, 35 (Ohio 1925).

136 262 U.S. 700 (1923).

limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment."[137] The California Supreme Court went even further: "anything calculated to promote the education, the recreation, or the pleasure of the public is to be included within the legitimate domain of public purposes" permitting the exercise of eminent domain.[138]

B. The New Deal Canonizes Progressivism

The confluence of "the Holmesian negative canon of limited court action and the aggressive New Deal version of judicial positivism" was to finalize the break with the Lockean tradition in a series of cases in the 1930s.[139] In 1934, writer and Yale University Professor Francis W. Coker concluded that the debate over government regulation of property had pretty much been settled in favor of extensive government regulation. "In some decisions, indeed, the American courts have enunciated a broad and positive collectivist doctrine" affirming such regulation.[140] The notion that preserving individual rights is a goal to be served by government was outmoded: there "is no important economic group that now holds in practice to any anti-interventionist conception of the proper sphere of state activity in the economic field."[141] Coker admired the Roosevelt Administration's "rapid advances in collectivism"[142] which, "if they work passably well in the emergency [of the Great Depression], they will in many particulars became [sic] permanent parts of governmental policy."[143] Such a result was perfectly consistent with the trend of Progressive political philosophy, because

> [a]s the means of production and distribution change, the forms of social interdependence also change, creating new problems of comfort, convenience, decency, and order. The specific interferences with individual economic freedom have recently assumed somewhat new forms, and there may appear to have been a general movement from individualism to collectivism. But private property is itself a highly collectivistic institution, dependent for its existence upon very substantial restraints, rigorously applied by the organized force of the community, upon individual freedom. At any given period of time, therefore, the law intervenes, not only to protect individual owners in what are then regarded as proper uses of private property, but also to

137 *Id.* at 707.

138 Egan v. City of San Francisco, 133 P. 294, 296 (Cal. 1913).

139 ARTHUR A. EKIRCH JR., IDEOLOGIES AND UTOPIAS: THE IMPACT OF THE NEW DEAL ON AMERICAN THOUGHT 205 (1969).

140 FRANCIS W. COKER, RECENT POLITICAL THOUGHT 554 (1934).

141 *Id.* at 556.

142 *Id.* at 558.

143 *Id.* at 559.

> safeguard individuals and the community as a whole against oppressive and incompetent uses of property.[144]

Two years later, James Madison's biographer and Progressive ideologue, Irving Brant, published a shrill, partisan book called *Storm Over the Constitution*, denouncing the "nine men in black robes" who stood in the way of nationwide economic reorganization.[145] "In the combat between economic democracy and the industrial oligarchy," he wrote,

> the Supreme Court has at all times been the last and most formidable entrenchment of privileged wealth. . . . The fundamental necessity is to find power through which federal and state governments, but particularly the federal government, may cope with the economic and social problems of the twentieth century. Federal power must be found in the Constitution; the state governments need only relief from misapplied constitutional restraints.[146]

Brant argued that the Constitution must be interpreted to allow Congress to experiment with new forms of "economic democracy." "Commerce among the states must be saved from demoralization," he wrote.[147] "Let that be the touchstone of constitutional interpretation and it will allow the federal government to go exactly so far, in controlling activities *affecting* interstate commerce, as may be necessary to make the commercial life of the nation serve the general welfare."[148]

In 1934, the Supreme Court formally adopted the Progressive doctrine that laws restricting economic liberty and private property rights would be presumed constitutional except in extremely rare circumstances.[149] "The court has repeatedly sustained curtailment of enjoyment of private property, in the public interest," wrote Justice Roberts in *Nebbia v. New York*.[150] "The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community."[151] Although not an eminent domain case, *Nebbia* is a legal landmark because it finally made the Progressive principle of deference toward legislative control over economic freedom and property rights into constitutional law, which it remains to-

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144 *Id.*

145 IRVING BRANT, STORM OVER THE CONSTITUTION 234–48 (1936).

146 *Id.* at 242.

147 *Id.* at 145.

148 *Id.* Brant suggested three options: amending the Constitution, restricting the power of judicial review, or "[c]onversion of the liberal Supreme Court minority into a consistent majority." *Id.* at 242. To this third option he added a less than ingenuous footnote: "But not by enlarging the Court even though Lincoln did it." *Id.* at 242 n.*. In 1937, of course, Franklin Roosevelt would propose just such a court-packing scheme.

149 *See* WHITE, *supra* note 112, at ch. 8 (2000).

150 291 U.S. 502, 525 (1934).

151 *Id.*

day. The Court declared that states are "free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it."[152]

Four justices dissented in *Nebbia*, and in the next three years, the Court sometimes patrolled the constitutional limits by striking down some of the more extreme New Deal programs.[153] But after the 1937 Supreme Court term, such dissent became more subdued and infrequent. In its place was erected a dogma that political philosophy is simply no concern of judges,[154] and that every conceivable (and even absurd) presumption is to be indulged in favor of the validity of the legislature's actions.[155] While the Court sometimes recited formulas suggesting it had some degree of understanding of the role of government—such as "rationally related to a legitimate government interest"—it had abandoned the tools that allowed it to understand what that role is. By 1987, over two hundred years after the founding of the United States, the Supreme Court would confess the humiliating fact that "[o]ur cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest.'"[156] The Court had simply forgotten what government exists to do.[157] When faced with that question, it would usually substitute "tradition" for constitutional principles,[158] or employ some other technique to avoid addressing whether government may rightfully pursue the goal in question. As a consequence, the Court tended—with notable exceptions[159]—to sustain any government

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152 *Id.* at 537.

153 *See, e.g.,* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); United States v. Butler, 297 U.S. 1 (1936).

154 *See, e.g.,* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 6 (1990).

155 *See, e.g.,* FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315–16 (1993) (stating that under the rational basis test, "those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it. . . . [W]e never require a legislature to articulate its reasons for enacting a statute, [so] it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged [law] actually motivated the legislature. . . . [T]he absence of legislative facts explaining the [law] . . . has no significance . . . . [and] legislative judgment [is] virtually unreviewable . . . .") (citations omitted) (internal quotation marks omitted).

156 Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987).

157 *Cf.* 6 JAMES MADISON, Letter to Henry Lee (Jan. 1, 1792), *in* THE WRITINGS OF JAMES MADISON 80, 81 n.1 (Gaillard Hunt ed., 1906) ("If not only the *means* [of government's actions], but the *objects* are unlimited, the parchment had better be thrown into the fire at once . . . .").

158 *See, e.g.,* Chavez v. Martinez, 538 U.S. 760, 775 (2003) ("Only fundamental rights and liberties which are 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty' qualify for [due process] protection.") (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

159 *See, e.g.,* Lawrence v. Texas, 123 S. Ct. 2472 (2003) (holding that a Texas statute,

interest as "legitimate" when it achieved significant public support.[160] And as a consequence, the Court had given its blessing, as a practical matter, to the abandonment of Lockean limits on government sovereignty. At the end of the 1930s, the Blackstonian vision—that the legislature could do whatever was not naturally impossible—was almost entirely realized in American jurisprudence. The "[r]evival of absolutism," said Roscoe Pound in 1940, "is a manifest fact. . . . The books of the day are full of theories which when carried out lead to organization of society in an omnicompetent state in which the individual man is submerged."[161]

There was one class of cases, however, where the Court continued to exercise some degree of judicial review. In *United States v. Carolene Products Co.*,[162] the Court indicated that its "presumption of constitutionality" would not apply "when legislation appears on its face to be within a specific prohibition of the Constitution." In other words, the Blackstonian notion of an inherently sovereign government, free to act however it pleased except where *specifically* forbidden, was enshrined for good, and as time went on, it would become increasingly clear that even some of the "specific prohibitions" in the Constitution would receive less judicial solicitude.

IV. "PUBLIC USE" SINCE THE NEW DEAL

A. The Court Abandons "Public Use"

The 1930s' abandonment of judicial protection for economic freedom was applied in the law of eminent domain only a decade later, when the Court held in *United States ex rel. Tennessee Valley Authority v. Welch* that "it is the function of Congress to decide what type of taking is for a public use . . . . Any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function . . . which has proved impracticable in other fields."[163] *Welch*, like the cases that were to follow, reflected the Progressives' innovations in constitutional law in that it was argued under the Public Use Clause rather than the Due Process Clause. Earlier cases had established that

criminalizing private sexual conduct between two people of the same sex, violated the Constitution).

160 *See* EPSTEIN, *supra* note 91, at 109 ("The legitimate state interest in vogue today is a bare conclusion, tantamount to asserting that the action is legitimate because it is lawful. . . . [It] functions, at best, as a convenient label for serious inquiry, without defining the set of permissible ends of government action.").

161 ROSCOE POUND, CONTEMPORARY JURISTIC THEORY 1 (Fred B. Rothman Publications 1999) (1940).

162 304 U.S. 144, 152 n.4 (1938).

163 327 U.S. 546, 551–52 (1946).

the prohibition on taking from *A* and giving to *B* was located in the substantive protections of the Due Process Clause—because enactments which redistributed wealth on the basis of political popularity were not *laws*, but were mere enactments.[164] But with the New Deal abandonment of this principle, reflected in the *Welch* Court's reference to "judicial restraint . . . in other fields," such cases were litigated under the Public Use Clause instead.[165]

The results, however, were no more successful than they would have been had they been brought under the older theory. Having explicitly abandoned the role of "deciding on what is and is not a governmental function," the Court finally rejected the notion that government may not take property from *A* and give it to *B*. *Berman v. Parker*[166] involved a challenge to a Washington, D.C., slum-clearance program. Judging certain neighborhoods dangerous to the public welfare, Congress declared that cleaning up the city could not be accomplished "by the ordinary operations of private enterprise alone,"[167] and ordered the condemnation of "blighted areas" of the city.[168] Moreover, Congress declared that "the leasing or sale" of the property taken in this way "for redevelopment pursuant to a project area redevelopment plan . . . is hereby declared to be a public use."[169]

Along with the substandard property, officials condemned viable property, including a department store owned by Max Morris. Morris sued, arguing that the condemnation violated the

164 *See, e.g.,* Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 664 (1874) ("This is not legislation. It is a decree under legislative forms.").

165 This is the answer to the seeming paradox that the Fifth Amendment refers explicitly only to compensating owners for takings that are "for public use"—which might be interpreting as allowing takings for private use to go uncompensated. This absurd result comes from forgetting the prohibition on private takings located in the Due Process Clause. The proper reading of the Fifth Amendment therefore declares that no person shall be deprived of property without due process of law (including that no person shall be deprived of property simply to transfer it to more politically successful parties), and that when property is taken for public use, it shall be compensated. Justice Kennedy is therefore correct in his observation that

> the Takings Clause . . . has not been understood to be a substantive or absolute limit on the government's power to act. The Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge. The Clause presupposes what the government intends to do is otherwise constitutional.

Eastern Enterprises v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment). To get to the compensation requirement, the government must first satisfy the Due Process limitation forbidding private takings.

166 348 U.S. 26 (1954).

167 *Id.* at 29 (quoting District of Columbia Redevelopment Act of 1945, Pub. L. No. 79-592, 60 Stat. 790, § 2 (1946)).

168 The Court itself noted that "[t]he Act does not define either 'slums' or 'blighted areas.'" *Id.* at 28 n.*.

169 *Id.* at 29 (quoting District of Columbia Redevelopment Act of 1945, Pub. L. No. 79-592, 60 Stat. 790, § 2 (1946)).

Public Use Clause because it would simply hand his property over to a private developer to build a store or some other building for his own private profit. Justice William O. Douglas rejected this argument in no uncertain terms:

> Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . . This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.[170]

Douglas—a Roosevelt appointee firmly in the grip of Progressive constitutionalism[171]—was applying *Nebbia*-style deference to the legislature's authority to reshape the neighborhood. In the process, he and the rest of the Court affirmed that government could take property from one private party and give it to another if the overriding goal were important enough—and the Court would defer to the legislature's judgment as to whether the goal was important enough.[172] What is particularly noteworthy about *Berman* is its lack of caution; the decision—which was unanimous—explicitly conceded that government may transfer property directly from one owner to another: "The public end may be as well or better served through an agency of private enterprise than through a department of government . . . . We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects."[173] *Berman* does not appear ever to have been criticized by a lower court.

The Court did not revisit the Public Use Clause for another thirty years. But during that time, protections for property rights continued to erode. In *Penn Central Transportation Co. v. New York City*,[174] the Court upheld the validity of a New York law forbidding the owners of a historic train station from constructing an office tower on the site. Although the law did not actually seize the title to the land, it prohibited the purchasers

170 *Id.* at 32.

171 *See, e.g.,* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.").

172 *See Berman*, 348 U.S. at 33 ("Appellants argue that . . . the project [is] a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.").

173 *Id.* at 33–34.

174 Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 135–38 (1978).

from using their land as they wanted, and thus deprived them of the value of their property. Although the Court had long held that government should not be able to evade the duty of paying just compensation through the trick of simply prohibiting the use of land while allowing the owner to keep the title,[175] it rejected the property owners' argument that the law was a taking of their property. To decide when legal interference with property use amounts to a taking of the property, *Penn Central* proposed a confusing, multi-factor "balancing" test, under which a property owner is almost never entitled to compensation.[176] Explaining this vague approach, Justice Brennan wrote that a taking "may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[177]

Under the principles of the American founding, of course, such programs are simply not constitutional, but the Court hardly paused to address that issue, concluding that "in a wide variety of contexts . . . government may execute laws or programs that adversely affect recognized economic values."[178] Brennan simply asserted, without explanation, that government has a legitimate interest in redistributing wealth, even when these "adversely affect" the property rights of those who have earned this wealth. The *Penn Central* test he devised purported to distinguish such valid programs from laws that unjustly deprived persons of their property, but he provided no substantive standards for making that distinction. Instead, he substituted such wholly subjective standards as "fairness" and interference with reasonable investment-backed expectations[179] (the reasonableness to be determined by the judge's subjective standards). The result has been an inconsistent body of law under which the property owner almost invariably loses.[180] The Court would employ a similar

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175 *See, e.g.,* Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177–78 (1871) ("It would be a very curious and unsatisfactory result . . . [to hold] that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely . . . without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use.").

176 *See* John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535, 1536 n.4 (1994) (explaining the balancing test created in *Penn Central Transportation Co.*, 438 U.S. at 124); David F. Coursen, *The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit*, 29 ENVTL. L. 821, 823 n.12 (1999) (noting that the Court has never compensated a property owner under the *Penn Central* test).

177 *Penn Cent. Transp. Co.*, 438 U.S. at 124 (citation omitted).

178 *Id.*

179 *Id.* The term "reasonable" was actually added to the *Penn Central* formula in *Kaiser Aetna v. United States*. 444 U.S. 164, 175 (1979).

180 *See* William P. Barr et al., *The Gild That Is Killing the Lily: How Confusion over Regulatory Takings Doctrine is Undermining the Core Protections of the Takings Clause,*

technique in the *Kelo* decision.

Finally, in the 1984 case of *Hawaii Housing v. Midkiff*,[181] the Court returned to the subject of eminent domain when it upheld a Hawaii law allowing any person renting a home to request that the state condemn the house, and resell it to the renter at a substantially discounted rate. This scheme, which even more obviously took property from *A* and gave it to *B* than did the law in *Berman*, was devised to address the problem of "land oligopoly," according to the state.[182] Forty-seven percent of the state's land was held by seventy-two private landowners, the state argued, and this caused a shortage of land for residences.[183] As a matter of economics, this is a bit silly: *seventy-two* distinct competitors in a marketplace, owning collectively less than half the land, is hardly an oligopoly, if that term even has meaning.[184] The state's further contention that this "oligopoly" was responsible for the shortage of residential land is belied by its admission that federal and state government owned forty-nine percent of the land.[185] The government had purchased almost half of the land in the state, and then, worried that there were too few landowners left, its solution was to redistribute what little property remained in private hands.

In any event, the Court held that the law satisfied the Public

73 GEO. WASH. L. REV. 429, 484 (2005).

> Inconsistency was inevitable [under *Penn Central*]. Regulations that cause massive economic harm to the owner are held not to go too far, whereas others with only a slight impact are found to constitute regulatory takings. As a result, the regulatory takings cases have fallen back to a three-factor, ad hoc test that tries to get at the idea of fairness to the owner. . . . It is inherently vague and subjective. As it turns out, the Court has usually not considered it unfair or unjust to force owners to bear fairly heavy burdens, at least if the owner is rich.

Id. (citations omitted).

181 467 U.S. 229, 233–36 (1984).

182 *Id.* at 242. As the Ninth Circuit Court of Appeals noted when it struck down the Hawaii law as a violation of the Public Use Clause, "[t]he key in *Berman* is the intermediate step in which the property was transferred from the private owner to the government for a public purpose, *i.e.*, the redevelopment of the area. In the case before us there is no such intermediate step . . . . The lessee simply retains possession of residential property throughout the condemnation process until he receives fee simple title. . . . Nothing in *Berman* permits the lessee of property to take ownership of that property from the owner involuntarily through condemnation proceedings." Midkiff v. Tom, 702 F.2d 788, 797 (9th Cir. 1983), *rev'd* 467 U.S. 229 (1984).

183 *Midkiff*, 467 U.S. at 232.

184 See Arthur Austin, *Antitrust Reaction to the Merger Wave: The Revolution vs. The Counterrevolution*, 66 N.C. L. REV. 931, 938–39 (1988), and GEORGE REISMAN, CAPITALISM: A TREATISE ON ECONOMICS 390–91 (1996), both noting that oligopoly is indefinable. *See also* Norman R. Prance, *Price Data Dissemination as a Per Se Violation of the Sherman Act*, 45 U. PITT. L. REV. 55, 56 (1983) (contending that oligopoly should be defined as a market with "no more than approximately six firms of equal size").

185 *Midkiff*, 467 U.S. at 232.

Use Clause despite transferring property exclusively to private users. Since "public use" and "public purpose" were synonymous, and since the legislature was responsible for declaring when a purpose was "public," the legislature possessed unlimited authority to redistribute private property for whatever reason it considered important enough. Emphasizing that "deference to the legislature's 'public use' determination is required 'until it is shown to involve an impossibility,'"[186] Justice Sandra Day O'Connor gave lip service to the principle that government may not engage in purely private transfers, but concluded that "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."[187] As with *Berman*, *Midkiff* was unanimous.

In the meantime, the Michigan Supreme Court had issued its infamous decision in *Poletown Neighborhood Council v. Detroit*,[188] allowing Detroit to condemn an entire neighborhood and transfer the property to the General Motors Corporation to build an auto factory.[189] Astute observers realized that liberalizing the rules on eminent domain had put in place the ingredients for a ruthless competition between private interest groups, seeking to persuade Michigan authorities to condemn property for their own benefit.

B. How Deference Tore Down the "Good Fences"

Whenever government has power to redistribute benefits and burdens between constituents, interest groups will compete for control of that power in order to secure benefits for themselves or to impose burdens on their competitors. Modern economists refer to this contest as "rent seeking," and predict that when government begins to transfer property between private parties, those parties will start spending their time and energy trying to persuade the government to give them someone else's property.[190]

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186 *Id.* at 240 (quoting Old Dominion Co. v. United States, 269 U.S. 55, 66 (1925)).

187 *Id.* at 241.

188 304 N.W.2d 455 (Mich. 1981).

189 *See* Timothy Sandefur, *A Gleeful Obituary for* Poletown Neighborhood Council v. Detroit, 28 HARV. J.L. & PUB. POL'Y 651 (2005).

190 *See generally* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 287 (Ann Arbor Paperbacks 1965) (1962).

> [T]he profitability of investment in [political organization] is a direct function of the size of the total public sector and an inverse function of the "generality" of the government budget. . . . The organized pressure group thus arises because differential advantages are expected to be secured through the political process.

Id.

The consequences of judicial abandonment of the public use requirement bear this prediction. Nationwide, during the years from 1998 to 2002, there were some 3700 reported instances of eminent domain used against private property owners for projects involving private beneficiaries.[191] Another 6000 property owners were threatened with condemnation. Some of the examples of eminent domain abuse are truly astonishing. The City of Merriam, Kansas, condemned a lot being used by one car dealership to sell the land to the BMW dealership next door.[192] The state of Mississippi condemned a twenty-three acre neighborhood to give to the Nissan company for an auto factory, even though the head of the state's Development Authority admitted to the *New York Times* that Nissan did not need the land.[193] Las Vegas, Nevada, condemned a mini-mall owned by the Pappas family to build a parking lot for the Fremont Street Experience, a pedestrian mall in the downtown area. While in many cases, topless bars and other "adult" establishments are considered examples of "blight" that must be cleaned up by the use of eminent domain, the Pappas family lost their property so that tourists could visit such attractions as the Topless Girls of Glitter Gulch![194] In one especially notorious case, billionaire Donald Trump convinced the government of Atlantic City, New Jersey, to condemn the home of an elderly widow so that he could build a limousine parking lot.[195] When Atlanta, Georgia, was constructing an Olympic Village for the 1996 games, it condemned the homes and businesses of thousands of people—and even condemned three homeless shelters.[196] (When China did the same thing to attract the

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191 *See* DANA BERLINER, PUBLIC POWER, PRIVATE GAIN 2 (2003).

192 Linda Cruse, *Merriam Sells Condemned Property to Baron BMW,* KANSAS CITY STAR (Mo.), Jan. 27, 1999, Shawnee & Lenexa, at 4.

193 *See* Sandefur, *Natural Rights Perspective*, *supra* note 67, at 598.

194 *See* City of Las Vegas Downtown Redevelopment Agency v. Pappas, 76 P.3d 1, 5–9 (Nev. 2003), *cert. denied*, 124 S. Ct. 1603 (2003); Richard Abowitz, *Gulch Doesn't Glitter and It's Not Gold*, LAS VEGAS WEEKLY, May 16, 2002, http://www.lasvegasweekly.com/2002/05_16/nightlife_skin.html; *see also* Brief Amici Curiae of Mary Bugryn Dudko et al. In Support of Petitioners at 18–22, Kelo v. City of New London, 125 S. Ct. 2655 (2005) (No. 04-108), *available at* http://www.cfif.org/htdocs/legal_issues/legal_activities/amicus_briefs/Kelo_Formatted_USSC_Draft.pdf.

195 Casino Reinvestment Dev. Auth. v. Banin, 727 A.2d 102 (N.J. 1998). Though he won the government over, the Superior Court of New Jersey ruled in favor of the widow, but only because there was no guarantee that Trump would only use the land as a parking lot. *See also* Stephen J. Jones, Note, Trump*ing Eminent Domain Law: An Argument for Strict Scrutiny Analysis under the Public Use Requirement of the Fifth Amendment*, 50 SYRACUSE L. REV. 285, 288 (2000).

196 *See* Loretta Ross, *Atlanta Olympics: A Steamroller Flattening the Poor And the Homeless,* NEWS & RECORD (Greensboro, N.C.), July 19, 1996, at A8; Douglas Holt, *Common Ground: Crowds, Advertisers Mob Atlanta's Olympic Park*, DALLAS MORNING NEWS, July 22, 1996 at 1A ("Some say [the Olympic park] has taken away a refuge for homeless people . . . . Robin Monsky, an Atlanta Committee for the Olympic Games spokeswoman, denied that the park displaced any homeless shelters.").

Olympics to Beijing, it was widely condemned by international human rights groups.[197])

Erasing the public use limitation meant that pressure groups raced to local governments, seeking to have property condemned for their benefit—and why not? The developers would get rich; the tax revenue to the city would increase; the brand new "old town" would look so nice; the politicians would look like visionaries. The only losers would be the property owners who lacked the political influence to persuade the government to respect their property rights.

By lowering the barriers that protected property from the political contest, the courts had revived the Hobbesian state of nature, where there is "no propriety, no dominion, no *mine* and *thine* distinct; but only that to be every man's, that he can get: and for so long, as he can keep it."[198] And the results were disastrous, both from an economic and social perspective.

From an economic perspective, rent-seeking is economically inefficient because it encourages groups to invest their resources and energy into nonproductive activity such as lobbying, rather than into wealth-creating activity or innovation.[199] By distracting producers from meeting consumer needs, and drawing resources away from the productive sectors of the economy and into the wining-and-dining of legislators, rent-seeking results in a lower supply of goods and services and higher costs to the consumer. Also, rent-seeking has a ratchet effect. Since the benefits conferred by government will be localized and concentrated, while the costs are broadly dispersed, the incentives will be skewed toward increased lobbying and ever-increasing amounts of wealth redistribution.[200] Rent-seeking behavior therefore tends to "restrict[ ] those political processes which can ordinarily be expected to bring about repeal of undesirable legislation,"[201] which was, at one time, considered a special concern of the judicial branch. Finally, rent-seeking behavior rewards those who are already most wealthy and powerful. A group's wealth can

197 *See* Press Release, Amnesty International, China: Human Rights—A Long Way to Go Before the Olympics (Aug. 5, 2005), *available at* http://news.amnesty.org/index/ENGASA170232005/$FILE/newsrelease.pdf; Human Rights Watch, Beijing 2008 Human Rights and the Olympics in China: Forced Evictions, http://hrw.org/campaigns/china/beijing08/evictions.htm (last visited Nov. 2, 2006). *See also* Frank Langfitt, *China Razes Alleys, Bulldozes Way of Life*, BALTIMORE SUN, Aug. 18, 2002, at 1A; Michael A. Lev, *Beijing's Poor Pay Price for Urban Renewal*, CHICAGO TRIBUNE, January 13, 2002 at 4.

198 HOBBES, *supra* note 12, at 101.

199 *See* BUCHANAN & TULLOCK, *supra* note 190, at 111 ("[B]argaining opportunities afforded in the political process *cause the individual to invest more resources in decision-making*, and, in this way, cause the attainment of 'solution' to be much more costly.").

200 *See id.* at 287–88 (noting the "spiral effect" of ever-greater lobbying efforts).

201 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4.

greatly affect its ability to influence legislation.[202] Small grass-roots organizations, or individuals, are less able to rally support behind a cause, and in the eminent domain context, winners are so enriched that they are increasingly likely to win the next time around. This problem is acute in eminent domain abuse.[203]

But more generally, the rash of eminent domain abuse has led to a severe weakening of social institutions.[204] Robert Frost famously said "Good fences make good neighbors,"[205] meaning that respect for each other's privacy and individuality reinforces the sense of goodwill that makes for a healthy community. As Friedrich Hayek put it,

> The understanding that "good fences make good neighbours," that is, that men can use their own knowledge in the pursuit of their own ends without colliding with each other only if clear boundaries can be drawn between their respective domains of free action, is the basis on which all known civilization has grown. Property . . . is the only solution men have yet discovered to the problem of reconciling individual freedom with an absence of conflict. . . . There can be no law in the sense of universal rules of conduct which does not determine boundaries of the domains of freedom by laying down rules that enable each to ascertain where he is free to act.[206]

American culture has long cherished the spirit of neighborliness and mutual respect that depends entirely on "good fences": that is, on mutual respect for property rights and, thereby, the individual liberties of one's fellow citizens.[207] But eminent do-

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202 *See* McConnell v. Fed. Election Comm'n, 540 U.S. 93, 115–16 (2003).

203 *See* Donald J. Kochan, *"Public Use" and the Independent Judiciary: Condemnation in an Interest-Group Perspective,* 3 TEX. REV. L. & POL. 49, 82 (1998)

> Even though a particular condemnation may concentrate the cost of the taking on the affected landowner . . . that owner is not likely to invest enough to successfully oppose the condemnation. First, the existence of compensation, even when not truly substituting for market or subjective value, decreases the cost to the affected owner of the land seized and thereby decreases his incentive to invest in fighting the condemnation. Furthermore, the special interest is likely to have more political influence, because unlike the landowner, the interest group is probably a repeat player in the political process . . . .

Id.

204 This section is based in part on the amicus curiae brief I filed on behalf of the Bugryn and Dudko families and Mr. Curtis Blanc, in *Kelo v. City of New London*. *See* Brief Amici Curiae of Mary Bugryn Dudko, et al. In Support of Petitioners, *supra* note 194.

205 ROBERT FROST, *Mending Wall*, *reprinted in* ROBERT FROST: COLLECTED POEMS, PROSE, & PLAYS 39, 39 (Richard Poirier & Mark Richardson eds., Library of America 1995) (1916).

206 1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY: RULES AND ORDER 107 (1973). *See also* RICHARD PIPES, PROPERTY AND FREEDOM 119 (1999) ("It is the sense of economic independence and that of personal worth which it generates that give rise to the idea of freedom.").

207 *See, e.g.,* Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), *in* THE ADAMS–JEFFERSON LETTERS 387, 391 (Lester Cappon ed., 1959).

main abuse threatens this sense of domestic tranquility by putting the private property rights of some citizens at the mercy of others.

The *Poletown* case provides a stark example of this.[208] The public debate over the project, which ultimately resulted in the condemnation and demolition of an entire neighborhood, turned what had been a peaceful, integrated community into a battleground between neighbors and officials. As Jeanie Wylie describes in her book about the case:

> [P]eople whose lives were composed of their union loyalty, their tenure in the auto plants, their patriotism, and their willingness to fight in U.S. wars were rejected, ignored, and robbed by the very institutions through which they claimed their identities. . . . [T]hese same people broke free of the illusion of civility that these institutions carry as trappings. . . . [H]istorically law-abiding Poletown residents felt free to cry out and to disrupt [a General Motors stockholders] meeting. In exactly the same spirit, Poletown resisters learned to interrupt reporters' interviews, to raise placards at the mayor's inaugural dinner, and, ultimately to go to jail when the city's police force moved on the [town's] church.[209]

The residents of Poletown, like so many other victims of eminent domain abuse, came to see democratic government not as a system of mutual respect and participation toward a common good, but as a machine destroying their homes, their family heritage, and their community.

Alexis de Tocqueville argued that American democracy rested on democratic mores, and in particular on the spirit of restraint by which "no one in the United States has dared to profess the maxim that everything is allowed in the interests of society, an impious maxim apparently invented in an age of freedom in order to legitimize every future tyrant."[210] He believed that this spirit of restraint—that is, of mutual respect for each other's

> Every one, by his property, or by his satisfactory situation, is interested in the support of law and order. And such men may safely and advantageously reserve to themselves a wholesome controul over their public affairs, and a degree of freedom, which in the hands of the [mob-rule] of the cities of Europe, would be instantly perverted to the demolition and destruction of every thing public and private.

Id.

208 Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981).

209 JEANIE WYLIE, POLETOWN: COMMUNITY BETRAYED 219–20 (1989). Wylie's book remains the standard history of the *Poletown* case, although it is in some ways (not relevant here) misleading. *See generally* William A. Fischel, *The Political Economy of Public Use in* Poletown*: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 MICH. ST. L. REV. 929 (2004) (discussing the use of eminent domain in *Poletwon* and federal grants' impact).

210 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 292 (J. P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1840).

rights—was responsible for the fact that "while the law allows the American people to do everything," there are things which their mores "forbid[] them to dare."[211] Eliminating the limits on eminent domain upends these *mores*, and puts the livelihood and the safety of a citizen's home at the mercy of the political process. It has established the principle that "everything is allowed in the interests of society," and turned the ballot box into a weapon.

This disillusionment is deeply harmful to a democratic society. As Professor Eric Claeys writes, the American Founders saw property not only as a vital protection for individual liberty, and an essential part of a prosperous economy, but also as a necessary foundation of healthy social participation.[212]

> [T]he Founders appreciated that self-government, the moral virtues, and social happiness cannot flourish unless . . . . [t]he law and political opinion . . . teach and habituate citizens to see their fellow citizens not as rivals but as neighbors and potential friends. That spirit of concord and friendship cannot flourish without security and trust. Security and trust, however, cannot flourish unless people first feel secure that they can take care of their most basic needs of survival and, more generally, that none of their would-be friends will interfere with their own. . . . [A]s [James] Wilson emphasizes, without the establishment of private property, "the tranquility of society would be perpetually disturbed by fierce and ungovernable competitions for the possession and enjoyment of things, insufficient to satisfy all, and by no rules of adjustment distributed to each." Trite as it may sound, good fences make good neighbors.[213]

By lowering those fences, the Progressive movement—despite its frequent invocation of the value of democracy—ended up corroding those principles on which a stable and worthy democratic society must rest.

C. The Courts Reexamine Eminent Domain

In July 2004, the Michigan Supreme Court, urged on by a coalition of conservative and liberal public policy groups, overruled its twenty-year-old *Poletown* decision.[214] Allowing private property to be taken and transferred to private parties was a mistake, the court unanimously declared. "After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's

211 *Id.*

212 *See* Eric R. Claeys, Property, Morality, and Society in Founding Era Legal Treatises 14–26 (Aug. 30, 2002) (unpublished manuscript, presented at the American Political Science Association Annual Meeting, on file with author).

213 *Id.* at 32 (quoting 2 JAMES WILSON, *On Property*, *in* WORKS OF JAMES WILSON 711, 719 (Robert McCloskey ed., 1967)).

214 County of Wayne v. Hathcock, 684 N.W.2d 765, 787 (Mich. 2004).

land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, 'megastore,' or the like."[215]

The court recognized that the basic flaw in *Poletown* lay in its holding that "public use" and "public benefit" were synonymous terms. Since every business contributes to the public benefit, by creating jobs or in some other way, that holding meant that the power of eminent domain was effectively limitless. Although the court recognized that the railroad and Mill Act cases provided some precedent for allowing private parties to use the eminent domain power, those cases did not permit the widespread exploitation of eminent domain by wholly private entities for their own aggrandizement.[216]

The demise of *Poletown* came only days after Susette Kelo had asked the United States Supreme Court to review the condemnation of her home in New London, Connecticut. When the Court agreed to hear the case, many defenders of property rights were hopeful that the Court would put some meaningful limit on the use of eminent domain at the federal level.

Kelo purchased a fixer-upper home on the Thames River in New London, Connecticut, in 1997. Divorced at the time, she began renovating the home. She and her partner (and later husband) Tim lived happily in the home until October of 2002, when Tim was in a car accident that left him severely handicapped. Susette, a nurse, took care of him, and took on extra jobs.[217] Meanwhile, in 1998, Pfizer pharmaceuticals decided to construct a multimillion dollar research facility nearby—a significant boost to the local economy. New London city officials hoped that the facility could serve as an anchor for further economic development. In 2000, the city asked the New London Development Corporation—a private company—to draw up the Fort Trumbull Municipal Development Plan, covering a ninety-acre economic redevelopment area. The Plan was divided into seven parcels, some of which would include a hotel and conference center, office space, fancy new housing, and a Coast Guard museum. The Plan was extremely vague on what would be done with several subparcels, however.[218]

Among the affected property owners were Wilhelmina Dery

215 *Id.* at 786.

216 *Id.* at 782.

217 *The Kelo Decision: Investigating Takings of Homes and Other Private Property: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 7 (2005) [hereinafter *Hearings*] (statement of Susette Kelo).

218 Brief of Petitioners at 4, Kelo v. City of New London, 125 S.Ct. 2655 (2005) (No. 04-108).

and Susette Kelo. Wilhelmina Dery's family immigrated from Italy in the 1880s, and purchased a home in New London in 1901. Two years later they bought the house next door. Wilhelmina was born in the house in 1918, and she grew up there. During World War II, she met a young merchant marine, Charles, at a USO dance. When Charles returned from the war in the Pacific, they were married, and he moved into the house. They opened a grocery store and had four children. When their youngest son, Matthew, married, Wilhelmina's mother gave him the house next door as a wedding present. He took over the family business in 1976, and with his wife Sue and their son, enjoyed the tightly-knit Italian neighborhood. "Nobody locked their doors," he recalled. "You just walked in and yelled. You'd get fed wherever you went."[219]

Susette Kelo had similarly pleasant memories of moving to Fort Trumbull.

> I searched all over for a home and finally found this perfect little Victorian cottage with beautiful views of the water. I was working then as a paramedic and was overjoyed that I was able to find a beautiful little place I could afford on my salary. I spent [e]very spare moment fixing it up and creating the kind of home I had always dreamed of . . . .[220]

In the years that followed, she met Tim, a stone mason and fellow antique lover, and graduated from nursing school. Tim did the stone work on the house himself, and Susette braided rugs and planted a garden. In 2000, the day before Thanksgiving, the Kelos were notified that the city was going to take their home to construct a convention center as part of a massive plan for economic redevelopment. The Derys, too, and several other property owners received similar notices. Interestingly, the Italian Dramatic Club, a social organization located next door to one of the condemned houses, was also originally slated for demolition, but was told in 2000 that it could remain in the area. It may have had something to do with the fact that the Italian Dramatic Club is frequented by many prominent Connecticut politicians, including former Governor John Rowland.[221]

The Kelos and the six other families sued, arguing that the condemnation of their property violated the "public use" requirement of both the Connecticut and United States Constitu-

219 Barry Yeoman, *Whose House Is It Anyway?*, AARP MAGAZINE, May & June 2005, at 66, 66; *see also* TIMOTHY SANDEFUR, CORNERSTONE OF LIBERTY: PROPERTY RIGHTS IN 21ST-CENTURY AMERICA 98 (2006).

220 *Hearings, supra* note 217, at 6 (statement of Susette Kelo).

221 Kathleen Edgecomb, *Decision to Save Italian Club Questioned*, THE DAY (New London), Sept. 21, 2000, at A1; SANDEFUR, *supra* note 219, at 98–99.

tions. After they lost in trial court, the Connecticut Supreme Court took up the case directly, and in a four to three decision, upheld the condemnation of the property. The majority indignantly rejected the notion that the Public Use Clause requires anything more than a general benefit to the public. The Connecticut Constitution "requires only that the 'benefit' of the taking be available to the general public," the court held, and "the dramatic economic benefit that the development plan is expected to have for the public in the New London community, namely, the massive projected growths in employment and tax and other revenues" was enough to sustain the condemnation.[222] Moreover, the court endorsed the most extreme form of deference;[223] it even found the *Poletown* decision was *too protective* of property owners, and "decline[d] to follow" it on the grounds that "the application of a 'heightened scrutiny' standard" to condemnations benefiting private parties "is inconsistent with our well established approach of deference to legislative determinations of public use."[224] It concluded:

> [E]conomic development plans that the appropriate legislative authority rationally has determined will promote municipal economic development by creating new jobs, increasing tax and other revenues, and otherwise revitalizing distressed urban areas, constitute a valid public use for the exercise of the eminent domain power under either the state or federal constitution [sic].[225]

In a five to four decision, the United States Supreme Court affirmed the decision and refused to reconsider its deferential attitude toward eminent domain. Just as Justice Brennan had asserted in *Penn Central* that redistributing wealth was a legitimate state interest—while providing no support for that proposition—Justice Stevens asserted without support that "[p]romoting economic development is a traditional and long accepted function of government."[226] And, following *Berman*, the Court reasoned that anything that benefits the public (as determined by the legislature) satisfies the Public Use Clause.[227] The decision confirms the virtually boundless power of state bureaucrats to redistribute private property for whatever reason they determine to be in the public interest.

The justifications Stevens provided for such boundless legis-

222 Kelo v. City of New London, 843 A.2d 500, 552 (Conn. 2004).

223 *See id.* at 527–28 ("Both federal and state courts place an overwhelming emphasis on the legislative purpose and motive behind the taking, and give substantial deference to the legislative determination of purpose.").

224 *Id.* at 528–29 n.39.

225 *Id.* at 531.

226 Kelo v. City of New London, 125 S. Ct. 2655, 2665 (2005).

227 *Id.* at 2662–63.

lative authority were tenuous. For instance, although he pointed to the Mill Act and railroad cases as proof that it would be "difficult to administer" any strict limit on the eminent domain power,[228] those cases prove nothing of the sort. They generally required that any private entity exercising the power of eminent domain must be regulated by the state to ensure that they do not aggrandize to themselves the monopoly profits they gain through exploiting government power: such entities were limited in what they could charge, and were required to serve all customers without discrimination. Under such regulations, as Justice Thomas pointed out, the mills and railroads "were 'public uses' in the fullest sense of the word, because the public could legally use and benefit from them equally."[229] The judiciary did not find this a judicially unmanageable requirement. What's more, some state courts struck down the Mill Acts for violating the public use requirement.[230] When, a year before *Kelo*, the Michigan Supreme Court overruled its *Poletown* decision, it did not find it "difficult to administer" a more meaningful standard of public use.

More important to the outcome of *Kelo* was Stevens' assertion that a lax benefit-to-the-public standard serves "the diverse and always evolving needs of society."[231] This approach to constitutional interpretation is generally called "living constitutionalism,"[232] but *Kelo* reveals that this approach is more appropriately called "dead constitutionalism." Seeing the Constitution as malleable, depending on the circumstances and needs of the moment, results not in a *living* Constitution, but in a Constitution with all sorts of *dead* spots in it. The violence that the Progressives and their progeny have done to the Constitution comes at a price, after all. For example, by allowing the Commerce Clause to mutate into a federal police power giving Congress authority over anything it sees fit to regulate,[233] the Court has transformed the federal government into a government of unenumerated and practically limitless powers.[234] This requires ignoring several explicit passages in the Constitution, such as the statement that

228 *Id.* at 2662.

229 *Id.* at 2681–83 (Thomas, J., dissenting).

230 *See id.* at 2682 n.2 (listing state cases striking down the Mill Acts). *See also* Sandefur, *Natural Rights Perspective, supra* note 67 at 599–601 (discussing cases that struck down the Mill Acts).

231 *Kelo*, 125 S. Ct. at 2662.

232 *See, e.g,* WHITE, *supra* note 112, at 299 (defining "living constitutionalism" as the theory that the Constitution is "an adaptive document that responds to changing social and economic conditions through altered judicial interpretations of its central textual provisions").

233 *See* Gonzales v. Raich, 125 S. Ct. 2195, 2205–06 (2005).

234 *Cf.* United States v. Lopez, 514 U.S. 549, 552 (1995) ("We start with first principles. The Constitution creates a Federal Government of enumerated powers.").

Congress has only those "legislative Powers herein granted."[235] Note the plural of "powers," and the phrase "herein granted." Today's Court simply ignores these words to make way for the regulatory welfare state. Likewise, to avoid striking down various government programs that are "traditional and long accepted," the Court simply rendered the phrase "public use" meaningless. The Progressive Constitution is a Constitution whose clauses are manipulated, bent, stretched, or ignored outright so as to allow the welfare state to accomplish its aims. To call this "living constitutionalism" is perverse, because it is neither living, nor constitutionalism.

Compounding the perversity is the fact that the so-called "liberal" members of the Supreme Court—Justices Stevens, Souter, Ginsberg, and Breyer—all joined in a decision which opens the door to massive "corporate welfare" programs at the expense of the poor and members of minority groups. This might seem paradoxical at first, but the key is that property rights are more important for the poor and powerless than for the rich and influential. Wealthy corporations, after all, have the resources to persuade political bodies to do their will, and this is why one rarely (if ever) sees the homes of wealthy and influential people being bulldozed to build shopping centers. But people like Susette Kelo and Wilhelmina Dery can only rely on the Constitution, and the federal courts, to protect their rights. As James Ely has concluded, *Kelo* "puts the lie to [the] canard" that "judicial solicitude for economic rights [is] favoritism to the wealthy and business interests."[236]

In the end, the *Kelo* decision was really not surprising. Stevens was certainly right that "[f]or more than a century, our public use jurisprudence has . . . afford[ed] legislatures broad latitude in determining what public needs justify the use of the takings power."[237] The Progressive Era decisions which created that "latitude" were based on a rejection of the founding principles of private property and limited government, and Stevens was simply following their direction.

V. REASON FOR HOPE AFTER *KELO*?

It is not that remarkable that the *Kelo* decision would follow *Berman*. What is remarkable is that four Justices dissented, in two strong opinions. These dissents represent the first time in

235 U.S. CONST. art I, § 1.

236 James W. Ely Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2004–2005 CATO SUP. CT. REV. 39, 64 (2005).

237 Kelo v. City of New London, 125 S. Ct. 2655, 2664 (2005).

over a century that any Justice of the Supreme Court has ever held that the Public Use Clause puts any serious limitations on the power of eminent domain. Moreover, these dissenters appear to be the first federal judges ever to openly criticize *Berman*.

Justice O'Connor—the author of *Midkiff*—dissented on the ground that the majority's rule rendered the phrase "public use" meaningless, contradicting a basic rule of interpretation.[238] Since the Due Process Clause requires the government to act in the public's welfare, the majority decision "makes the Public Use Clause redundant with the Due Process Clause, which already prohibits irrational government action."[239] Moreover, equating public use with public benefit would also reduce the Clause to "little more than hortatory fluff,"[240] since the legislature will always declare that its decisions benefit the public.

O'Connor identified three types of condemnations that satisfied the Public Use Clause: (1) takings for government buildings or other actual public uses, (2) transfers to common carriers and public utilities that might be run by private parties, and, most problematically, (3) takings which "serve a public purpose . . . even if the property is destined for subsequent private use."[241] O'Connor cited *Berman* and *Midkiff* as examples of the third type, because in those cases, "the extraordinary, precondemnation use of the targeted property inflicted affirmative harm on society . . . ."[242] Eliminating that harm required taking the property. Since the taking *itself*, as distinguished from the subsequent use of the property, accomplished the legislature's goals, the Public Use Clause was satisfied, and "it did not matter that the property was turned over to private use."[243]

Justice O'Connor's attempt to reconcile *Berman* and her *Midkiff* opinion with her dissent in *Kelo* is deeply unsatisfying, and does not survive Justice Stevens' criticism. As Stevens pointed out, there was nothing affirmatively "harmful" about the property at issue in *Berman*, which was a non-blighted department store.[244] Nor has the law of eminent domain ever limited condemnations to instances of "harmful property use."[245] On the contrary, harmful property use has always been the subject of *nuisance* law, and, in the traditional understanding of government's powers, subject to the *police power*, not the power of emi-

238 *Id.* at 2673 (O'Connor, J., dissenting).
239 *Id.* at 2676.
240 *Id.* at 2673.
241 *Id.*
242 *Id.* at 2674.
243 *Id.*
244 *Id.* at 2666 n.16 (majority opinion).
245 *Id.*

nent domain.[246] But then O'Connor reaches the essential problem with *Kelo* and its ancestry:

> The trouble with economic development takings is that private benefit and incidental public benefit are, by definition, merged and mutually reinforcing. In this case, for example, any boon for Pfizer or the plan's developer is difficult to disaggregate from the promised public gains in taxes and jobs. . . .
>
> . . . .
>
> . . . [W]ho among us can say she already makes the most productive or attractive possible use of her property? The specter of condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory.[247]

Strong as Justice O'Connor's dissent was, it was only Justice Thomas who saw into the philosophical heart of the *Kelo* case. *Midkiff* and *Berman* were both wrongly decided to begin with, he stated, part of "a string of . . . cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning."[248] Employing a scrupulous textual analysis, Justice Thomas pointed out that "the phrase 'public use' contrasts with the very different phrase 'general Welfare' used elsewhere in the Constitution. . . . The Framers would have used some such broader term if they had meant the Public Use Clause to have a similarly sweeping scope."[249] Referring to sources from Blackstone to Kent to Samuel Johnson, Thomas concluded that the Public Use Clause "embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from 'tak[ing] *property* from A. and giv[ing] it to B.'"[250]

As for deference, Thomas was uniquely sensitive to the suspicious nature of this argument. In 1994, Thomas joined with Justice Scalia in rejecting the "picking and choosing among various rights to be accorded 'substantive due process' protection."[251]

246 Alas, another philosophical conundrum arising from the Supreme Court's Fifth Amendment cases is to confuse the police power (the government's power to defend the health, safety, and welfare of the people) with the power of eminent domain (used to provide public goods). This error began in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), and was reiterated in Justice O'Connor's *Midkiff* decision, 467 U.S. 229, 240 (1984) ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers."). Under the police power as properly understood, government may eradicate "harmful property use"—i.e., nuisances—without paying any compensation at all. In *Kelo*, Justice O'Connor admitted this error and characterized one of the most important lines in *Midkiff* as dictum! *Kelo,* 125 S. Ct. at 2675 (O'Connor, J., dissenting).

247 *Kelo,* 125 S. Ct. at 2675–76 (O'Connor, J., dissenting).

248 *Id.* at 2678 (Thomas, J., dissenting).

249 *Id.* at 2679–80 (citation omitted).

250 *Id.* (quoting Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798)).

251 United States v. Carlton, 512 U.S. 26, 41 (1994) (Scalia, J., concurring in judg-

The "categorical and inexplicable exclusion of so-called 'economic rights'" from such protection despite the Fifth Amendment's explicit reference to property "unquestionably involves policymaking rather than neutral legal analysis."[252] Likewise, in *Kelo*, Thomas compared the deference that the majority applied to the condemnation of property with the lack of deference in other areas of the law:

> [I]t is most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause, uniquely among all the express provisions of the Bill of Rights. We would not defer to a legislature's determination of the various circumstances that establish, for example, when a search of a home would be reasonable, or when a convicted double-murderer may be shackled during a sentencing proceeding without on-the-record findings, or when state law creates a property interest protected by the Due Process Clause.
>
> Still worse, it is backwards to adopt a searching standard of constitutional review for nontraditional property interests, such as welfare benefits, while deferring to the legislature's determination as to what constitutes a public use when it exercises the power of eminent domain, and thereby invades individuals' traditional rights in real property.[253]

Finally, like O'Connor, Thomas recognized that the rent-seeking problem will cause the *Kelo* decision to lay a disproportionate burden on the poor and those with less political power. "[E]xtending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful."[254]

The dissents give reason for hope. They present solid and persuasive arguments, which will influence future legal thinkers. More importantly, they reveal a willingness to reconsider some of the most pernicious aspects of the last seventy years of Supreme Court jurisprudence. *Berman* and *Midkiff* were unanimous and their holdings crystal clear. The same cannot be said of even of such atrocities as *Dred Scott, Korematsu, Plessy,* or *Nebbia*. Yet it is hard to imagine, fifty years after the holdings in any of those cases, four justices writing such powerful dissents challenging their basic holdings. In fact, there are very few instances of Justices so directly challenging the philosophical trend of the Court's

ment).

252 *Id.* at 41–42.

253 *Kelo,* 125 S. Ct. at 2684–85 (Thomas, J., dissenting) (citations omitted).

254 *Id.* at 2686–87.

decisions.

Kelo stands at one end of a long debate between two fundamentally differing views of the American Constitution. One, which I have called the Lockean view, sees government as a tool for protecting the rights of individuals against the wrongs of others, and sees the overriding goal of constitutionalism as preventing government from being perverted into a tool for violating those rights. The other view, following Blackstone and Hobbes, sees the government as primary and individuals as secondary, and believes that rights are created by the society for certain prudential reasons, and when society's "diverse and always evolving needs" require that the citizen relinquish those rights, the courts should not stand in the way. American legal history has been profoundly shaped by these two different outlooks, from Chase and Iredell's dispute in *Calder* to the decisions in *Kelo*, each of which quotes the corresponding *Calder* opinion that supports it.

It is hoped that the legal community will take the dissents in *Kelo* seriously. As Justice Thomas so aptly puts it, "[s]omething has gone seriously awry with this Court's interpretation of the Constitution."[255] Setting it right will require a careful consideration of fundamental principles. Those principles were severely damaged by a philosophical movement that abandoned notions of individual liberty and private property. The consequences of that movement, in eminent domain as well as other areas of the law, have been disastrous. But so much of our world has been built on those errors that fixing the problem will require courage, strength, and a great deal of patience.

CONCLUSION

Kelo v. New London hardly came out of the blue. It was a logical next step, given the gradual erosion of the Founders' vision as enunciated in the Declaration of Independence and the Constitution. Those who were shocked by the outcome of that decision, and by the abuse of eminent domain across the nation, must understand the philosophical background of the fight they are waging. Only by challenging the assumptions of the modern Progressive state can they hope to prevail, and to restore respect for the fundamental right of private property.

255 *Id.* at 2685.

Judicial Usurpation of Legislative Power: Why Congress Must Reassert its Power to Determine What is "Appropriate Legislation" to Enforce the Fourteenth Amendment

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INTRODUCTION

Throughout the past decade, the United States Supreme

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Court has pursued a rather meticulous course of evaluating the constitutional bases for legislative enactments passed by Congress. This trend has not been limited to legislation enacted pursuant to Congress's authority under Article I of the United States Constitution, but has extended to measures designed to enforce the Fourteenth Amendment. At the same time, the Court has vigorously defended its own authority to delineate the rights of criminal defendants in various contexts, particularly with regard to *Miranda v. Arizona*[1] and its progeny. These seemingly unrelated matters have produced anomalous results regarding the authority of each branch of the Federal Government to enforce individual rights secured by the Constitution. For the sake of the delicate balance of power that the Constitution was designed to maintain, and for the welfare of those individuals who rightly invoke its provisions in court, the U.S. Supreme Court must retreat from its present course of overreaching activism and permit Congress to exercise its constitutional authority to enact more sweeping legislation designed to protect individual rights.

As Justice Scalia noted in his dissenting opinion in *Dickerson v. United States*, "[w]here the Constitution has wished to lodge in one of the branches of the Federal Government some limited power to supplement its guarantees, it has said so."[2] He was referring to provisions such as Section Five of the Fourteenth Amendment, which states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[3] *Dickerson* stands as perhaps the most obvious example of the Court's insistence that it somehow possesses the authority to demand a little more than the Constitution actually requires in order to guarantee that its provisions will not be eroded. Nevertheless, while the Court has recently taken such steps to expand its own prophylactic power, it has simultaneously begun to limit Congress's authority to enact prophylactic legislation designed to enforce the rights protected by the Fourteenth Amendment. The net result has been an unfortunate shift of constitutional prophylactic power from Congress to the federal courts.

The Court began to curtail congressional authority with regard to prophylactic legislation in its 1997 decision in *City of Boerne v. Flores*,[4] a year after its decision in *Seminole Tribe of Florida v. Florida.*[5] In *Seminole Tribe*, the Court held that the Indian Commerce Clause did not give Congress the authority to

1 384 U.S. 436 (1966).
2 530 U.S. 428, 460 (2000) (Scalia, J., dissenting).
3 U.S. CONST. amend. XIV, § 5.
4 521 U.S. 507 (1997).
5 517 U.S. 44 (1996).

abrogate the Eleventh Amendment immunity enjoyed by the states.[6] The case stands for the more general proposition that while Congress may abrogate the states' Eleventh Amendment immunity when it validly enacts legislation under Section Five of the Fourteenth Amendment, it does not have that authority when it acts pursuant to its powers under Article I.

Subsequently, these two decisions ended up on a collision course. Congressional attempts to enforce various legal rights against the states became subject to a complicated judicial inquiry into the constitutional bases of the underlying statutes creating substantive rights. Since Congress possesses the power to abrogate the states' Eleventh Amendment immunity when it enacts legislation to enforce the Fourteenth Amendment, the *Flores* rationale has begun to further limit Congress's abrogation power. Given the fact that legislation is often based on more than one constitutional grant of power, some cases have presented the question of whether Congress has the power to use the abrogation of Eleventh Amendment immunity as an enforcement mechanism to vindicate statutory rights that were created pursuant to Article I authority in conjunction with the powers derived from the Fourteenth Amendment's Enforcement Clause. Consequently, the abrogation option has been denied to Congress in instances where the Court has deemed the prophylactic legislation to be in excess of the power granted in Section Five of the Fourteenth Amendment, even where the underlying substantive statutes have been concededly valid exercises of Article I power.

The net result of these cases has been a judicial usurpation of the power to enforce the guarantees of the Constitution. On the one hand, the U.S. Supreme Court has created its own prophylactic rules to protect the rights of criminal defendants and has even divested Congress of the authority to replace them.[7] On the other hand, the Court has curtailed Congress's authority to enforce the rights contained within the Fourteenth Amendment, notwithstanding the fact that the Constitution clearly grants such enforcement authority to Congress and lacks any provision implying that such authority exists in the Judiciary. If the Court continues on this perilous course, Congress will have to take the steps necessary to reassert its power to determine what legislation is "appropriate" in order to enforce the Fourteenth Amendment.

6 *Id.* at 76.

7 *Dickerson,* 530 U.S. at 444 (declaring *Miranda* to be "a constitutional rule that Congress may not supersede legislatively").

I. THE BATTLE OVER THE RELIGIOUS FREEDOM RESTORATION ACT OF 1993

On November 16, 1993, President Bill Clinton signed the Religious Freedom Restoration Act into law.[8] The Act was passed unanimously by the House of Representatives and with only three dissenting votes in the Senate.[9] It was enacted in response to the U.S. Supreme Court's decision in *Employment Division v. Smith*, which held that the Free Exercise Clause of the First Amendment, made applicable to the states by the Fourteenth Amendment's Due Process Clause, does not require neutral laws of general application that indirectly burden the free exercise of religion to be narrowly tailored to secure a compelling state interest.[10] As the Court explained in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[11] *Church of the Lukumi Babalu Aye, Inc.*, which was decided just five months before the Act was signed into law, held that a challenged enactment must be "justified by a compelling interest" and "narrowly tailored to advance that interest" in circumstances where "the object of a law is to infringe upon or restrict practices because of their religious motivation."[12]

In the "Findings and Declaration of Purposes" section of the Act, Congress stated that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."[13] The purposes of the Act were "to restore the compelling interest test as set forth in *Sherbert v. Verner*[14] and *Wisconsin v. Yoder*[15] and to guarantee its application in all cases where free exercise of religion is substantially burdened," as well as "to provide a claim or defense to persons whose religious exercise is substantially burdened by government."[16] The statute stated that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the relevant governmental actor could demonstrate that the application of the burden to the individual was both "in furtherance of a

8 Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–2000bb-4 (2000).
9 Mockaitis v. Harcleroad, 104 F.3d 1522, 1529 (9th Cir. 1997).
10 494 U.S. 872 (1990).
11 508 U.S. 520, 531 (1993).
12 *Id.* at 533.
13 42 U.S.C. § 2000bb(a)(2) (2000).
14 374 U.S. 398 (1963).
15 406 U.S. 205 (1972).
16 42 U.S.C. § 2000bb(1)–(2).

compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest."[17] The Act permitted "[a] person whose religious exercise [had] been burdened in violation" of the statutory mandate to "assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government."[18]

Prior to its invalidation as applied to the states in *City of Boerne v. Flores*, the Act was upheld by three Courts of Appeals in different applications. In *Equal Employment Opportunity Commission v. Catholic University of America*, the U.S. Court of Appeals for the District of Columbia Circuit rejected a separation of powers challenge to the statute brought by a litigant who contended that the law was an attempt by Congress to "overturn the Supreme Court's interpretation of the Free Exercise Clause."[19] The Court of Appeals declared that the objective of Congress "was to overturn the *effects* of the *Smith* decision, not the decision itself."[20] The Act, according to the Court of Appeals, did "nothing more than substitute a statutory test for the constitutional test that *Smith* found not to be mandated by the Free Exercise Clause in cases where the right of free exercise was burdened by a neutral law of general application."[21] Nevertheless, *Catholic University* was an easy case with regard to the Act because the relevant governmental actor was an agency of the federal government rather than that of a state.[22] Congress undoubtedly possesses the authority to create exceptions to the application of its own laws, provided that the exceptions themselves do not suffer from distinct constitutional infirmities. *Catholic University* involved an application of Title VII of the Civil Rights Act of 1964, making it unnecessary for the Court to address the constitutionality of the Religious Freedom Restoration Act's application to the states. Consequently, it was easy for the Court to affirm the authority of Congress "to determine against whom, and under what circumstances, Title VII and other federal laws will be enforced."[23]

It is worthy of note that the U.S. Supreme Court recently applied the Religious Freedom Restoration Act in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, which involved a claim by a small religious sect that its members were entitled to "receive[] communion by drinking a sacramental tea, brewed

17 *Id.* § 2000bb-1(a), (b)(1)–(2).
18 *Id.* § 2000bb-1(c).
19 83 F.3d 455, 469 (D.C. Cir. 1996).
20 *Id.*
21 *Id.*
22 *Id.* at 457.
23 *Id.* at 470.

from plants unique to the [Amazon Rainforest], that contain[ed] a hallucinogen regulated under the Controlled Substances Act by the Federal Government."[24] The sect had obtained a preliminary injunction blocking enforcement of the federal ban on the sacramental tea, and this grant of a preliminary injunction was ultimately affirmed by the U.S. Supreme Court. The Court concluded that the courts below had not erred "in determining that the [Federal] Government failed to demonstrate, at the preliminary injunction stage, a compelling interest in barring the [sect's] sacramental use of [the tea]."[25] Absent such a showing, the Religious Freedom Restoration Act provided the sect with an exemption from the operation of the Controlled Substances Act.

The U.S. Court of Appeals for the Ninth Circuit was presented with a much more difficult case in *Mockaitis v. Harcleroad*,[26] which involved the Religious Freedom Restoration Act's application to the State of Oregon. Coincidentally, it was Oregon that had secured a victory in *Smith*, prompting Congress to enact the statute in the first place. In *Mockaitis*, the Court of Appeals relied on the Act, in part, to approve declaratory and injunctive relief against the taping of confessions in an Oregon prison.[27]

Conan Wayne Hale was a suspect in three murders and two burglaries.[28] While he was in prison, nearly all of his conversations with visitors were taped, with the sole exception being those conversations that he had with his attorney.[29] The prison authorities were implicitly authorized by an Oregon statute[30] to "intercept and record conversations between inmates and all visitors save their counsel."[31] Hale was fully aware of the fact that approximately ninety percent of his conversations were being recorded.[32]

On April 22, 1996, Father Timothy Mockaitis heard Hale's confession in the jail's visiting booths.[33] Even though Hale was not a Catholic, he was eligible to participate in the Sacrament of Reconciliation because of his status as a baptized Christian.[34] Following the usual protocol, the conversation was recorded. Al-

24 126 S. Ct. 1211, 1216 (2006).
25 *Id.* at 1225.
26 104 F.3d 1522 (9th Cir. 1997).
27 *Id.* at 1534.
28 *Id.* at 1525.
29 *Id.*
30 OR. REV. STAT. § 165.540(2)(a)(B) (2005).
31 *Mockaitis,* 104 F.3d at 1529.
32 *Id.* at 1525, 1533.
33 *Id.* at 1525.
34 *Id.*

though Hale was probably aware of the fact that the recording was taking place, the Court of Appeals was clearly of the view that Father Mockaitis had absolutely no knowledge whatsoever about the taping of the confession.[35]

The very next day, Detective Jeffrey James Carley sought a search warrant to obtain the tape of the confession, which was issued by Judge Bryant Hodges.[36] Shortly thereafter, District Attorney Douglass Harcleroad obtained an order from Judge Kip Leonard to "retain and seal the tape and to prohibit anyone who knew its contents from divulging them without further order of the court."[37] Ultimately, Father Mockaitis and Archbishop Francis E. George brought an action in the U.S. District Court for the District of Oregon seeking the destruction of both the tape itself and the transcript which had been made from it.[38] Judge Owen Panner dismissed the action, and Father Mockaitis and Archbishop George appealed to the U.S. Court of Appeals for the Ninth Circuit, relying on the Religious Freedom Restoration Act.

Without extended debate, the Court of Appeals rejected the State's argument that the Act was an unconstitutional exercise of Congress's power to enforce the provisions of the Fourteenth Amendment. Using the U.S. Supreme Court's language in *Katzenbach v. Morgan*, the Court of Appeals described Section Five of the Fourteenth Amendment as "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[39] The Court found the taping of the confession to be in violation of the Act because it substantially burdened the cleric's free exercise of religion. Although the State's interest in obtaining evidence of criminal activity was assumed to be compelling, the taping of the confession was not the "least restrictive means of furthering that [compelling governmental] interest" because the same kind of evidence could be obtained through diligent work on the part of the police and the detectives.[40] The Court also found the recording to be in violation of the Fourth and Fourteenth Amendments because Oregon's rules of evidence, coupled with the "uniform respect for the character of sacramental confession," gave Father Mockaitis a reasonable expectation of privacy in the contents of the conversation.[41]

35 *Id.*
36 *Id.* at 1524–25.
37 *Id.* at 1526.
38 *Id.* at 1526–27.
39 *Id.* at 1529 (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)).
40 *Id.* at 1530.
41 *Id.* at 1532.

The unique aspect of this case lies in the fact that Hale was actually against the destruction of the tape.[42] He contended that he had confessed to committing the two burglaries but that he had expressly denied committing the murders. Ironically, even though Detective Carley originally sought the tape in order to make the case against Hale, it was Hale who ultimately wanted the tape for his defense. In fact, the Court of Appeals even noted that it was "reasonable to infer that Hale hoped that his words would be recorded and preserved."[43]

In the end, the Court of Appeals agreed with Father Mockaitis and Archbishop George in their argument for declaratory relief, holding that the secret taping of the confession violated the Religious Freedom Restoration Act as well as the Fourth and Fourteenth Amendments.[44] The clergymen also obtained an injunction to "restrain Harcleroad and his agents and employees from further violation of [the Act] and the Fourth Amendment by assisting, participating in or using any recording of a confidential communications [sic] from inmates of the Lane County Jail to any member of the clergy in the member's professional character."[45] These requests for relief were to be granted by the District Court, on remand from the Court of Appeals. Nevertheless, the Court did not see fit to order the destruction of the tape, reasoning that the preservation of the tape for Hale's trial did not substantially burden Father Mockaitis and Archbishop George in the exercise of their religion.[46] After all, Hale was always free to reveal the contents of his own confession. Therefore, the Court permitted the tape to be preserved even as it instructed the District Court to enjoin further violations of the Act and the Fourth and Fourteenth Amendments.

The U.S. Court of Appeals for the Fifth Circuit likewise upheld the Religious Freedom Restoration Act in *Flores v. City of Boerne*,[47] but its decision was ultimately reversed by the U.S. Supreme Court. In *City of Boerne v. Flores*,[48] the Supreme Court invalidated the Act as applied to the states. The case involved St. Peter Catholic Church, which had been built in 1923 and was only able to seat about 230 people.[49] Archbishop P.F. Flores granted permission to the parish to enlarge the building in order to provide seating for the forty to sixty parishioners who were not

42 *Id.* at 1533.
43 *Id.*
44 *Id.* at 1533–34.
45 *Id.* at 1534.
46 *Id.* at 1531.
47 73 F.3d 1352, 1363 (5th Cir. 1996), *rev'd* 521 U.S. 507 (1997).
48 521 U.S. 507 (1997).
49 *Id.* at 511–12.

accommodated at some Sunday Masses, but the City of Boerne's Historic Landmark Commission later denied the Archbishop's request for the necessary building permit on the ground that St. Peter Church was located in a district that was designated as historic. The Archbishop proceeded to bring a suit in the U.S. District Court for the Western District of Texas challenging the permit denial and using the Act as a basis for relief.[50] Although the District Court concluded that the Act exceeded Congress's authority under the Fourteenth Amendment, its judgment was reversed by the Court of Appeals on interlocutory appeal.[51] Ultimately, however, the U.S. Supreme Court granted certiorari.[52]

The Court noted at the outset that the Act was specifically designed to protect the free exercise of religion, applicable to the states by virtue of the Due Process Clause of the Fourteenth Amendment, beyond the requirements of the *Smith* decision.[53] Justice Kennedy, who authored the Court's opinion, reiterated the language in *Ex parte Virginia* by declaring:

> "Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power."[54]

He also stated that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress's enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'"[55]

Nevertheless, Justice Kennedy drew a sharp distinction between legislation designed to enforce the Fourteenth Amendment and legislation which attempts "to determine what constitutes a constitutional violation."[56] In *Catholic University*, the U.S. Court of Appeals for the District of Columbia Circuit had said that "Congress's objective in enacting the [Religious Freedom Restoration Act] was to overturn the *effects* of the *Smith* decision, not the decision itself."[57] In other words, while Congress lacked the authority to overrule the U.S. Supreme Court's interpretation of the

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50 Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1995), *rev'd*, 73 F.3d 1352 (5th Cir. 1996), *rev'd*, 521 U.S. 507 (1997).

51 *Flores*, 73 F.3d at 1362–65 (5th Cir. 1996), *rev'd* 521 U.S. 507 (1997).

52 City of Boerne v. Flores, 519 U.S. 926 (1996).

53 *Flores*, 521 U.S. at 512–13.

54 *Id.* at 517–18 (quoting *Ex parte* Virginia, 100 U.S. 339, 345–46 (1879)).

55 *Id.* at 518 (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976)).

56 *Id.* at 519.

57 EEOC v. Catholic Univ. of Am., 83 F.3d 455, 469 (D.C. Cir. 1996).

Free Exercise Clause of the First Amendment, the Court of Appeals sustained Congress's power to "substitute a statutory test for the constitutional test that *Smith* found not to be mandated by the Free Exercise Clause in cases where the right of free exercise was burdened by a neutral law of general application."[58] *Catholic University*, however, did not involve the Act's application to the states, making it easy for the Court of Appeals to assert that Congress possesses "at least the facial authority to determine against whom, and under what circumstances, Title VII and other federal laws will be enforced."[59] There was no question that Congress had legislative jurisdiction to limit the application of neutral federal laws of general application, but *Flores* posed a more difficult question because the Act purported to limit the application of state law.

Although the U.S. Supreme Court agreed that Section Five of the Fourteenth Amendment gave Congress the power to enforce the Free Exercise Clause of the First Amendment, given that the latter was incorporated within the Fourteenth Amendment's Due Process Clause, the Court did not view the Act as a valid enforcement measure. Instead, the Court saw the statute as an encroachment on its own interpretive authority and declared that "Congress does not enforce a constitutional right by changing what the right is."[60] Justice Kennedy explained the applicable test for evaluating the constitutionality of Section Five legislation by stating that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[61]

The Religious Freedom Restoration Act was found to fail the congruence and proportionality test because it was not limited to the deterrence of actual Free Exercise Clause violations. Instead, it was designed to displace the application of various state laws even in instances where no constitutional violations were present. The statute reached every incidental burden placed on the exercise of religion by neutral laws of general application, while the Constitution only reached those laws which directly targeted religious practices for special legal burdens. The Court noted that "[w]hen the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious be-

58 *Id.*
59 *Id.* at 470.
60 *Flores*, 521 U.S. at 519.
61 *Id.* at 520.

liefs."[62] Therefore, the Act was invalidated as applied to the states, and it could not be used to vindicate Archbishop Flores in his efforts to win an exemption from the application of the City of Boerne's ordinance governing the designation and maintenance of historic landmarks.

Justice Stevens authored a short concurring opinion in which he expressed the view that the Religious Freedom Restoration Act violated the Establishment Clause of the First Amendment. As he saw it, the statute had "provided the Church with a legal weapon that no atheist or agnostic [could] obtain."[63] Citing the Court's decision in *Wallace v. Jaffree*,[64] he declared that "[t]his governmental preference for religion, as opposed to irreligion, [was] forbidden by the First Amendment."[65] Although he did not specifically mention a distinction between the Act's application to federal or state law, Justice Stevens' opinion can only be read as a contention that the statute is likewise unconstitutional as applied to federal law.

The other Justices approached the issue as one regarding legislative jurisdiction, with Justices O'Connor, Souter and Breyer expressing the dissenting view that the underlying holding in *Smith* should be reexamined, and Chief Justice Rehnquist and Justices Kennedy, Thomas, Scalia and Ginsburg adhering to the view that the Act was simply in excess of Congress's power to enforce the Fourteenth Amendment.[66] To these eight Justices, there would be no reason to question the constitutionality of the Act as applied to the federal government because Congress would not need to rely on Section Five of the Fourteenth Amendment to restrict the application of its own laws. Since Justice Stevens saw the Act as a violation of the Establishment Clause, however, his position must necessarily be that the Act is unconstitutional in all of its applications. This logic can be inferred from the fact that the Establishment Clause operates as a substantive limit on the powers of Congress even when legislative jurisdiction is otherwise present. Although Justice Stevens joined the opinion of the Court in *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, which involved the Act's application to the federal government and vindicated the religious sect seeking relief under the Act, there was no constitutional challenge brought against the statute in that case.[67]

62 *Id.* at 535.

63 *Id.* at 537 (Stevens, J., concurring).

64 Wallace v. Jaffree, 472 U.S. 38, 52–55 (1985).

65 *Flores*, 521 U.S. at 537 (Stevens, J., concurring).

66 *Id.* at 544–45 (O'Connor, J., dissenting); *Id.* at 565–66 (Souter, J., dissenting); *Id.* at 566 (Breyer, J., dissenting); *Id.* at 511 (majority opinion).

67 126 S. Ct. 1211, 1225 (2006).

While invalidating the Religious Freedom Restoration Act in *Flores*, the Court relied to some degree on *South Carolina v. Katzenbach*,[68] a precedent upholding the Voting Rights Act of 1965 as a valid exercise of Section Two of the Fifteenth Amendment. The Court viewed the Voting Rights Act as being more directly related to enforcing the Constitution than the Religious Freedom Restoration Act, leaving one to infer that the Enforcement Clauses of the Fourteenth and Fifteenth Amendments should be construed in a similar manner because of the similarities in their wording.

Nevertheless, the Court made no attempt to distinguish its precedents involving the power of Congress to enforce the Thirteenth Amendment. In *Jones v. Alfred H. Mayer Co.*, the Court declared that, "[b]y its own unaided force and effect, the Thirteenth Amendment abolished slavery, and established universal freedom."[69] Justice Stewart, who delivered the opinion of the Court, went on to say that "[w]hether or not the Amendment *itself* did any more than that—a question not involved in this case—it is at least clear that the Enabling Clause of that Amendment empowered Congress to do much more. For that clause clothed Congress with power to pass *all laws necessary and proper for abolishing all badges and incidents of slavery in the United States*."[70] *Jones* upheld 42 U.S.C. § 1982, which provides that "[a]ll citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[71]

In *Runyon v. McCrary*,[72] the Court again upheld sweeping legislation as a valid exercise of Section Two of the Thirteenth Amendment. *Runyon* upheld 42 U.S.C. § 1981, which provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.[73]

It cannot be doubted that these two statutes would fail the "congruence and proportionality" test described in *Flores* if it

68 383 U.S. 301, 308 (1966).
69 392 U.S. 409, 439 (1968) (internal quotation marks omitted).
70 *Id.* at 439 (internal quotation marks omitted).
71 42 U.S.C. § 1982 (2000).
72 427 U.S. 160 (1976).
73 42 U.S.C. § 1981(a) (2000).

were to be applied in the Thirteenth Amendment context. These legislative acts, though passed pursuant to Section Two of the Thirteenth Amendment, cannot be said to be limited to the mere enforcement of the underlying constitutional provision. There are many actions which would violate either § 1981 or § 1982 without violating the Thirteenth Amendment itself. By choosing to rely on its Fifteenth Amendment cases while ignoring its Thirteenth Amendment precedents, the Supreme Court left both a hole in its rationale and a cloud over Congress's power to enforce the Civil War Amendments. The similar wording of these three constitutional provisions, all of which delegated legislative power to Congress that did not exist under the original Constitution, leaves no principled reason for treating one radically different from the other two.

It is, of course, true that the Thirteenth Amendment operates against a broader array of potential transgressors. While the Fourteenth and Fifteenth Amendments limit only governmental entities, the Thirteenth Amendment limits governmental and private actors alike.[74] Although the Thirteenth Amendment's prohibitions have a broader target, the prohibitions themselves are far narrower than those contained in the Fourteenth Amendment. The category of conduct which violates the Fourteenth Amendment is far more inclusive than that which violates the Thirteenth Amendment, potentially leading one to the conclusion that Section Five of the Fourteenth Amendment should be construed as a broader delegation of legislative authority than Section Two of the Thirteenth Amendment. Notwithstanding this reality, the holding in *Flores* appears to indicate the contrary, especially in light of the sweeping legislative enactments upheld in *Jones* and *Runyon*.

The U.S. Supreme Court has not always reconciled its various decisions interpreting the Civil War Amendments, and its cases have often led to implicit anomalies.[75] Perhaps no anomaly is more glaring in this area of the law, however, than the Court's recent practice of meticulously scrutinizing prophylactic legislation designed to enforce the Fourteenth Amendment after upholding such broad legislative mandates passed pursuant to Section Two of the Thirteenth Amendment in *Jones* and *Runyon*.

II. THE COLLISION BETWEEN *FLORES* AND *SEMINOLE TRIBE*

When the U.S. Supreme Court decided *Flores* in 1997, it had

74 *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); *Runyon,* 427 U.S. 160.

75 *See* Ken Gormley, *Racial Mind-Games and Reapportionment: When Can Race Be Considered (Legitimately) in Redistricting?*, 4 U. PA. J. CONST. L., 735, 736 (2002).

already decided *Seminole Tribe of Florida v. Florida*[76] a year earlier. In *Seminole Tribe*, the Court held that the Indian Commerce Clause did not provide Congress with the authority to abrogate the Eleventh Amendment immunity enjoyed by the states.[77] In so holding, the Court rejected its prior plurality decision in *Pennsylvania v. Union Gas Co.*, which held that the Interstate Commerce Clause gave Congress the power to abrogate state sovereign immunity and declared that the federal power to regulate interstate commerce would be "incomplete without the authority to render States liable in damages."[78] Chief Justice Rehnquist, who authored the opinion of the Court in *Seminole Tribe*, made it clear that "[t]he Eleventh Amendment restricts judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."[79] The Court distinguished its decision in *Fitzpatrick v. Bitzer*,[80] which held that Section Five of the Fourteenth Amendment did grant Congress the authority to abrogate the states' Eleventh Amendment immunity. In *Seminole Tribe*, Chief Justice Rehnquist explained that "the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the preexisting balance between state and federal power achieved by Article III and the Eleventh Amendment."[81]

The principle that Article I does not give Congress the authority to abrogate the states' Eleventh Amendment immunity remains the law despite the Court's recent decision in *Central Virginia Community College v. Katz*.[82] In *Central Virginia Community College*, the Court declared that "the power to enact bankruptcy legislation was understood to carry with it the power to subordinate state sovereignty, albeit within a limited sphere."[83] Justice Stevens, who delivered the opinion of the Court, explained that, "[i]n ratifying the Bankruptcy Clause, the States acquiesced in a subordination of whatever sovereign immunity they might otherwise have asserted in proceedings necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts."[84] He went on to state that "Congress may, at its option, either treat States in the same way as other creditors insofar as

76 Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).
77 *See id.* at 76.
78 491 U.S. 1, 19 (1989) (plurality opinion), *overruled by Seminole Tribe*, 517 U.S. 44.
79 517 U.S. at 72–73.
80 427 U.S. 445, 456 (1976).
81 *Seminole Tribe,* 517 U.S. at 65–66.
82 126 S. Ct. 990 (2006).
83 *Id.* at 1004.
84 *Id.* at 1005.

concerns Laws on the subject of Bankruptcies or exempt them from operation of such laws."[85] This power, according to the Court, "arises from the Bankruptcy Clause itself" and is not dependent on any purported abrogation of the states' Eleventh Amendment immunity by Congress.[86] Therefore, *Seminole Tribe* remains good law despite the Court's holding in *Central Virginia Community College* that "[a] proceeding initiated by a bankruptcy trustee to set aside preferential transfers by the debtor to state agencies" is not barred by sovereign immunity.[87]

At first glance, one might conclude that *Flores* and *Seminole Tribe* addressed wholly unrelated matters that one could not implicate in the same case. Nevertheless, the holdings in these two decisions later collided to produce a situation in which Congress was stripped of its power to provide the abrogation remedy in circumstances where federal legislative jurisdiction to enact the substantive statutory provisions was beyond question. The problem began just two years after *Flores* was decided.

A. The *College Savings Bank* and *Florida Prepaid Cases*

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, the Court held that the Trademark Remedy Clarification Act did not validly abrogate the states' sovereign immunity.[88] Similarly, in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Court held that the Patent and Plant Variety Protection Remedy Clarification Act did not validly abrogate the states' Eleventh Amendment immunity.[89] Although the Patent Clause unambiguously gives Congress legislative jurisdiction to regulate the subject matter, that provision could not be the basis for an abrogation of Eleventh Amendment immunity because it is contained in Article I of the Constitution. Congress amended the patent laws in 1992 and "expressly abrogated the States' sovereign immunity from claims of patent infringement,"[90] but *Seminole Tribe* foreclosed any argument to the effect that the Patent Clause, an Article I power, provided Congress with the constitutional authority to do so. Therefore, pursuant to *Fitzpatrick*, the statutory abrogations involved in these two cases could only be sustained if they were validly enacted by Congress under Section Five of the Fourteenth Amendment.

85 *Id*. (internal quotation marks omitted).
86 *Id*.
87 *Id.* at 994.
88 527 U.S. 666, 691 (1999).
89 527 U.S. 627, 647 (1999).
90 *Id.* at 630.

In *College Savings Bank*, the Court rejected the argument that the Trademark Remedy Clarification Act, which subjected the states to suits brought under section 43(a) of the Trademark Act of 1946 for "false and misleading advertising,"[91] was a valid exercise of Congress's power to enforce the Due Process Clause of the Fourteenth Amendment. Justice Scalia, who delivered the opinion of the Court, noted at the outset that under *Flores*, the object of Section Five legislation "must be the carefully delimited remediation or prevention of constitutional violations."[92] College Savings Bank contended that Congress had passed the Act to prevent state deprivations, without due process of law, of two species of property rights. The first was characterized as "a right to be free from a business competitor's false advertising about its own product," and the second was described as "a more generalized right to be secure in one's business interests."[93] The Court was not convinced that either right qualified as a property right protected by the Fourteenth Amendment.

Rejecting the first asserted right, the Court declared that "[t]he hallmark of a protected property interest is the right to exclude others."[94] The Trademark Remedy Clarification Act bore "no relationship to any right to exclude,"[95] making College Savings Bank's argument all the more difficult. Justice Scalia explained that "Florida Prepaid's alleged misrepresentations concerning its own products intruded upon no interest over which [College Savings Bank] had exclusive dominion."[96] He went on to say that even if the tort of unfair competition could be viewed as a mechanism to protect property interests, "not everything which *protects* property interests is designed to remedy or prevent *deprivations* of those property interests."[97]

The Court likewise rejected College Savings Bank's second alleged property interest. Reasoning that no business asset of College Savings Bank was impinged upon by Florida Prepaid's false advertising, Justice Scalia made it clear that there was no deprivation of property at issue in the case. While it was conceded that any state taking of business assets would qualify as a deprivation of property under the Due Process Clause, College Savings Bank was wholly unable to identify a loss of such an asset. Since the Court found no underlying violation of the Fourteenth Amendment, it saw no reason to consider whether the

91 *Coll. Sav. Bank,* 527 U.S. at 669.
92 *Id.* at 672.
93 *Id.*
94 *Id.* at 673.
95 *Id.*
96 *Id.*
97 *Id.* at 674.

prophylactic measure taken pursuant to Section Five was "genuinely necessary" to prevent an actual constitutional violation.[98] It was also determined that Florida's activities in interstate commerce did not constitute a waiver of the state's Eleventh Amendment immunity, leaving the federal courts without jurisdiction to entertain the suit.

Justice Stevens, in a dissenting opinion, took issue with the Court's determination that the Trademark Remedy Clarification Act was not a valid exercise of Section Five of the Fourteenth Amendment. He viewed a state's "deliberate destruction of a going business" as "a deprivation of property within the meaning of the Due Process Clause."[99] Emphasizing that the Act was a valid exercise of Congress's Section Five power, even if Florida Prepaid's allegedly false advertising did not itself amount to a constitutional violation, he declared that "the validity of a congressional decision to abrogate sovereign immunity in a category of cases" depended on "whether Congress had a reasonable basis for concluding that abrogation was necessary to prevent violations that would otherwise occur" rather than on "the strength of the claim asserted in a particular case within that category."[100] Justice Stevens concluded his dissent by noting that Congress's judgment commanded more respect, especially in light of "the presumption of validity that supports all federal statutes."[101]

In *Florida Prepaid*, the U.S. Supreme Court rejected a similar attempt by College Savings Bank to take advantage of a purported abrogation of the states' Eleventh Amendment immunity. College Savings Bank, a New Jersey chartered savings bank, obtained a patent for a financing methodology "designed to guarantee investors sufficient funds to cover the costs of tuition for college[]."[102] The Florida Prepaid Postsecondary Education Expense Board, which was created by the State of Florida, administered similar "tuition prepayment contracts" that were available to residents of Florida. College Savings Bank ultimately brought a patent infringement action against Florida Prepaid pursuant to 35 U.S.C. § 271(a), arguing that Florida Prepaid had infringed its patent by administering a distinct tuition prepayment program. Two years before the action was brought, Congress had enacted the Patent and Plant Variety Protection Remedy Clarification Act, which abrogated the states' sovereign immunity in patent in-

98 *Id*. at 675.
99 *Id*. at 693 (Stevens, J., dissenting).
100 *Id*.
101 *Id*.
102 Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 631 (1999).

fringement cases.[103] Nonetheless, Congress enacted the Act, with its purported abrogation, before *Seminole Tribe* and *Flores* were decided, making it necessary for the Court to determine the Act's constitutionality pursuant to the standards enunciated in those cases.

Article I, Section Eight of the U.S. Constitution gives Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[104] This provision, however, could not sustain an abrogation of the states' Eleventh Amendment immunity because of the rule of *Seminole Tribe*. Since Article I could not provide a basis for such an abrogation, College Savings Bank contended that the Patent Remedy Act was a valid exercise of Congress's power to enforce the Fourteenth Amendment.[105] Because *Seminole Tribe* foreclosed the arguments under the Patent and Interstate Commerce Clauses, College Savings Bank sought refuge under the rule of *Fitzpatrick*.

Chief Justice Rehnquist, who delivered the opinion of the Court, first pointed out that Congress had "identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations."[106] Moving on to the inquiry required under *Flores*, he noted that under *Brown v. Duchesne*[107] and *Consolidated Fruit-Jar Co. v. Wright*,[108] patents are property protected by the Due Process Clause of the Fourteenth Amendment. Although College Savings Bank likewise argued that the Fifth Amendment's Just Compensation Clause, applicable to Florida by virtue of the Fourteenth Amendment's Due Process Clause, provided an additional reason to justify prophylactic legislation under the Enforcement Clause, the Court did not agree. Due to the fact that Congress had been "so explicit about invoking its authority under Article I and its authority to prevent a State from depriving a person of property without due process of law under the Fourteenth Amendment," the Court viewed the omission of the Just Compensation Clause from the statutory text and the legislative history of the Patent Remedy Act as fatal to College Savings Bank's argument that the Just Compensation Clause provided an alternative ground to uphold the statute.[109]

103 *See id.* at 631–32.
104 U.S. CONST. art. I, § 8, cl. 8.
105 *Fla. Prepaid*, 527 U.S. at 633.
106 *Id.* at 640.
107 60 U.S. (19 How.) 183 (1857).
108 94 U.S. 92 (1877).
109 *Fla. Prepaid,* 527 U.S. at 642 n.7.

Reviewing the Patent Remedy Act under the *Flores* standard, the Court sought to identify the underlying constitutional violation that Congress attempted to remedy. Relying on its prior decisions in *Parratt v. Taylor*,[110] *Hudson v. Palmer*,[111] and *Zinermon v. Burch*,[112] the Court declared that "a State's infringement of a patent, though interfering with a patent owner's right to exclude others, does not by itself violate the Constitution."[113] This is because a deprivation of a constitutionally protected property interest by a state actor does not violate the Fourteenth Amendment if the state actor provides due process. What is unconstitutional, in this context, "is the deprivation of such an interest *without due process of law*."[114] Therefore, the Court made it clear that "only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent could a deprivation of property without due process result."[115] It was likewise noted that Florida provided both a legislative remedy[116] and a judicial remedy[117] "to patent owners for alleged infringement on the part of the State."[118]

While the Court was sympathetic to the "need for uniformity in the construction of patent law," it insisted that such a factor belonged to the "Article I patent-power calculus" and not "to any determination of whether a state plea of sovereign immunity deprives a patentee of property without due process of law."[119] The Court went on to say that Congress, while enacting the Patent Remedy Act, had focused on negligent infringements of patents by the states and not on examples of reckless or intentional infringements. Under *Daniels v. Williams*, negligent conduct by a state actor which results in an unintended injury to a person's liberty or property does not constitute a "deprivation" for Due Process Clause purposes.[120] Consequently, the Court was persuaded that Congress's purported abrogation of the states' Eleventh Amendment immunity was in response to various patent infringements by states in which no deprivations of property could be established, let alone deprivations of property without due

110 451 U.S. 527 (1981).
111 468 U.S. 517 (1984).
112 494 U.S. 113 (1990).
113 *Fla. Prepaid,* 527 U.S. at 643.
114 *Zinermon,* 494 U.S. at 125.
115 *Fla. Prepaid,* 527 U.S. at 643.
116 *See* Fla. Stat. § 11.065 (2005).
117 *See* Jacobs Wind Elec. Co. v. Fla. Dept. of Transp, 626 So.2d 1333, 1337 (Fla. 1993).
118 *Fla. Prepaid,* 527 U.S. at 644 n.9.
119 *Id.* at 645.
120 474 U.S. 327, 331 (1986).

process of law. The Court emphasized that "Congress did nothing to limit the coverage of the Act to cases involving arguable constitutional violations, such as where a State refuses to offer any state-court remedy for patent owners whose patents it had infringed."[121] Congress made no "attempt to confine the reach of the Act by limiting the remedy to certain types of infringement, such as nonnegligent infringement or infringement authorized pursuant to state policy," nor did it provide for suits "only against States with questionable remedies or a high incidence of infringement."[122] Therefore, the Patent Remedy Act, unable to pass the "congruence and proportionality" test established in *Flores*, was invalidated as being in excess of Congress's power under Section Five of the Fourteenth Amendment. This was largely because the underlying state conduct, in most instances reached by the statute, was not itself unconstitutional.

Justice Stevens, in a dissenting opinion joined by Justices Souter, Ginsburg and Breyer, questioned whether the *Daniels* standard for identifying a deprivation of a constitutionally protected property interest applied in the patent infringement context.[123] He contended that "the *Daniels* line of cases ha[d] only marginal relevance" to the case at hand because College Savings Bank was alleging that Florida Prepaid's infringement had been willful.[124] He also noted that it was reasonable for Congress to assume that state remedies for patent infringement did not exist because it "had long ago pre-empted state jurisdiction over patent infringement cases."[125] Justice Stevens went on to point out that *Alden v. Maine*, which was decided that same day, and which held that "the powers delegated to Congress under Article I . . . do not include the power to subject nonconsenting States to private suits for damages in state courts,"[126] would likely preclude Congress from requiring state courts to "entertain infringement actions when a State is named as a defendant."[127] He asserted that the Patent Remedy Act passed the "congruence and proportionality" test established in *Flores* because its sole purpose was to "abrogate the States' sovereign immunity as a defense to a charge of patent infringement."[128] He reasoned that "congruence [was] equally precise whether infringement of patents by state actors [was] rare or frequent," since the impact of

121 *Fla. Prepaid,* 527 U.S. at 646–47.
122 *Id.* at 647.
123 *Id.* at 653 (Stevens, J., dissenting).
124 *Id.*
125 *Id.* at 658.
126 527 U.S. 706, 712 (1999).
127 *Fla. Prepaid,* 527 U.S. at 659 (Stevens, J., dissenting).
128 *Id.* at 662.

the statute would "expand in precise harmony with the growth of the problem that Congress anticipated and sought to prevent."[129] This was because the statute would only apply in instances where a state raised its sovereign immunity as a defense to a patent infringement action, regardless of how common or rare such infringements were.

Florida Prepaid and *College Savings Bank*, which were decided on the same day, were only the first examples of the problems created as a result of the collision between *Seminole Tribe* and *Flores*. Nonetheless, they continue to serve as a stark illustration of the resulting enforcement anomaly. Although Article I undoubtedly confers on Congress the legislative jurisdiction to regulate patents and trademarks, *Seminole Tribe* prevents Congress from using that power to abrogate the states' Eleventh Amendment immunity in infringement cases. While *Fitzpatrick* permits such an abrogation pursuant to Section Five of the Fourteenth Amendment, the narrow construction given to that constitutional provision in *Flores* significantly impedes the use of that legislative option.

The power vested in Congress by the Copyright and Patent Clause is very extensive, as was recently illustrated by the U.S. Supreme Court's decision in *Eldred v. Ashcroft*.[130] In *Eldred*, the Court declared that "the Copyright Clause empowers Congress to prescribe 'limited Times' for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future."[131] In so holding, the Court rejected the argument that "a time prescription, once set, becomes forever fixed or inalterable."[132] Justice Ginsburg, who authored the opinion of the Court, likewise noted that the "congruence and proportionality" standard established in *Flores* was not applicable in *Eldred* and could not be invoked to ensure that legislation extending copyrights was appropriately in pursuit of the purposes of the Copyright and Patent Clause. She contrasted the two different constitutional provisions by saying that "Section 5 authorizes Congress to *enforce* commands contained in and incorporated into the Fourteenth Amendment," while the Copyright and Patent Clause "empowers Congress to *define* the scope of the substantive right."[133] Consequently, the deference given to Congress in the Article I context is much broader than that shown in *Flores*, which involved an interpretation of the Enforcement Clause.

129 *Id*. at 662–63.
130 537 U.S. 186 (2003).
131 *Id*. at 199.
132 *Id*. (internal quotation marks omitted).
133 *Id*. at 218.

This deference, however, did not help College Savings Bank because of the rule enunciated in *Seminole Tribe*. Notwithstanding the extensive nature of Congress's authority under the Copyright and Patent Clause, the Eleventh Amendment operated as a barrier to federal adjudicatory jurisdiction in *Florida Prepaid* and *College Savings Bank*. The U.S. Supreme Court's description of the Trademark Remedy Clarification Act and the Patent Remedy Act as disproportionate attempts to enforce the Fourteenth Amendment may make some sense, but the broad nature of these statutes is unsurprising when the timing of their enactment is considered. The Patent Remedy Act, for instance, was enacted in response to *Chew v. California*,[134] which was a 1990 decision of the U.S. Court of Appeals for the Federal Circuit. It held that the patent statutes did not contain the clear statement of Congress's intent to abrogate the states' sovereign immunity required under the U.S. Supreme Court's decision in *Atascadero State Hospital v. Scanlon*.[135] The U.S. Supreme Court's decision in *Pennsylvania v. Union Gas Co.*, issued in 1989, affirmed Congress's authority to abrogate the states' Eleventh Amendment immunity pursuant to the Commerce Clause.[136] Congress, relying on *Union Gas Co.*, passed the Patent Remedy Act in 1992 and abrogated the states' Eleventh Amendment immunity in patent infringement cases pursuant to its powers under the Patent Clause, the Commerce Clause, and Section Five of the Fourteenth Amendment. Four years later, *Seminole Tribe* overruled *Union Gas Co.* and made it clear that Article I powers cannot be used to effect such abrogations.[137] When the Patent Remedy Act was passed, however, Congress saw no need to tailor the remedy to the limits of its authority under the Enforcement Clause of the Fourteenth Amendment, given that two clauses in Article I were also being invoked and that *Seminole Tribe* had not yet been decided.

B. *Kimel v. Florida Board of Regents*

The enforcement anomaly that began in 1999 with *Florida Prepaid* and *College Savings Bank* continued into the Court's next term. In *Kimel v. Florida Board of Regents*, the U.S. Supreme Court held that the Age Discrimination in Employment Act of 1967, as amended in 1974 to cover the states by abrogating their sovereign immunity, was in excess of Congress's power to

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[134] 893 F.2d 331 (Fed. Cir. 1990).

[135] 473 U.S. 234 (1985).

[136] 491 U.S. 1, 13–14 (1989) (plurality opinion), overruled by Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

[137] *Seminole Tribe*, 517 U.S. at 72–73.

enforce the Fourteenth Amendment.[138] The Act makes it illegal for an employer, governmental or private, "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[139] It protects individuals age forty and over, subject to certain exceptions specifically enumerated in the text of the Act. Various plaintiffs sued their state employers under the Act, alleging that they were discriminated against on the basis of age.[140] The defendants contended that the Eleventh Amendment barred the suits. The cases were consolidated on appeal by the U.S. Court of Appeals for the Eleventh Circuit, which held that the states were immune from suits brought in federal court for violations of the Act.[141] Ultimately, the cases reached the U.S. Supreme Court.

After conceding that Congress had unequivocally expressed its intent to abrogate the states' Eleventh Amendment immunity, the Court went on to decide whether the Age Discrimination in Employment Act was a valid exercise of Congress's power under Section Five of the Fourteenth Amendment. The opinion of the Court in *Kimel* was delivered by Justice O'Connor, who noted at the outset that the application of the Act's substantive provisions to the states had already been upheld.[142] In *EEOC v. Wyoming*, the U.S. Supreme Court held that the Act was a valid exercise of Congress's authority to regulate interstate commerce, making it unnecessary for the Court to determine whether Section Five of the Fourteenth Amendment provided an alternative ground for upholding the statute.[143] The Eleventh Amendment, of course, does not bar suits brought by the United States against a state.[144]

In *Kimel*, however, the Court had to resolve the Enforcement Clause question. Although *EEOC* had found the Act to be a valid exercise of Congress's power under the Interstate Commerce Clause, the rule of *Seminole Tribe* prevented the plaintiffs in *Kimel* from using that precedent to assert federal adjudicatory jurisdiction.[145] The Court began its discussion of the Enforcement Clause issue by declaring that Congress's power to enforce the Fourteenth Amendment "includes the authority both to remedy

138 528 U.S. 62, 91 (2000).
139 29 U.S.C. § 623(a)(1) (2000).
140 *Kimel*, 528 U.S. at 66.
141 Kimel v. Fla. Bd. of Regents, 139 F.3d 1426, 1433 (1998), *aff'd*, 528 U.S. 62.
142 *See Kimel,* 528 U.S. at 78.
143 460 U.S. 226 at 243 (1983).
144 *See* Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 n.9 (2001).
145 *Kimel*, 528 U.S. at 78–79.

and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."[146] Nonetheless, it was also noted that the determination of "whether purportedly prophylactic legislation constitutes appropriate remedial legislation, or instead effects a substantive redefinition of the Fourteenth Amendment right at issue, is often difficult."[147]

Despite any perceived difficulty posed by the question, the Court concluded that the Age Discrimination in Employment Act was not a valid exercise of Section Five of the Fourteenth Amendment because the Act's substantive provisions were "disproportionate to any unconstitutional conduct that conceivably could be targeted."[148] Relying on its prior decisions in *Gregory v. Ashcroft*,[149] *Vance v. Bradley*,[150] and *Massachusetts Board of Retirement v. Murgia*,[151] the Court explained that "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."[152] This is because age is not a suspect classification for Equal Protection Clause purposes. Age classifications made by a state are not inherently suspect because older persons have not been subject to a "history of purposeful unequal treatment,"[153] nor are they members of a "discrete and insular minority."[154] Unlike classifications based on race or gender, age classifications cannot properly be characterized as "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy."[155] Therefore, as the Court made clear in *Kimel*, "a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests," even though age may prove to be an "inaccurate proxy" from time to time.[156]

According to the Court, the Age Discrimination in Employment Act required far more of state employers than did the Equal Protection Clause of the Fourteenth Amendment. The Act included exceptions permitting employers to defend themselves against suits by demonstrating that age was "a bona fide occupa-

146 *Id.* at 81 (citing City of Boerne v. Flores, 521 U.S. 507, 518 (1997)).
147 *Id.* at 81 (citing *Flores,* 521 U.S. at 519–20).
148 *Id.* at 83.
149 501 U.S. 452, 473 (1991).
150 440 U.S. 93, 111 (1979).
151 427 U.S. 307, 317 (1976) (per curiam).
152 *Kimel,* 528 U.S. at 83.
153 *Murgia,* 427 U.S. at 313.
154 *Kimel,* 528 U.S. at 83.
155 City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985).
156 *Kimel,* 528 U.S. at 84.

tional qualification reasonably necessary to the normal operation of the particular business" or that "the differentiation [was] based on reasonable factors other than age."[157] The plaintiffs argued that these exceptions narrowed the reach of the Act, thereby making it a more "congruent" and "proportional" prophylactic measure designed to enforce the Equal Protection Clause.[158] The Court rejected this argument, however, because it had narrowly construed these exceptions in *Western Air Lines, Inc. v. Criswell*[159] and *Hazen Paper Co. v. Biggins*,[160] leaving the Act's substantive requirements "at a level akin to [the Court's] heightened scrutiny cases under the Equal Protection Clause."[161] The Act, so construed, prohibited employers from using age as a proxy for other characteristics related to an employee's work. Given that construction, the Act's protection was deemed to extend far beyond that provided by the Fourteenth Amendment.

The Court went on to say that "Congress's failure to uncover any significant pattern of unconstitutional discrimination" only served to confirm that "Congress had no reason to believe that broad prophylactic legislation was necessary in this field."[162] Justice O'Connor explained that Congress's purpose for enacting the Act was to raise the level of scrutiny applicable in age discrimination cases rather than to enforce the guarantees of the Fourteenth Amendment. This purpose, of course, justified a valid exercise of the Commerce Clause power, but the rule of *Seminole Tribe* prevented that provision from being used to effect an abrogation of the states' Eleventh Amendment immunity. Since the Act was not viewed as a valid abrogation of the Eleventh Amendment immunity enjoyed by the defendant state entities, the suits were dismissed.

Justice Stevens authored a dissenting opinion, joined by Justices Souter, Ginsburg and Breyer.[163] Focusing more on the rule enunciated in *Seminole Tribe* than on the *Flores* standard, Justice Stevens insisted that "Congress's power to authorize federal remedies against state agencies that violate federal statutory obligations is coextensive with its power to impose those obligations on the States in the first place."[164] In his view, *Seminole Tribe* had been wrongly decided, forcing the Court to "resolve vexing questions of constitutional law" respecting Congress's authority

157 29 U.S.C. § 623(f)(1) (2000).
158 *Kimel,* 528 U.S. at 82–83.
159 472 U.S. 400, 423 (1985).
160 507 U.S. 604, 616 (1993).
161 *Kimel,* 528 U.S. at 88.
162 *Id.* at 91.
163 *Id.* at 92 (Stevens, J., dissenting).
164 *Id.* at 93.

to enforce the Fourteenth Amendment.[165] After all, the substantive provisions of the Age Discrimination in Employment Act had already been upheld in *EEOC v. Wyoming* as a valid exercise of Congress's power to regulate interstate commerce.[166] Had *Union Gas Co.* not been overruled by *Seminole Tribe*, Article I would have provided a constitutionally adequate basis for effecting the desired abrogation of the states' sovereign immunity. He also questioned the idea that the Judicial Branch should serve as the guardian of state sovereignty.

In an intricate manner, Justice Stevens described the structural protections provided to the states by the Constitution. He referred to Article I's allocation to the states of equal representation in the Senate as the Constitution's "principal structural protection for the sovereignty of the several States."[167] After emphasizing that point, he went on to note that "[t]he electors who choose the President are appointed in a manner directed by the state legislatures," providing structural protection for the states as they fulfill their role in selecting the only governmental figure who can sign or veto statutes passed by Congress.[168] These structural safeguards in the Constitution, according to Justice Stevens, made the Court's "ancient judge-made doctrine of sovereign immunity" unnecessary.[169]

Finally, Justice Stevens highlighted his contempt for the holding in *Seminole Tribe* by declaring that the Eleventh Amendment only placed "a textual limitation on the diversity jurisdiction of the federal courts."[170] In his view, the Eleventh Amendment did not apply to federal question cases, making it wholly inapplicable to the *Kimel* case. He suggested that it made no sense to permit Congress to abrogate the states' Eleventh Amendment immunity since it was a jurisdictional limit akin to those contained in Article III, but he nevertheless construed the Amendment's text to preclude its application to the case before the Court.

Perhaps the U.S. Supreme Court's broad construction of the Age Discrimination in Employment Act in *Kimel* benefits most older workers, particularly those who work for private employers. Interpreting the Act more narrowly would likely have preserved the abrogation of the states' Eleventh Amendment immunity, providing a more effective remedy for state workers but sacrific-

165 *Id.* at 98.
166 460 U.S. 226, 243 (1983).
167 *Kimel*, 528 U.S. at 93 (Stevens, J., dissenting).
168 *Id.* at 95 n.4.
169 *Id.* at 93.
170 *Id.* at 97.

ing some of the substantive protections that the Act currently provides to non-state workers. The Court's subsequent decision in *Smith v. City of Jackson* further illustrates the breadth of the Act's protection by holding that the Act permits recovery under a disparate-impact theory of liability in certain instances.[171] The Court's recent decision in *Clark v. Martinez* makes it clear that the same statute cannot be construed differently in some cases merely because some applications raise serious constitutional questions while others do not.[172] Therefore, one could argue that the construction of the Act in *Kimel* saved its effectiveness for the overwhelming majority of older workers in the United States. Notwithstanding this reality, however, Justice Stevens' contention that *Seminole Tribe* forced the Court to reach an otherwise inconsequential constitutional inquiry is noteworthy, especially when coupled with his view that the Eleventh Amendment has no application to federal question cases. What is true, in any event, is the fact that the *Flores* standard, enunciated in the aftermath of *Seminole Tribe*, severely limited Congress's authority to enforce concededly valid federal legislation, as was the case with the Act at issue in *Kimel*. The Act, of course, was upheld in *EEOC*.[173] Had the Court adopted a construction of Section Five of the Fourteenth Amendment similar to that given to Section Two of the Thirteenth Amendment in *Jones* and *Runyon*, the plaintiffs in *Kimel* could have proceeded with their cases in federal court despite the holding in *Seminole Tribe*.

C. *United States v. Morrison*

Later that year, the U.S. Supreme Court decided another case involving Congress's power to enforce the Fourteenth Amendment. Unlike *College Savings Bank*, *Florida Prepaid* and *Kimel*, *United States v. Morrison*[174] involved neither the Eleventh Amendment nor a concededly valid substantive statutory scheme. Instead, *Morrison* involved a constitutional challenge to the Violence Against Women Act, which provided a federal civil remedy to vindicate victims of gender-motivated violence.[175] The case began when a female student at Virginia Polytechnic Institute sued two members of the Institute's football team under the Act, accusing them of raping her. The Act defined a crime of violence "motivated by gender" as "a crime of violence committed because of gender or on the basis of gender, and due, at least in

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171 125 S. Ct. 1536, 1546 (2005).
172 125 S. Ct. 716, 726 (2005).
173 EEOC v. Wyoming, 460 U.S. 226 (1983).
174 529 U.S. 598 (2000).
175 42 U.S.C. § 13981 (2000).

part, to an animus based on the victim's gender."[176] Federal and state courts were given concurrent jurisdiction over complaints brought under the Act. Congress invoked its authority under both Article I, Section Eight and Section Five of the Fourteenth Amendment as its sources of constitutional power to enact the legislation.[177]

The United States, in defending the constitutionality of the Act, relied on both the Commerce Clause and Section Five of the Fourteenth Amendment.[178] Ultimately, the U.S. Supreme Court determined that the Act could not be sustained under either provision. Chief Justice Rehnquist, who delivered the opinion of the Court in *Morrison*, explained why the Act was in excess of Congress's legislative authority.

The Court began its analysis of the Commerce Clause issue by noting that the provision gives Congress the authority to "regulate the use of the channels of interstate commerce."[179] Moreover, Congress possesses the power to "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."[180] Finally, and most relevant to the situation in *Morrison*, Congress has the authority to "regulate those activities having a substantial relation to interstate commerce," or "those activities that substantially affect interstate commerce."[181] Having laid out the scope of federal legislative authority in this area, the Court proceeded to evaluate the Violence Against Women Act pursuant to the standard enunciated in *United States v. Lopez*.[182] In *Lopez*, the Court invalidated the Gun-Free School Zones Act of 1990, which made it a federal crime to knowingly possess a firearm within close proximity to a school, as an excess of Congress's authority to regulate interstate commerce.[183]

The relevant inquiry considered four factors, all of which were initially identified in *Lopez*. It was necessary for this detailed examination to proceed because the Violence Against Women Act, like the Gun-Free School Zones Act invalidated in *Lopez*, could not be characterized as a regulation of either the channels or the instrumentalities of interstate commerce. The first factor discussed by the Court was the fact that "[g]ender-

176 42 U.S.C. § 13981(d)(1) (2000).
177 *Morrison*, 529 U.S. at 607.
178 *Id.* at 609.
179 *Id.*
180 *Id.*
181 *Id.*
182 514 U.S. 549 (1995).
183 18 U.S.C. § 922(q)(2)(A) (2000); *id.* at 567–68.

motivated crimes of violence are not, in any sense of the phrase, economic activity."[184] Second, it was noted that the Violence Against Women Act did not contain a jurisdictional element limiting its reach to a discrete class of cases substantially related to interstate commerce. Instead, Congress had chosen to cast the Act's remedy "over a wider, and more purely intrastate, body of violent crime."[185] The third *Lopez* factor involved an examination into whether Congress identified specific findings to demonstrate the regulated activity's effect on interstate commerce. Even though the Act was "supported by numerous findings regarding the serious impact that gender-motivated violence has on victims and their families," the Court declared that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation."[186] Finally, the Court viewed the link between gender-motivated violence and interstate commerce as simply too attenuated to justify such an expansion of federal legislative jurisdiction under the guise of the Commerce Clause. Emphasizing this point, Chief Justice Rehnquist concluded the Commerce Clause analysis by stating that "if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part."[187]

Since the Violence Against Women Act was not deemed to be a valid exercise of federal legislative authority under Article I, the Court proceeded to address the question of whether the Act could be sustained on the alternative ground that it was a law designed to enforce the Fourteenth Amendment. The Act was passed, in large measure, to deal with the "pervasive bias in various state justice systems against victims of gender-motivated violence."[188] The Court noted Congress's conclusion that "discriminatory stereotypes often result in insufficient investigation and prosecution of gender-motivated crimes, inappropriate focus on the behavior and credibility of the victims of that crime, and unacceptably lenient punishments for those who are actually convicted of gender-motivated violence."[189] For these reasons, the United States defended the Act as being necessary to remedy the states' biases and to deter further instances of gender-based discrimination in the state courts. It was argued that the inherent

184 *Morrison*, 529 U.S. at 613.
185 *Id.*
186 *Id.* at 614.
187 *Id.* at 615.
188 *Id.* at 619.
189 *Id.* at 620.

unfairness in the justice system itself operated as a denial of equal protection, opening the door for federal legislation pursuant to Section Five of the Fourteenth Amendment.

Nevertheless, the Court was unsympathetic to the arguments raised by the United States and the plaintiff. Relying on its prior decisions in *United States v. Harris*[190] and the *Civil Rights Cases*,[191] the Court declared that Enforcement Clause legislation cannot be "directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers."[192] Emphasizing the point further, Chief Justice Rehnquist explained that the Act did nothing to hold any Virginia public official accountable for doing an inadequate job of investigating or prosecuting the alleged assault.[193] Instead, the Act was designed solely to provide a private remedy for the victim via the use of a direct suit against her alleged attackers. Finally, the Court found the Act to be excessive in that it applied uniformly throughout the United States and was not limited to those states in which discrimination against the victims of gender-motivated crimes could be identified. Therefore, the Act was not deemed to be akin to the federal statutes upheld in *Katzenbach v. Morgan*[194] and *South Carolina v. Katzenbach*.[195] Those enactments, of course, were directed solely to the particular states in which Congress found evidence of unconstitutional discrimination. For these reasons, the Violence Against Women Act was invalidated as an excess of the powers granted to Congress under both Article I, Section Eight and Section Five of the Fourteenth Amendment.

Justice Thomas authored a short concurring opinion in which he expressed the view that *Lopez*'s "substantial effects" test, though somewhat circumscribed, would encourage Congress to "persist in its view that the Commerce Clause has virtually no limits."[196] He urged the Court to replace the *Lopez* test with one more consistent with the "original understanding" of the Commerce Clause.[197] Justices Souter and Breyer both authored dissenting opinions.[198] Justice Souter focused primarily on Congress's findings, which included detailed evidence of the detrimental effect that gender-motivated violence has on inter-

190 106 U.S. 629 (1883).
191 109 U.S. 3 (1883).
192 *Morrison*, 529 U.S. at 621.
193 *Id.* at 626.
194 384 U.S. 641 (1966).
195 383 U.S. 301 (1966).
196 *Morrison,* 529 U.S. at 627 (Thomas, J., concurring).
197 *Id.*
198 *Id.* at 628, 655 (Souter & Breyer, JJ., dissenting).

state commerce. He contended that "[t]he business of the courts is to review the congressional assessment, not for soundness but simply for the rationality of concluding that a jurisdictional basis exists in fact."[199] Citing evidence provided by Congress indicating that violent crime against women costs the country at least $3 billion each year, Justice Souter asserted that Congress had good reasons to assume that the Commerce Clause gave it the power to provide a civil remedy for the victims of gender-motivated violence.[200] Justices Stevens, Ginsburg and Breyer joined his dissenting opinion.[201]

Justice Breyer, in a separate dissent, declared that the language in the Constitution "says nothing about either the local nature, or the economic nature, of an interstate-commerce-affecting cause."[202] Relying on the Court's prior decision in *Heart of Atlanta Motel, Inc. v. United States*,[203] he insisted that "virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State."[204] He referred to the structural protections for the states that were discussed in Justice Stevens' dissent in *Kimel*, explaining that the Judicial Branch was overstepping its bounds by meticulously scrutinizing Congress's judgment. Justice Breyer stated that "within the bounds of the rational, Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance."[205] Justices Stevens, Souter and Ginsburg joined this portion of Justice Breyer's dissenting opinion.[206]

In a later portion of his dissenting opinion, Justice Breyer stated that his conclusion that the Violence Against Women Act was a valid exercise of Congress's power to regulate interstate commerce made it unnecessary for him to reach a conclusion with regard to the Enforcement Clause issue.[207] Nevertheless, he questioned why the Court found Congress to lack the power to provide a remedy for victims of gender-motivated crimes against private actors. Even though the private actors who allegedly attacked the victim in question did not violate the Fourteenth Amendment, Justice Breyer viewed the Act as an exercise of Congress's power to enact remedial legislation that "prohibits

199 *Id.* at 629 (Souter, J., dissenting).
200 *Id.* at 635.
201 *Id.* at 628.
202 *Id.* at 657 (Breyer, J., dissenting).
203 379 U.S. 241 (1964).
204 *Morrison*, 529 U.S. at 660 (Breyer, J., dissenting).
205 *Id.*
206 *Id.* at 655.
207 *Id.* at 666.

conduct which is not itself unconstitutional."[208] Since the Act did nothing more than provide a federal remedy for victims of conduct that was already criminalized by state law, he did not agree with the Court's characterization of the remedy as disproportionate. He added that there was no lack of "congruence and proportionality," for purposes of the *Flores* standard, because the Act dealt with nothing other than "the creation of a federal remedy to substitute for constitutionally inadequate state remedies."[209] Justice Stevens joined this portion of Justice Breyer's dissenting opinion, which consisted of skeptical observations about the Court's Enforcement Clause analysis without purporting to give a firm answer to the question presented.

The holding in *Morrison* regarding the Fourteenth Amendment issue was consistent with the Court's prior decision in *DeShaney v. Winnebago County Department of Social Services*,[210] which made it clear that the Constitution does not impose an affirmative duty on the states to protect individuals from violent criminals. This principle was further illustrated by the Court's recent decision in *Town of Castle Rock v. Gonzales*.[211] Justice Scalia, who delivered the opinion of the Court in *Gonzales*, explained that "the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations."[212] Nevertheless, Congress's judgment that victims of gender-motivated violence were being effectively denied the equal protection of the laws was entitled to more deference than that shown by the U.S. Supreme Court. The Violence Against Women Act was designed to counter the apparent inadequacies found in the justice systems of the several states. Such inadequacies, in many instances, could lead to violations of the Equal Protection Clause. While it is true that the Act was directed at private conduct rather than state action, Section Five of the Fourteenth Amendment delegates the enforcement power to Congress. Congress believed that the Act was "appropriate legislation"[213] to deal with the problem of de facto gender discrimination in the criminal justice system, and the means chosen to address the perceived constitutional deficiencies should have been accorded the respect owed to the people's elected representatives. The Court again made no attempt to distinguish the narrow construction given to Section Five of

208 *Id.* at 665.
209 *Id.*
210 489 U.S. 189 (1989).
211 125 S. Ct. 2796 (2005).
212 *Id.* at 2810.
213 U.S. CONST. amend. XIV, § 5.

the Fourteenth Amendment in *Morrison* from the broad construction given to Section Two of the Thirteenth Amendment in *Jones* and *Runyon*. While it is true that the Thirteenth Amendment itself applies to private conduct, it is also true that the sweeping legislative enactments upheld in those two cases went far beyond the prohibitions contained in the underlying constitutional provision. The Court has not explained why the Enforcement Clause of the Fourteenth Amendment should be read more narrowly than its almost identical counterpart.

D. *Board of Trustees of the University of Alabama v. Garrett*

The following year, the Court decided another case involving the interaction between the standards enunciated in *Seminole Tribe* and *Flores*. *Board of Trustees of the University of Alabama v. Garrett*[214] posed the question of whether Title I of the Americans with Disabilities Act of 1990[215] constituted a valid abrogation of the states' Eleventh Amendment immunity. The Act's substantive provisions were not challenged as an excess of Congress's legislative authority under Article I, but the holding in *Seminole Tribe* prevented the concededly valid statutory requirements from justifying an abrogation of the states' sovereign immunity. Therefore, the plaintiffs were required to demonstrate that the Act was a valid exercise of Section Five of the Fourteenth Amendment before they could pursue their case. Like the plaintiffs in *College Savings Bank*, *Florida Prepaid* and *Kimel*, they were unsuccessful.[216]

The Act prohibits covered employers, including the states, from "discriminat[ing] against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[217] To facilitate the Act's objectives, employers covered by its provisions are required to "mak[e] reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the [employer's] business."[218] Congress clearly expressed its intent to subject the states to suits brought by private individuals for violations of the

214 531 U.S. 356 (2001).
215 42 U.S.C. §§ 12111–12117 (2000).
216 *Garrett*, 531 U.S. at 374.
217 42 U.S.C. § 12112(a) (2000).
218 42 U.S.C. § 12112(b)(5)(A) (2000).

Act, making it unnecessary for the Court to engage in an extensive analysis of how to interpret the statute.[219]

The Court began the inquiry required under *Flores* by looking to its prior decisions interpreting the Equal Protection Clause of the Fourteenth Amendment. *City of Cleburne v. Cleburne Living Center, Inc.*[220] made it clear that "States are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions toward such individuals are rational."[221] The Court explained that classifications based on disability, like the age classifications discussed in *Kimel*, "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."[222] Therefore, it was apparent to the Court that the requirements of the Americans with Disabilities Act extended far beyond the mandates of the Equal Protection Clause. After all, not all violations of the Act resulted from irrational discrimination, given that an employer may reasonably conclude that it is less costly to hire healthy employees than it is to make special accommodations for disabled workers.

Chief Justice Rehnquist, who delivered the Court's opinion in *Garrett*, went on to "examine whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled."[223] Examples of discrimination by local governments were deemed irrelevant to the inquiry. Even though the actions of local governments constitute state action for purposes of the Fourteenth Amendment, the Court's determination in *Lincoln County v. Luning*[224] that local governments do not enjoy Eleventh Amendment immunity precluded congressional reliance on misconduct by local governmental entities for purposes of establishing the needed pattern of state misconduct.[225]

Although the record provided evidence of unwillingness on the part of some state officials to make the sort of accommodations for the disabled required by the Act, the Equal Protection Clause did not mandate such accommodations. The Act did contain an exception for employers able to demonstrate that the accommodation requirement would impose an "undue hardship on the operation of the business"[226] involved. The Court insisted

219 42 U.S.C. § 12202 (2000).
220 473 U.S. 432 (1985).
221 *Garrett,* 531 U.S. at 367.
222 *Id*. at 367 (quoting Heller v. Doe, 509 U.S. 312, 320 (1993)).
223 *Garrett,* 531 U.S. at 368.
224 133 U.S. 529, 530 (1890).
225 *Garrett*, 531 U.S. at 369.
226 42 U.S.C. § 12112(b)(5)(4) (2000).

that the accommodation duty imposed by the Act still far exceeded the requirements of the Fourteenth Amendment in that it made unlawful "a range of alternate responses that would be reasonable but would fall short of imposing an 'undue burden' upon the employer."[227] It was also noted that the Act placed the burden on the employer to prove that it would suffer such a hardship, while the complaining party had to "negate reasonable bases for the employer's decision" to establish a violation of the Equal Protection Clause.[228] Finally, the Court found the Act's prohibition against the use of "standards, criteria, or methods of administration" that had a disparate impact on the disabled to be out of proportion with the Equal Protection Clause jurisprudence. In *Washington v. Davis*, the Court had found evidence of a disparate impact on racial minorities, standing alone, to be insufficient to establish a violation of the equal protection component of the Fifth Amendment's Due Process Clause.[229]

Chief Justice Rehnquist concluded the opinion of the Court by contrasting the Americans with Disabilities Act with the Voting Rights Act upheld in *South Carolina v. Katzenbach*.[230] After stating that "Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment,"[231] he described the Voting Rights Act as "a detailed but limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment in those areas of the Nation where abundant evidence of States' systematic denial of those rights was identified."[232] He declared that "in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation."[233] Consequently, Title I of the Americans with Disabilities Act was found to be in excess of Congress's power to enforce the substantive guarantees of the Fourteenth Amendment. In a footnote, the Court noted that Title I's provisions still applied to the states and could be "enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*."[234]

Justice Kennedy authored a concurring opinion, joined by

227 *Garrett,* 531 U.S. at 372.
228 *Id.*
229 426 U.S. 229, 239 (1976).
230 383 U.S. 301, 337 (1966).
231 *Garrett,* 531 U.S. at 373 n.8.
232 *Id.* at 373.
233 *Id.* at 374.
234 *Id.* at 374 n.9 (citation omitted).

Justice O'Connor.[235] He expressed his agreement with the Court by declaring that "[t]he predicate for money damages against an unconsenting State in suits brought by private persons must be a federal statute enacted upon the documentation of patterns of constitutional violations committed by the State in its official capacity."[236] Since no pattern of unconstitutional discrimination by the states had been identified, Justice Kennedy believed that the Act was in excess of Congress's power to enforce the Fourteenth Amendment.

Garrett was a five to four decision, with Justice Breyer authoring a dissenting opinion joined by Justices Stevens, Souter and Ginsburg.[237] Justice Breyer insisted that the Court had not "traditionally required Congress to make findings as to state discrimination, or to break down the record evidence, category by category."[238] As he saw it, the inquiry in cases like *Katzenbach v. Morgan*[239] had been "whether Congress's likely conclusions were reasonable."[240] He saw no need for the Court to focus on whether there was "adequate evidentiary support in the record."[241] Lamenting the lack of deference shown to the Legislative Branch, he noted that "[t]he Court's failure to find sufficient evidentiary support may well rest upon its decision to hold Congress to a strict, judicially created evidentiary standard, particularly in respect to lack of justification."[242]

Justice Breyer went on to decry the Court's misapprehension of its role in the case. He stated that "neither the 'burden of proof' that favors States nor any other rule of restraint applicable to *judges* applies to *Congress* when it exercises its § 5 power."[243] He contended that "Congress directly reflects public attitudes and beliefs, enabling Congress better to understand where, and to what extent, refusals to accommodate a disability amount to behavior that is callous or unreasonable to the point of lacking constitutional justification."[244] Although he acknowledged that "what is 'reasonable' in the statutory sense and what is 'unreasonable' in the constitutional sense might differ,"[245] Justice Breyer emphasized that the framers of the Enforcement Clause "sought to grant to Congress, by a specific provision applicable to

235 *Id.* at 374 (Kennedy, J., concurring).
236 *Id.* at 376.
237 *Id.* at 376 (Breyer, J., dissenting).
238 *Id.* at 380.
239 384 U.S. 641 (1966).
240 *Garrett,* 531 U.S. at 380 (Breyer, J., dissenting).
241 *Id.*
242 *Id.* at 382.
243 *Id.* at 383.
244 *Id.* at 384.
245 *Id.* at 385.

the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause."[246] Quoting *South Carolina v. Katzenbach*, which involved the Enforcement Clause of the Fifteenth Amendment, he declared that Congress had the prerogative to use "any rational means to effectuate the constitutional prohibition."[247] It was clear to Justice Breyer that the Americans with Disabilities Act was unquestionably a valid exercise of Congress's authority to enforce the Equal Protection Clause. Therefore, he would have upheld Congress's purported abrogation of the states' Eleventh Amendment immunity.

The U.S. Supreme Court's decision in *Garrett* serves as further evidence of the lack of deference shown to Congress in recent years. *Garrett* also contained another flaw. The Court's language about the pattern requirement was so unclear that it has led some to conclude that such documentation is required whenever Congress chooses to abrogate the states' Eleventh Amendment immunity.[248] Such an interpretation of the Court's opinion would explain why the Court discounted examples of discrimination by local governments. Nevertheless, this interpretation makes no sense when taking into consideration the context of the Court's language. In *South Carolina v. Katzenbach*, the Court upheld the Voting Rights Act of 1965, which prohibited a broader swath of conduct than that directly forbidden by the Fifteenth Amendment.[249] The Act's substantive provisions were deemed valid enforcement measures because the prohibited state conduct, though not itself unconstitutional, had resulted in constitutional violations in various instances. Consequently, it would seem that the documentation of a pattern of unconstitutional behavior by the states is required when Congress enacts prophylactic legislation that raises the substantive bar above the constitutional mandate. Congress need not, however, provide such documentation when it merely provides a remedy for actual violations of the Constitution. This line of reasoning leads to the conclusion that Congress is always free to abrogate the states' Eleventh Amendment immunity, even without a pattern of unconstitutional behavior by the states, as long as the substantive requirements of the underlying statute do not prohibit conduct that is not proscribed by the Fourteenth Amendment itself.

The Court's opinion in *Garrett*, however, was very unclear.

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246 *Id.* at 386 (quoting Katzenbach v. Morgan, 384 U.S. 641, 650 (1966)).

247 *Id.* at 386 (quoting *Katzenbach*, 383 U.S. 301, 324 (1966)).

248 Joan Shinavski, *The Eleventh Amendment Bars Private Individuals from Suing State Employers for Money Damages Under Title I of the Americans with Disabilites Act: Board of Trustees of the University of Alabama v. Garrett*, 40 DUQUESNE LAW REVIEW 161–179 (2001).

249 *Katzenbach*, 383 U.S. at 337.

Since local governments are state actors for purposes of the Fourteenth Amendment, there was no reason for the Court to ignore evidence of discrimination by local governments. While it is true that local governments do not enjoy the immunity that the Eleventh Amendment gives to the states, the pattern of discrimination documented by Congress does not belong in the abrogation calculus. Instead, it is relevant only for demonstrating that the substantive requirements of the underlying prophylactic Act are necessary in order to prevent actual constitutional violations. As Justice Breyer pointed out in his dissenting opinion, "the substantive obligation that the Equal Protection Clause creates applies to state and local governmental entities alike."[250] The same is true of the substantive obligations that the Americans with Disabilities Act imposes on government employers. Since evidence of past discrimination by governmental entities was only relevant for establishing that the Act's prophylactic requirements were needed to deter actual violations of the Fourteenth Amendment, the Court was wrong to discount examples of discrimination by local governments.

The Court's reliance on *South Carolina v. Katzenbach* was anomalous for yet another reason. Chief Justice Rehnquist explained that the precedent was relevant because of the similarities in the wording of Section Two of the Fifteenth Amendment and Section Five of the Fourteenth Amendment.[251] Nonetheless, he never mentioned that the two constitutional provisions, though similar to each other, are almost identical to Section Two of the Thirteenth Amendment as well. The legislative enactments upheld in *Jones* and *Runyon* pursuant to Section Two of the Thirteenth Amendment were certainly not "congruent" and "proportional" for purposes of *Flores*. Those statutes swept far beyond the narrow requirements of the Thirteenth Amendment. The Court construed Congress's power to enforce the Thirteenth Amendment very broadly in *Jones* and *Runyon*, and it has not provided a principled reason for giving an overly narrow construction to Section Five of the Fourteenth Amendment in *Flores*, *College Savings Bank*, *Florida Prepaid*, *Kimel*, *Morrison* and *Garrett*.

III. THE COURT'S RETREAT IN *HIBBS*, *LANE* AND *GOODMAN*

A. *Nevada Department of Human Resources v. Hibbs*

After *Garrett* was decided, it appeared as if the rigorous judicial scrutiny applied to Enforcement Clause legislation would

250 *Garrett,* 531 U.S. at 378 (Breyer, J., dissenting).
251 *Id.* at 373 n.8.

continue to disrupt the enforcement of many other federal laws. The Americans with Disabilities Act, signed into law by President George H.W. Bush in 1990, was the sixth Act that the U.S. Supreme Court had found to be in excess of Congress's power to enforce the Fourteenth Amendment. *Flores*, *College Savings Bank*, *Florida Prepaid*, *Kimel*, *Morrison* and *Garrett* were all decided within a five-year span. For proponents of prophylactic legislation, no end to the judicial overreaching seemed to be in sight. Nevertheless, that changed in 2003, when the Court issued its decision in *Nevada Department of Human Resources v. Hibbs*.[252] In *Hibbs*, the Court determined that the Family and Medical Leave Act was a legitimate exercise of Congress's Enforcement Clause authority.[253]

The Family and Medical Leave Act, which was signed into law by President Bill Clinton in 1993, entitles eligible employees to take up to twelve weeks of unpaid leave annually for any of a variety of reasons.[254] Aggrieved employees may seek both equitable relief and money damages against offending employers covered under the statute, including state employers. An employee of the State of Nevada sued his employer in federal court for an alleged violation of the Act, seeking money damages in addition to injunctive and declaratory relief. The Nevada Department of Human Resources contended that the Eleventh Amendment barred the suit because the Act, though a valid exercise of Congress's Article I power, was in excess of its authority to enforce the Fourteenth Amendment. Like the state defendants in *College Savings Bank*, *Florida Prepaid*, *Kimel* and *Garrett*, the Department believed that the rules of *Seminole Tribe* and *Flores* entitled it to the dismissal of the plaintiff's suit. Notwithstanding some apparent similarities, however, the Court's ruling in *Hibbs* went the other way.

In enacting the Family and Medical Leave Act, Congress relied on both the Commerce Clause and Section Five of the Fourteenth Amendment. *Seminole Tribe*, of course, prevented the plaintiff from relying on the Commerce Clause to sustain the Act's purported abrogation of the states' Eleventh Amendment immunity, so the inquiry quickly turned to the question of whether the Act was a valid exercise of Congress's Enforcement Clause power. Among the purposes listed in the Act was the promotion of "equal employment opportunity for women and men" in a manner consistent with the Equal Protection Clause.[255]

252 538 U.S. 721, 740 (2003).
253 *Id.*
254 29 U.S.C. § 2612 (2000).
255 29 U.S.C. § 2601(b)(5) (2000).

Ultimately, the U.S. Supreme Court determined that the Act was a valid exercise of Congress's power to enforce the Equal Protection Clause, thereby enabling the plaintiff to proceed with his suit in federal court pursuant to the rule of *Fitzpatrick*.

Chief Justice Rehnquist, who delivered the opinion of the Court in *Hibbs*, noted at the outset that Section Five of the Fourteenth Amendment enables Congress to "enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct."[256] Explaining that the Act aimed "to protect the right to be free from gender-based discrimination in the workplace,"[257] he went on to say that heightened scrutiny applied to gender-based discrimination challenged on Equal Protection Clause grounds. In order for a gender-based classification to withstand such scrutiny in court, it must "serv[e] important governmental objectives," and "the discriminatory means employed [must be] substantially related to the achievement of those objectives."[258] The Constitution does not permit the states to "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."[259] Chief Justice Rehnquist stated that Congress had documented evidence of gender discrimination in the family-leave context. He pointed out that many states had provided women with maternity leave that exceeded the "period of physical disability due to pregnancy and childbirth" without offering a similar benefit to fathers.[260] He declared that these "differential leave policies were not attributable to any differential physical needs of men and women, but rather to the pervasive sex-role stereotype that caring for family members is women's work."[261]

The Court went on to assert that the discretionary nature of some family-leave programs had resulted in de facto gender discrimination, providing a reasonable basis for Congress to conclude that "such discretionary family-leave programs would do little to combat the stereotypes about the roles of male and female employees."[262] There had also been instances of overt discrimination, as "seven States had childcare leave provisions that applied to women only" and "Massachusetts required that notice of its leave provisions be posted only in 'establishments in which females are employed.'"[263] These cases of gender-based discrimi-

256 *Hibbs,* 538 U.S. at 727–28.
257 *Id.* at 728.
258 *Id.* (quoting United States v. Virginia, 518 U.S. 515, 533 (1996)).
259 *Id.* at 729 (quoting *Virginia*, 518 U.S. at 533).
260 *Id.* at 731.
261 *Id.*
262 *Id.* at 734.
263 *Id.* at 733 (quoting MASS. GEN. LAWS ANN. ch. 149, § 105D (West 2004)).

nation convinced the Court that Congress was justified in relying on its Enforcement Clause power to pass the Family and Medical Leave Act, which provided men and women with an equal statutory right to unpaid leave. The Court distinguished *Kimel* and *Garrett* by emphasizing the difference between the rational basis test that applies to age and disability classifications and the heightened scrutiny that applies to gender classifications.[264] Since the standard for demonstrating the constitutionality of gender-based classifications is more difficult for the states to meet than the rationality standard applicable to classifications based on age and disability, it was easier for Congress to establish a pattern of unconstitutional gender discrimination by the states.

It was also determined that the Family and Medical Leave Act was "congruent and proportional to the targeted violation."[265] The Court reasoned that Congress had the authority to create "an across-the-board, routine employment benefit for all eligible employees" in order to "ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men."[266] Therefore, the Act was deemed a valid exercise of Congress's power to enforce the Equal Protection Clause, permitting the plaintiff in *Hibbs* to proceed with his suit against the State of Nevada. Since the underlying federal Act passed the "congruence and proportionality" test enunciated in *Flores*, the case was governed by *Fitzpatrick*, and the Eleventh Amendment did not preclude federal adjudicatory jurisdiction.

The opinion of the Court, delivered by Chief Justice Rehnquist, was joined by Justices O'Connor, Souter, Ginsburg and Breyer. In a short concurring opinion, Justice Souter noted that he joined the opinion of the Court without abandoning the dissenting positions expressed in *Seminole Tribe*, *Florida Prepaid*, *Kimel* and *Garrett*.[267] He was joined by Justices Ginsburg and Breyer. Justice Stevens, who concurred in the judgment, did not join the opinion of the Court because he was uncertain whether the Family and Medical Leave Act was "truly 'needed to secure the guarantees of the Fourteenth Amendment'" and had "never been convinced that an Act of Congress can amend the

264 *Id.* at 735.
265 *Id.* at 737 (quoting Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001)).
266 *Id.*
267 *Id.* at 740 (Souter, J., concurring).

Constitution."[268] He concurred in the judgment only because he viewed Nevada's sovereign immunity defense as one based on judge-made common law, which Congress could abrogate pursuant to its Commerce Clause authority. He insisted that the Eleventh Amendment posed no barrier to the adjudication at issue in *Hibbs* because the plaintiff was a citizen of Nevada. The Eleventh Amendment, of course, only states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[269] Justice Stevens construed the Eleventh Amendment to be nothing more than a limit on the diversity jurisdiction of the federal courts.

Justice Scalia authored a dissenting opinion in which he decried the nationwide reach of the remedy. He declared that the inquiry should focus on "whether the State has itself engaged in discrimination sufficient to support the exercise of Congress's prophylactic power."[270] In his view, Congress was only empowered to apply prophylactic legislation to those particular states that had engaged in unconstitutional behavior. Therefore, he would have dismissed the plaintiff's suit in the absence of a congressional determination that Nevada, as opposed to some states, had engaged in unconstitutional gender discrimination in the area of family and medical leave.[271]

Justice Kennedy authored a separate dissenting opinion, joined by Justices Scalia and Thomas. He asserted that Section Five of the Fourteenth Amendment did not give Congress the power to create an "entitlement program of its own design."[272] While expressing the view that "[t]he Commerce Clause likely would permit the National Government to enact an entitlement program" such as the one created by the Family and Medical Leave Act, he insisted that the Act could not be sustained as a valid exercise of Congress's Enforcement Clause authority.[273] It was clear that he did not view the stereotypes described by the Court as evidence of unconstitutional discrimination by the states. Justice Kennedy declared:

> Given the insufficiency of the evidence that States discriminated in the provision of family leave, the unfortunate fact that stereotypes about women continue to be a serious and pervasive social problem

268 *Id.* at 740–41 (Stevens, J., concurring).
269 U.S. CONST. amend. XI.
270 *Hibbs,* 538 U.S. at 743 (Scalia, J., dissenting).
271 *Id.*
272 *Id.* at 744 (Kennedy, J., dissenting).
273 *Id.*

> would not alone support the charge that a State has engaged in a practice designed to deny its citizens the equal protection of the laws.[274]

He contended that the states' sovereign immunity "cannot be abrogated without documentation of a pattern of unconstitutional acts by the States, and only then by a congruent and proportional remedy."[275]

Justice Kennedy's dissenting opinion in *Hibbs*, like the opinion of the Court in *Garrett*, did not clarify when the documentation requirement applies. Although his language implies that Congress cannot abrogate the states' Eleventh Amendment immunity in any instance without documenting a pattern of unconstitutional activity, the context of that language indicates that the documentation requirement applies only when the underlying federal statute imposes a higher standard on the states than that set by the Fourteenth Amendment itself. The Family and Medical Leave Act undoubtedly does that. Justice Kennedy did not address a situation in which Congress, seeking to deter violations of the Fourteenth Amendment, acts to abrogate the states' Eleventh Amendment immunity in cases where the plaintiffs' complaints allege unconstitutional conduct rather than conduct that merely violates a federal prophylactic statute. If Congress were to abrogate the states' Eleventh Amendment immunity in cases involving suits against the states for actual violations of the Fourteenth Amendment, it is unlikely that the documentation requirement would apply. It would make no sense for the Court to say that Congress must wait for a pattern of unconstitutional activity to develop before allowing private lawsuits to redress the relevant violations. The documentation requirement, therefore, appears to be applicable only when Congress attempts to demonstrate that prophylactic legislation, which raises the bar above the requirements of the Constitution, is needed to deter actual violations of the Fourteenth Amendment. The alternative understanding would be even more troubling than the status quo, as it would be utterly ridiculous to require that Congress allow some unconstitutional conduct to go unaddressed before permitting aggrieved individuals to sue their respective states.

In any event, the Court clearly appears to be showing more deference to Congress's judgment when the challenged prophylactic legislation is designed to deter discrimination based on race or gender. *Hibbs* was an important victory for equality in the workplace, and it remains to be seen whether the principles

274 *Id.* at 754.
275 *Id.* at 759.

underlying that decision will be sufficient to sustain other prophylactic statutes. While it is unfortunate that a similar respect for legislative judgment was not shown in *Morrison*, it is generally true that the Violence Against Women Act was directed at private conduct rather than state action. For this reason, the constitutional prospects for prophylactic legislation designed to combat state-sanctioned gender discrimination appear to be good.

B. *Tennessee v. Lane*

A year after the *Hibbs* decision, the U.S. Supreme Court was called upon to decide whether Title II of the Americans with Disabilities Act constituted a valid exercise of Congress's power to enforce the Fourteenth Amendment.[276] Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[277] In *Tennessee v. Lane*, the Court found Title II to be a valid exercise of Congress's prophylactic power as applied to "the class of cases implicating the fundamental right of access to the courts."[278]

Two paraplegics sued the State of Tennessee and several Tennessee counties, alleging that they had been denied access to the state judicial system due to their disabilities. George Lane alleged that he was required to appear on the second floor of a courthouse that lacked an elevator in order to answer a set of criminal charges.[279] Apparently, he got to the courtroom only after crawling up two flights of stairs. When he returned to the courthouse for another hearing, he was arrested and jailed for failure to appear after refusing to crawl again or to be carried to the courtroom by police officers.[280] Beverly Jones, who was a certified court reporter, claimed that she was denied both work opportunities and chances to participate in the judicial process because of inadequate accommodations at various county courthouses.[281] The State of Tennessee contended that the Eleventh Amendment barred the suit, relying heavily on the Court's prior decision in *Garrett*.

Justice Stevens, who delivered the opinion of the Court in *Lane*, explained that the Court's opinion in *Garrett* had noted that most of the instances of state-sponsored discrimination

276 Tennessee v. Lane, 124 S. Ct. 1978, 1982 (2004).
277 42 U.S.C. § 12132 (2000).
278 *Lane,* 124 S. Ct. at 1994.
279 *Id.* at 1982.
280 *Id.* at 1983.
281 *Id.*

against the disabled documented by Congress "related to 'the provision of public services and public accommodations, which areas are addressed in Titles II and III,' rather than Title I."[282] That was among the reasons why *Garrett* held that "Title I's broad remedial scheme was insufficiently targeted to remedy or prevent unconstitutional discrimination in public employment."[283] Nevertheless, because of the differences between the substantive provisions of Titles I and II, *Garrett* left open the possibility that Title II was a valid exercise of Congress's power under Section Five of the Fourteenth Amendment.

The Court likewise emphasized that Title II was enacted to enforce constitutional guarantees other than the Equal Protection Clause. Although governmental discrimination against the disabled only triggers a rationality analysis for purposes of the Equal Protection Clause, the Court declared that Title II sought to "enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review."[284] For instance, the Due Process Clause guarantees to a criminal defendant the "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings."[285] That right is also secured by the Confrontation Clause of the Sixth Amendment, which is incorporated within the Due Process Clause of the Fourteenth Amendment. The Due Process Clause also requires the states to provide certain civil litigants with a "'meaningful opportunity to be heard' by removing obstacles to their full participation in judicial proceedings."[286] The Jury Trial Clause of the Sixth Amendment, applicable to the states by virtue of the Due Process Clause, guarantees to criminal defendants the right to "trial by a jury composed of a fair cross section of the community."[287] Disabled persons are, of course, a part of that community. The First Amendment, which is also incorporated within the Due Process Clause, secures to members of the public "a right of access to criminal proceedings."[288] Consequently, the rationale that controlled in *Garrett* was inapplicable in *Lane*.

Proceeding to the documentation analysis, the Court noted that "[a] report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities, even tak-

282 *Id.* at 1987 (quoting Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. at 371 n.7).
283 *Id.* (summarizing the holding in *Garrett*).
284 *Id.* at 1988.
285 *Id.* (quoting Faretta v. California, 422 U.S. 806, 819 n.15 (1975)).
286 *Id.* (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)).
287 *Id.*
288 *Id.*

ing into account the possibility that the services and programs might be restructured or relocated to other parts of the buildings."[289] The Court stated:

> [Congress's] appointed task force heard numerous examples of the exclusion of persons with disabilities from state judicial services and programs, including exclusion of persons with visual impairments and hearing impairments from jury service, failure of state and local governments to provide interpretive services for the hearing impaired, failure to permit the testimony of adults with developmental disabilities in abuse cases, and failure to make courtrooms accessible to witnesses with physical disabilities.[290]

These findings were clearly sufficient to satisfy the need for evidence of unconstitutional discrimination by the states.

Comparing the circumstances in *Lane* to those that had been present in *Hibbs*, the Court asserted that Title II was aimed at the enforcement of a variety of constitutional rights "that call for a standard of judicial review at least as searching, and in some cases more searching, than the standard that applies to sex-based classifications."[291] The Court also made it clear that it did not have to "consider Title II, with its wide variety of applications, as an undifferentiated whole."[292] Instead, the inquiry was limited to the question of whether the Enforcement Clause provided Congress with the authority to subject unconsenting states to suits for money damages for failing to give the disabled access to the courts. Since the Court found Title II to be valid Enforcement Clause legislation as applied to "the class of cases implicating the accessibility of judicial services," other applications of the statute were deemed immaterial to the outcome of the case.[293] It was likewise noted that *Garrett*, which had severed Title I from Title II for purposes of the Enforcement Clause inquiry, demonstrated that courts were not required to "examine the full breadth of the statute all at once."[294]

Title II was viewed as "congruent and proportional to its object of enforcing the right of access to the courts" because it "require[d] only 'reasonable modifications' that would not fundamentally alter the nature of the service provided, and only when the individual seeking modification [was] otherwise eligible for the service."[295] Since the case at issue in *Lane* implicated additional constitutional rights secured by the Fourteenth Amend-

289 *Id.* at 1990–91.
290 *Id.* at 1991.
291 *Id.* at 1992.
292 *Id.*
293 *Id.* at 1993.
294 *Id.* (internal quotation marks omitted).
295 *Id.* (quoting 42 U.S.C. § 12131(2) (2000)).

ment, the Court saw no need to decide whether Title II's duty to accommodate was in excess of Congress's Section Five authority as applied to the class of cases implicating only the Equal Protection Clause's prohibition of irrational discrimination against disabled persons.[296] Congress clearly stated its intention to abrogate the states' Eleventh Amendment immunity when it enacted the Americans with Disabilities Act.[297] Therefore, pursuant to the Court's prior decisions in *Fitzpatrick* and *Hibbs*, the plaintiffs in *Lane* were able to proceed with their Title II actions in federal court.

The opinion of the Court, delivered by Justice Stevens, was joined by Justices O'Connor, Souter, Ginsburg and Breyer. In a concurring opinion joined by Justice Ginsburg, Justice Souter decried the Court's prior decision in *Buck v. Bell*,[298] which sustained the constitutionality of the "once-pervasive practice of involuntarily sterilizing those with mental disabilities."[299] He declared that "the judiciary itself has endorsed the basis for some of the very discrimination subject to congressional remedy under § 5."[300] Justice Ginsburg, who was joined by Justices Souter and Breyer, authored a concurring opinion in which she insisted that it was "not conducive to a harmonious federal system to require Congress, before it exercises authority under § 5 of the Fourteenth Amendment, essentially to indict each State for disregarding the equal-citizenship stature of persons with disabilities."[301] She went on to state that there was no need to "disarm a National Legislature for resisting an adversarial approach to lawmaking better suited to the courtroom."[302] Justice Ginsburg concluded her concurrence by expressing her approval of the Court's decision to defer to Congress's judgment in cases implicating the right of access to judicial proceedings.

Chief Justice Rehnquist authored a dissenting opinion, joined by Justices Kennedy and Thomas. In his view, the Court's decision in *Lane* could not be reconciled with *Garrett*. Relying on *Garrett*, he stated that the first step of *Flores*' "congruence and proportionality" analysis was to "identify with some precision the scope of the constitutional right at issue."[303] The second step, according to Chief Justice Rehnquist, was to "examine whether

[296] *Id.* at 1994 n.20.
[297] 42 U.S.C. § 12202 (2000).
[298] 274 U.S. 200 (1927).
[299] *Lane,* 124 S. Ct. at 1995 (Souter, J., concurring).
[300] *Id.*
[301] *Id.* at 1996 (Ginsburg, J., concurring).
[302] *Id.* at 1997.
[303] *Id.* at 1998 (Rehnquist, C.J., dissenting) (quoting Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001)).

Congress identified a history and pattern of violations" of the constitutional right being enforced.[304] Finally, he contended that the last step of the *Flores* inquiry required the Court to determine "whether the rights and remedies created by Title II [were] congruent and proportional to the constitutional rights it purport[ed] to enforce and the record of constitutional violations adduced by Congress."[305] Chief Justice Rehnquist was clearly convinced that *Garrett* required the dismissal of the plaintiffs' suits against the State of Tennessee.

Beginning with the first step of the analysis, Chief Justice Rehnquist acknowledged that "the task of identifying the scope of the relevant constitutional protection" in *Lane* was difficult because Title II purported to "enforce a panoply of constitutional rights of disabled persons."[306] Since the Court upheld Title II as applied to "the class of cases implicating the fundamental right of access to the courts," he viewed the proper inquiry as being limited to the scope of those due process rights specifically related to access to judicial proceedings.[307] Moving on to the second step, he criticized the majority for setting out on "a wide-ranging account of societal discrimination against the disabled" instead of limiting its examination of constitutional violations to the specific due process right on which it relied to uphold Title II.[308] He indicated that such a broad examination of the documentation was especially inappropriate in light of the Court's decision to evaluate Title II only as applied to the circumstances in *Lane*. Expressing doubt that the statute was designed to deter actual constitutional violations, he declared that no person "has a *constitutional* right to make his way into a courtroom without any external assistance" and that "[a] violation of due process occurs only when a person is actually denied the constitutional right to access a given judicial proceeding."[309]

Chief Justice Rehnquist went on to the third step of the *Flores* analysis and insisted that Title II was out of proportion with Congress's objective of enforcing the Fourteenth Amendment's substantive provisions. He stated that the Court was obligated to measure the full breadth of Title II's coverage against the scope of the specific constitutional rights that it purported to enforce. In his view, the Court's "as applied" approach was inappropriate in the Enforcement Clause context because it converted

304 *Id.* at 1999 (internal quotation marks omitted).
305 *Id.* at 2003.
306 *Id.* at 1998.
307 *Id.*
308 *Id.* at 1999.
309 *Id.* at 2002.

the *Flores* inquiry into a test of whether the Court could "conceive of a hypothetical statute narrowly tailored enough to constitute valid prophylactic legislation."[310] He contended that the majority's analysis would allow Congress to "simply rely on the courts to sort out which hypothetical applications of an undifferentiated statute, such as Title II, may be enforced against the States."[311] This, he said, would eliminate any incentive for Congress to draft Enforcement Clause legislation narrowly "for the purpose of remedying or deterring actual constitutional violations."[312]

Justice Scalia also authored a dissenting opinion.[313] He abandoned his support for *Flores*' "congruence and proportionality" standard, calling it "a standing invitation to judicial arbitrariness and policy-driven decisionmaking."[314] Instead, he proposed a test even more restrictive of Congress's authority to enforce the substantive provisions of the Fourteenth Amendment. He asserted that "[n]othing in § 5 allows Congress to go *beyond* the provisions of the Fourteenth Amendment to proscribe, prevent, or 'remedy' conduct that does not *itself* violate any provision of the Fourteenth Amendment."[315] In his view, Section Five only "authorizes Congress to create a cause of action through which the citizen may vindicate his [or her] Fourteenth Amendment rights."[316] Addressing the principle of stare decisis, he noted that most of the pre-*Hibbs* decisions sustaining prophylactic legislation under the Civil War Amendments had "involved congressional measures that were directed exclusively against, or were used in the particular case to remedy, *racial discrimination*."[317] *Jones* was among the cases cited by Justice Scalia to illustrate this point. He contended that when many of those earlier cases were decided, "the Fourteenth Amendment did not include the many guarantees that it now provides," creating a situation in which "it did not appear to be a massive expansion of congressional power to interpret § 5 broadly."[318]

Consequently, Justice Scalia declared that he would only apply a permissive Enforcement Clause standard to "congressional measures designed to remedy racial discrimination by the

310 *Id*. at 2005.
311 *Id*.
312 *Id*.
313 *Id*. at 2007 (Scalia, J., dissenting).
314 *Id*. at 2008–09.
315 *Id*. at 2009.
316 *Id*. at 2009–10.
317 *Id*. at 2010.
318 *Id*. at 2011–12.

States."[319] Referring to his prior dissent in *Hibbs*, he made it clear that he was not abandoning "the requirement that Congress may impose prophylactic § 5 legislation only upon those particular States in which there has been an identified history of relevant constitutional violations."[320] Citing *Morrison*, he stated his intention to "adhere to the requirement that the prophylactic remedy predicated upon such state violations must be directed against the States or state actors rather than the public at large."[321] Assuming that those requirements were met and that no other constitutional provision was violated, Justice Scalia asserted that he would "leave it to Congress, under constraints no tighter than those of the Necessary and Proper Clause, to decide what measures are appropriate under § 5 to prevent or remedy racial discrimination by the States."[322] Nonetheless, he emphasized that he would not show Congress such extensive deference in other Enforcement Clause contexts and that it was "past time to draw a line limiting the uncontrolled spread of a well-intentioned textual distortion."[323] Justice Thomas, who joined Chief Justice Rehnquist's dissent but not that of Justice Scalia, authored a short dissenting opinion in which he expressed the view that *Hibbs* had been wrongly decided and made it clear that he was not relying on that precedent to reach his conclusion in *Lane*.[324]

C. *United States v. Georgia*

In 2006, the Court decided its first case involving the Enforcement Clause under newly confirmed Chief Justice John G. Roberts, Jr., who was chosen by President George W. Bush to replace Chief Justice Rehnquist. Surprisingly, *United States v. Georgia* (hereinafter referred to as "*Goodman*") was a unanimous decision.[325] Justice Scalia, who delivered the opinion of the Court, explained that the question for consideration was "whether a disabled inmate in a state prison may sue the State for money damages under Title II of the Americans with Disabilities Act of 1990."[326] Title II states that "no qualified individual . . . shall, by reason of such disability, be excluded from par-

319 *Id.* at 2012.
320 *Id.*
321 *Id.*
322 *Id.* at 2013.
323 *Id.*
324 *Id.* at 2013 (Thomas, J., dissenting).
325 United States v. Georgia (*Goodman*), 126 S. Ct. 877 (2006). Tony Goodman was the petitioner in No. 04-1236. The United States, the petitioner in No. 04-1203, "intervened to defend the constitutionality of Title II's abrogation of state sovereign immunity." *Id.* at 880.
326 *Id.* at 878; 42 U.S.C. §§ 12131–12165 (2000).

ticipation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[327] Relying on the Court's prior decision in *Pennsylvania Department of Corrections v. Yeskey*,[328] Justice Scalia noted that it was clear that the term "public entity" was broad enough to include state prisons.[329] Congress's intent to abrogate the states' Eleventh Amendment immunity was, of course, clearly expressed in the Act.[330]

Tony Goodman, a paraplegic inmate in a Georgia prison, sued the State of Georgia and the Georgia Department of Corrections, in addition to several individual prison officials, under both Title II and 42 U.S.C. § 1983.[331] He sought "both injunctive relief and money damages against all defendants."[332] He alleged that "he had injured himself in attempting to transfer from his wheelchair to the shower or toilet on his own and [that], on several other occasions, he had been forced to sit in his own feces and urine while prison officials refused to assist him in cleaning up the waste."[333] In addition, Goodman claimed that he had been denied access to physical therapy, medical treatment and other services on account of his disability.

It was noted at the outset that "Goodman's claims for money damages against the State under Title II were evidently based, at least in large part, on conduct that independently violated the provisions of § 1 of the Fourteenth Amendment."[334] This was due to the Eighth Amendment's proscription of cruel and unusual punishment, which was incorporated within the Due Process Clause of the Fourteenth Amendment.[335] Georgia did not dispute Goodman's assertion that the same alleged conduct that violated the Eighth Amendment also violated Title II of the Americans with Disabilities Act.[336]

Writing for the Court in *Goodman* and relying on his own prior dissent in *Lane*, Justice Scalia explained that no member of the Court doubted Congress's Section Five authority to create "private remedies against the States for *actual* violations" of the Fourteenth Amendment.[337] The Court went on to state that, "in-

327 42 U.S.C. § 12132 (2000).
328 524 U.S. 206, 210 (1998).
329 *Goodman,* 126 S. Ct. at 879.
330 42 U.S.C. § 12202 (2000).
331 42 U.S.C. §§ 12131–12165, 1983.
332 *Goodman,* 126 S. Ct. at 879.
333 *Id.*
334 *Id.* at 881.
335 Louisiana *ex. rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947).
336 *Goodman,* 126 S. Ct. at 881–82.
337 *Id*. at 881.

sofar as Title II creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity."[338] Consequently, it was determined that the U.S. Court of Appeals for the Eleventh Circuit had "erred in dismissing those of Goodman's Title II claims that were based on such unconstitutional conduct."[339] The Supreme Court declined to address the question of whether Congress's purported abrogation of sovereign immunity was valid as to the class of alleged conduct that "violated Title II but did not violate the Fourteenth Amendment," leaving it to the applicable inferior federal courts to conduct the "congruence and proportionality" inquiry in the first instance.[340]

Justice Stevens, in a concurring opinion joined by Justice Ginsburg, emphasized that the Court's focus on Goodman's Eighth Amendment claims arose "simply from the fact that those [were] the only constitutional violations [that] the Eleventh Circuit [had] found him to have alleged properly."[341] He asserted that "the history of mistreatment leading to Congress' decision to extend Title II's protections to prison inmates was not limited to violations of the Eighth Amendment,"[342] and that courts had "reviewed myriad other types of claims by disabled prisoners, such as allegations of the abridgment of religious liberties, undue censorship, interference with access to the judicial process, and procedural due process violations."[343] Justice Stevens concluded his concurring opinion by explaining that the District Court and the Court of Appeals would, on remand, have an opportunity to consider all of the potential Fourteenth Amendment violations for purposes of both Goodman's complaint and the *Flores* inquiry.[344]

Goodman cleared up much of the confusion created by the Court's poorly written opinion in *Garrett*. First of all, it now seems obvious that the documentation requirement applies only when Congress prohibits conduct which does not itself violate the Fourteenth Amendment, and that Congress clearly has the power to abrogate the states' Eleventh Amendment immunity in order to redress Fourteenth Amendment violations. Secondly, in light of *Lane* and *Goodman*, litigants who allege conduct that actually violates the Fourteenth Amendment are likely to circumvent the Eleventh Amendment hurdle, assuming that Congress's

338 *Id.* at 882.
339 *Id.*
340 *Id.*
341 *Id.* at 883 (Stevens, J., concurring).
342 *Id.*
343 *Id.* at 884.
344 *Id.*

intent to abrogate sovereign immunity is clear, even if the underlying statutes do not satisfy the "congruence and proportionality" standard as applied to the broader class of cases which do not involve constitutional violations.

These principles are consistent with Justice Scalia's dissent in *Lane*, in which he conceded that Congress has the power to abrogate the states' Eleventh Amendment immunity in order to redress actual Fourteenth Amendment violations. It is worthy of note that Justice Scalia did not join Chief Justice Rehnquist's dissenting opinion in *Lane*, where the Chief Justice contended that the Court's "as applied" approach to the case was erroneous. The Chief Justice found that it would permit Congress to "simply rely on the courts to sort out which hypothetical applications of an undifferentiated statute, such as Title II, may be enforced against the States."[345] Justice Scalia authored his own dissent in *Lane*, expressing the view that Congress's ability to prohibit more than the Fourteenth Amendment itself prohibits should be limited to cases involving racial discrimination.

While it is true that most of the Court's early decisions upholding sweeping Enforcement Clause legislation involved congressional efforts to deter racial discrimination, Justice Scalia provided no principled reason for subjecting prophylactic legislation involving other Fourteenth Amendment rights to a greater degree of judicial scrutiny. When viewed in the context of *Jones* and *Runyon*, the "congruence and proportionality" standard enunciated in *Flores* is virtually inexplicable. Therefore, neither the restrictive test advocated by Justice Scalia, nor the slightly less rigorous test currently used by the Court to assess the constitutionality of Enforcement Clause legislation, is consistent with the Court's pre-*Flores* precedents.

In *Jones*, the Court sustained a broad civil rights statute under Section Two of the Thirteenth Amendment on the ground that "the Enabling Clause of that Amendment empowered Congress to do much more" than the self-executing Section One accomplished in the absence of additional federal legislation.[346] In *Runyon*, the Court reaffirmed Congress's authority to enact such legislation.[347] There was no indication that Section Two legislation had to be limited to the purpose of remedying or deterring actual Thirteenth Amendment violations.

In *Katzenbach v. Morgan*, the Court declared that "the *McCulloch v. Maryland* standard is the measure of what consti-

345 Tennessee v. Lane, 124 S. Ct. 1978, 2005 (2004) (Rehnquist, C.J., dissenting).
346 Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968).
347 Runyon v. McCrary, 427 U.S. 160, 179 (1976).

tutes 'appropriate legislation' under § 5 of the Fourteenth Amendment."[348] *McCulloch* construed the Necessary and Proper Clause as an extensive grant of legislative authority and rejected an argument for a narrow reading of that provision.[349] Likening the Enforcement Clause of the Fourteenth Amendment to the Necessary and Proper Clause as construed in *McCulloch*, the Court explained in *Morgan* that "§ 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[350] The construction given to the Enforcement Clause was clearly one that showed a substantial degree of deference to the judgments made by Congress.

The Court likewise adopted a broad construction of Section Two of the Fifteenth Amendment in *South Carolina v. Katzenbach*. In that case, the Court stated that "[t]he basic test to be applied in a case involving § 2 of the Fifteenth Amendment is the same as in all cases concerning the express powers of Congress with relation to the reserved powers of the States."[351] This was, of course, a direct reference to Chief Justice Marshall's language in *McCulloch*. It was further noted that the Court had "echoed his language in describing each of the Civil War Amendments."[352]

Unfortunately, the Court has not seen fit to echo the language of Chief Justice Marshall in recent times, particularly with regard to Section Five of the Fourteenth Amendment. The utter lack of deference shown to Congress in *Flores*, *College Savings Bank*, *Florida Prepaid*, *Kimel*, *Morrison* and *Garrett* is a far cry from the rationale underlying the Court's decision in *McCulloch*. Furthermore, the Court has made no attempt to distinguish its recent Enforcement Clause holdings from *Jones* and *Runyon*. Since the Thirteenth Amendment itself restricts private entities, it is easy to understand why *Jones* and *Runyon* did not call for a different result in *Morrison*. The Fourteenth Amendment, of course, only limits state action, providing the Court with a logical reason to view the Violence Against Women Act as an excess of Congress's Enforcement Clause authority. That Act was concededly directed against private actors. This is true despite the fact that it was designed, at least in part, to address the problem of gender discrimination in the criminal justice system. That is not to say that *Morrison* was correctly decided, but it does illustrate

348 384 U.S. 641, 651 (1966).

349 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 323–25 (1819).

350 384 U.S. at 651.

351 South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966).

352 *Id*. at 327.

why the Court's Thirteenth Amendment precedents were never used to inform the Court's Enforcement Clause inquiry. Nevertheless, that line of reasoning was wholly inapplicable in *Flores*, *College Savings Bank*, *Florida Prepaid*, *Kimel* and *Garrett*.

In *Garrett*, the Court noted that "Section 2 of the Fifteenth Amendment is virtually identical to § 5 of the Fourteenth Amendment."[353] Chief Justice Rehnquist, who delivered the opinion of the Court in *Garrett*, described Title I of the Americans with Disabilities Act as an excess of Congress's power to enforce the Fourteenth Amendment. He viewed the Voting Rights Act upheld in *South Carolina v. Katzenbach* as a "limited remedial scheme designed to guarantee meaningful enforcement of the Fifteenth Amendment."[354] Contending that Title I was not a "limited remedial scheme" akin to the Voting Rights Act, he purported to rely on *South Carolina v. Katzenbach* to justify the invalidation of Title I for Enforcement Clause purposes.[355] That precedent, however, exhibited a large measure of deference to Congress, making the Court's reliance on it in *Garrett* all the more ironic.

Since the Court relied on a precedent involving the Fifteenth Amendment to justify a narrow construction of the Fourteenth Amendment's Enforcement Clause, there is no reason why the Court should not also use the relevant Thirteenth Amendment precedents to inform the Fourteenth Amendment inquiry. The Fourteenth and Fifteenth Amendments restrict only governmental entities, while the Thirteenth Amendment is directed at private action. Nonetheless, the Enforcement Clauses of the three Civil War Amendments are virtually identical. The self-executing provisions of the Thirteenth and Fifteenth Amendments are much narrower than the protections provided by Section One of the Fourteenth Amendment. If anything, Section Five of the Fourteenth Amendment should be given a broader construction than the Enforcement Clauses of the other two Civil War Amendments. The Court, however, has disregarded the deferential standard applied in *Jones* and *Runyon* when interpreting the Enforcement Clause of the Fourteenth Amendment.

Justice Scalia, dissenting in *Lane*, acknowledged the deference shown to Congress with regard to the deterrence of racial discrimination. Nevertheless, he insisted that he would give Congress such latitude in that limited context only because of stare decisis.[356] He never explained why Congress's authority to

353 Bd. of Tr. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 373 n.8 (2001).
354 *Id.* at 373.
355 *Id.* at 373–74.
356 Tennessee v. Lane, 124 S. Ct. 1978, 2012 (2004) (Scalia, J., dissenting).

enforce other Fourteenth Amendment rights should be more circumscribed, aside from highlighting his own unwillingness to expand federal legislative jurisdiction.

Any objective observer must acknowledge that Congress's authority under Section Five of the Fourteenth Amendment is not unlimited. It is true that *Oregon v. Mitchell*[357] "found to be *beyond* the § 5 power [a federal statute] that lowered the voting age from twenty-one to eighteen in state elections."[358] *Mitchell*, of course, preceded the adoption of the Twenty-Sixth Amendment. Nevertheless, most of the pre-*Flores* precedents interpreting the Enforcement Clauses of the Civil War Amendments generally applied a standard consistent with that described in *McCulloch*, and the Court's recent departure from that trend is unfortunate. The Court certainly did not apply such a deferential standard in *Flores*, *College Savings Bank*, *Florida Prepaid*, *Kimel*, *Morrison* and *Garrett*. Perhaps *Hibbs*, *Lane* and *Goodman* represent the beginning of a larger retreat on the part of the Court. Since the Constitution grants the enforcement power to Congress rather than to the courts, one can only hope that the pendulum is beginning to swing back in the direction of those elected by the people of the United States.

IV. THE COURT'S ASSERTION OF ITS OWN PROPHYLACTIC POWER

Section Five of the Fourteenth Amendment states that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[359] Nothing in the Constitution says anything about entrusting a similar power to the federal courts. Notwithstanding this reality, however, the U.S. Supreme Court has sometimes prescribed prophylactic rules of its own.

Among the most famous prophylactic rules created by the Court is the one requiring that *Miranda* warnings be given to a criminal suspect prior to the commencement of custodial interrogation. Before custodial interrogation can begin, a suspect must be verbally warned that he or she "has the right to remain silent, that anything he [or she] says can be used against him [or her] in a court of law, that he [or she] has the right to the presence of an attorney, and that if he [or she] cannot afford an attorney one will be appointed for him [or her] prior to any questioning if he [or she] so desires."[360] These warnings are required under the Court's 1966 decision in *Miranda v. Arizona*.[361] Confessions ob-

357 400 U.S. 112 (1970).
358 *Lane,* 124 S. Ct. at 2012 (Scalia, J., dissenting).
359 U.S. CONST. amend. XIV, § 5.
360 Miranda v. Arizona, 384 U.S. 436, 479 (1966).
361 *Id.*

tained in violation of *Miranda* cannot be admitted into evidence as a part of the prosecution's case-in-chief against the defendant.[362]

The warning requirement enunciated in *Miranda* is a prophylactic rule designed to enforce the Self-Incrimination Clause of the Fifth Amendment. The Due Process Clause of the Fourteenth Amendment, of course, incorporates the Self-Incrimination Clause and makes it applicable to the states.[363] Prior to *Miranda*, the Court evaluated the admissibility of a suspect's confession, for constitutional purposes, under a "voluntariness test."[364] There are two distinct bases for the requirement that confessions be voluntary in order to admit them into evidence. The first basis, recognized in *Bram v. United States*, is the Self-Incrimination Clause of the Fifth Amendment.[365] The second basis, discussed in *Brown v. Mississippi*, is the Due Process Clause of the Fourteenth Amendment.[366] It is worthy of note that the Fifth Amendment contains its own Due Process Clause, providing a similar voluntariness protection to federal defendants.[367] Nevertheless, the Court ultimately became convinced that new custodial interrogation techniques had begun to blur the line between voluntary and involuntary confessions, requiring more "concrete constitutional guidelines for law enforcement agencies and courts to follow."[368] Therefore, the Court created the prophylactic exclusionary rule of *Miranda*, barring the admission of confessions made during custodial interrogation before the giving of the warnings.

Two years after *Miranda* was decided, Congress enacted 18 U.S.C. § 3501.[369] The statute was designed to alter the rule of *Miranda* in criminal prosecutions brought by the United States or the District of Columbia. Under *Miranda*, the required warnings had to be given in order for a suspect's confession made during custodial interrogation to be introduced as evidence by the prosecution at trial. Section 3501(a) stated that, "[i]n any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given."[370] Section

362 *Id.*
363 Malloy v. Hogan, 378 U.S. 1, 3 (1964).
364 Dickerson v. United States, 530 U.S. 428, 433 (2000).
365 168 U.S. 532 (1897).
366 297 U.S. 278 (1936).
367 U.S. CONST. amend. V.
368 Miranda v. Arizona, 384 U.S. 436, 442 (1966).
369 18 U.S.C. § 3501 (2000), *invalidated by* Dickerson v. United States, 530 U.S. 428 (2000).
370 § 3501(a).

3501(e) defined the word "confession" as "any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing."[371] The factors to be used by the trial judge to determine whether a given confession was voluntary were enumerated in § 3501(b). These factors included all relevant "circumstances surrounding the giving of the confession, including . . . the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment . . . ."[372] Inquiries were also mandated to determine

> whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, . . . whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, . . . whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and . . . whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.[373]

Finally, § 3501(b) made it clear that the presence or absence of any of the enumerated factors was not necessarily "conclusive on the issue of voluntariness of the confession."[374]

The U.S. Supreme Court was ultimately called upon to decide whether § 3501 was valid federal legislation in *Dickerson v. United States*.[375] Charles Thomas Dickerson was indicted for several offenses under Title 18 of the United States Code, including "bank robbery, conspiracy to commit bank robbery, and using a firearm in the course of committing a crime of violence . . . ."[376] Prior to his trial, he moved for the suppression of a statement that he had made during a custodial interrogation session at a Federal Bureau of Investigation field office, contending that no one had given him *Miranda* warnings before the questioning commenced. Although the District Court granted his motion, the U.S. Court of Appeals for the Fourth Circuit reversed on interlocutory appeal by the Government, holding that the matter was governed by § 3501 rather than by *Miranda*.[377] The Court of Appeals reasoned that Congress had the authority to substitute § 3501's voluntariness test for the prophylactic warning rule be-

[371] § 3501(e).
[372] § 3501(b).
[373] *Id.*
[374] *Id.*
[375] 530 U.S. 428, 432 (2000).
[376] *Id.* at 432.
[377] United States v. Dickerson, 166 F.3d 667, 671 (4th Cir. 1999), *rev'd* 530 U.S. 428 (2000).

cause *Miranda* was not a constitutional holding. The U.S. Supreme Court granted certiorari, however, and ultimately reversed the decision of the Court of Appeals.[378]

Chief Justice Rehnquist, who delivered the opinion of the Court in *Dickerson*, explained that "Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution."[379] Citing *Flores*, he declared that Congress did not have the power to legislatively supersede the Court's decisions "interpreting and applying the Constitution."[380] The outcome of the case was left to turn on the question of "whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction."[381]

Moving on to address the critical issue, Chief Justice Rehnquist made it clear that *Miranda* had announced a constitutional rule that Congress could not alter. He explained that the *Miranda* Court had

> emphasized that it could not foresee "the potential alternatives for protecting the privilege which might be devised by Congress or the States," and [that] it [had] accordingly opined that the Constitution would not preclude legislative solutions that differed from the prescribed *Miranda* warnings but which were "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it."[382]

Nevertheless, it was likewise noted that the *Miranda* Court had "concluded that something more than the totality test was necessary" to enforce the Self-Incrimination Clause.[383] Since § 3501 reinstated the totality of the circumstances test without providing additional protection, it was found to be unconstitutional.

Another reason relied on by the Court to assert the constitutional status of *Miranda* was the fact that the warning requirement had been applied to state prosecutions. The U.S. Supreme Court, of course, does not have "a supervisory power over the courts of the several States," and its authority with respect to state criminal proceedings is "limited to enforcing the commands of the United States Constitution."[384] Consequently, *Miranda*'s direct application to the states meant that it was a constitutional

378 *Dickerson*, 530 U.S. 428, 432 (2000).
379 *Id.* at 437.
380 *Id.*
381 *Id.*
382 *Id.* at 440 (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)).
383 *Id.* at 442.
384 *Id.* at 438 (internal quotation marks omitted).

threshold to be applied uniformly to both the states and the federal government, not simply an exercise of the Court's supervisory authority over the federal courts.

Finally, the Court rejected the Government's contention that the exceptions carved into *Miranda*'s exclusionary rule had undermined its constitutional status. Such exceptions included the rule enunciated in *Oregon v. Hass*, which held that a confession obtained in violation of *Miranda* may be used to impeach the defendant's trial testimony if he or she takes the stand, assuming that the confession was otherwise voluntary.[385] Another exception relied on by the United States was the rule announced in *New York v. Quarles*, which permitted the admission of statements made by a detained suspect in response to police questioning that was deemed to be necessary to protect the public from immediate danger.[386] The Court declared that these exceptions to *Miranda*'s exclusionary rule did not destroy its status as a constitutional rule. Instead, the Court asserted that "no constitutional rule is immutable."[387] Because the Court found that *Miranda* was a constitutional precedent, it governed the result in *Dickerson*. Explaining that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture," the Court declined the Government's invitation to overrule *Miranda*.[388] Therefore, Congress was without the constitutional authority to enact § 3501.

Justices Stevens, Souter, Ginsburg, Breyer, Kennedy and O'Connor joined Chief Justice Rehnquist's majority opinion.[389] Justice Scalia authored a dissenting opinion, joined by Justice Thomas.[390] Questioning the Court's authority to invalidate § 3501, Justice Scalia characterized the Court's decision in *Dickerson* as an assertion of "the power, not merely to apply the Constitution but to expand it, imposing what it regards as useful 'prophylactic' restrictions upon Congress and the States."[391] He insisted that, since *Miranda*, the Court had "interpreted that decision as having announced, not the circumstances in which custodial interrogation runs afoul of the Fifth or Fourteenth Amendment, but rather only 'prophylactic' rules that go beyond the right against compelled self-incrimination."[392] Relying on *Quarles*, he declared that the warnings prescribed by *Miranda*

385 420 U.S. 714, 723–24 (1975).
386 467 U.S. 649 (1984).
387 *Dickerson,* 530 U.S. at 441.
388 *Id.* at 443.
389 *Id.* at 430.
390 *Id.* at 444 (Scalia, J., dissenting).
391 *Id.* at 446.
392 *Id.* at 450.

were "not themselves rights protected by the Constitution."[393] Quoting the Court's prior decision in *Oregon v. Elstad*, Justice Scalia explained: "*Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm."[394]

Seeking to further illustrate his view that the decision in *Dickerson* was an excess of the Court's authority, Justice Scalia contended that "[w]here the Constitution has wished to lodge in one of the branches of the Federal Government some limited power to supplement its guarantees, it has said so."[395] That statement, of course, was a reference to Section Five of the Fourteenth Amendment. He went on to state that "[t]he power with which the Court would endow itself under a 'prophylactic' justification for *Miranda* goes far beyond what it has permitted Congress to do under authority of that text."[396] Justice Scalia asserted that while congressional action under the Enforcement Clause could be used only to deter actual violations of the Constitution, the Court's "power to embellish" permitted it to prescribe prophylactic measures against "foolhardy" confessions as well as "constitutionally prohibited compelled confessions."[397] In so stating, he referred to the "congruence and proportionality" test established in *Flores*.

Notwithstanding the observations made by Justice Scalia in *Dickerson*, the prophylactic rule enunciated by the Court in *Miranda* would likely pass *Flores*' "congruence and proportionality" test if it were enacted by Congress pursuant to Section Five of the Fourteenth Amendment. The Court created *Miranda*'s exclusionary rule to deter actual violations of the Self-Incrimination Clause, which is incorporated within the Due Process Clause of the Fourteenth Amendment. Nevertheless, it was mandated by a judicial decision rather than by federal legislation. Even though the Enforcement Clause gives the prophylactic power to Congress, the Court has chosen to seize that power for itself. Since *Dickerson* was a federal case, the Fourteenth Amendment was not applicable and the Fifth Amendment's application was direct. Despite that fact, it is clear that the exclusionary rule's application in state cases influenced the Court's decision. In light of *Miranda* and *Dickerson*, it is apparent that the Court has confused its own duty to *give effect* to the substantive provisions of the Fourteenth Amendment in a spe-

393 *Id.* at 452 (quoting New York v. Quarles, 467 U.S. 649, 654 (1984)).
394 *Id.* at 453 (quoting Oregon v. Elstad, 470 U.S. 298, 307 (1985)).
395 *Id.* at 460.
396 *Id.*
397 *Id.* at 461.

cific case with Congress's power to *enforce* those provisions by enacting prophylactic legislation.

CONCLUSION

The Federal Judiciary's assault on Congress's power to enforce the Fourteenth Amendment threatens the rights of Americans all across the country. The U.S. Supreme Court's recent decisions limiting Congress's Enforcement Clause authority are particularly troubling in light of the Court's reaffirmation of its own prophylactic power in *Dickerson*. In spite of the decisions sustaining sweeping legislation under Section Two of the Thirteenth Amendment, the Court has inexplicably given Section Five of the Fourteenth Amendment a much more narrow construction. While it cannot be doubted that each of the Civil War Amendments provides a unique scope of substantive protection, the Court has never explained why these similarly worded enforcement provisions have been given such drastically different constructions.

Legislation to enforce one constitutional guarantee, of course, cannot itself conflict with another. For instance, Congress's authority to enforce the Fifteenth Amendment cannot be used to require the states to make race the "predominant factor" in redistricting decisions. Under *Miller v. Johnson*,[398] the Equal Protection Clause forbids the use of race as the "predominant factor" for purposes related to the composition of legislative districts.[399] Congress does not have the authority to authorize violations of the Fourteenth Amendment.[400] Legislative enactments designed to enforce the Civil War Amendments, like all other enactments, must not themselves violate the Constitution.

Notwithstanding the presence of some limitations, however, Congress's authority to enforce the Fourteenth Amendment should be viewed more broadly than the *Flores* standard permits. In *McCulloch*, the Court construed the words "necessary and proper"[401] in a manner which gave Congress wide latitude to enact federal legislation, rejecting the contention that the word "necessary" meant "absolutely or indispensably necessary."[402] The word "appropriate," as it appears in Section Five of the Fourteenth Amendment, cannot reasonably be construed to be more

398 515 U.S. 900 (1995).

399 Ken Gormley, *Racial Mind-Games and Reapportionment: When Can Race Be Considered (Legitimately) in Redistricting?,* 4 U. PA. J. CONST. LAW, 735, 736 (2002) (discussing the "predominant factor" test).

400 Saenz v. Roe, 526 U.S. 489, 490 (1999).

401 U.S. CONST. art. 1, § 8.

402 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 414 (1819).

restrictive of Congress's authority than the word "necessary" in the Necessary and Proper Clause. The propriety of legislation is a political judgment for Congress to make.

Justice Kennedy, who authored the opinion of the Court in *Flores* and introduced the "congruence and proportionality" test, took a contrary position during his confirmation hearings before the Senate Judiciary Committee. When questioned by Senator Arlen Specter about the U.S. Supreme Court's status as the final arbiter of the Constitution, then-Judge Kennedy stated that Congress would have the legislative authority to provide newspapers with heightened protection from libel suits if *New York Times v. Sullivan*[403] were overruled.[404] He believed that Congress had the authority to bring back the "actual malice" standard by statute if the Court were to reject it as a matter of constitutional law.[405] He made it clear that, in his view, Congress "could make that judgment as a constitutional matter."[406] Needless to say, the Religious Freedom Restoration Act, though governing a different subject, sought to accomplish an objective similar to that described in Judge Kennedy's hypothetical. While Congress lacks the power to overrule the Court's decisions interpreting the Constitution, its prophylactic power under Section Five of the Fourteenth Amendment should be viewed as broad enough to sustain a statute such as the Religious Freedom Restoration Act.

The lack of deference shown to Congress's determinations about what is "appropriate legislation" to enforce the Fourteenth Amendment should meet an aggressive legislative response. Even without resorting to the constitutional amendment process established by Article V, Congress has several options available. Primarily, Congress should look for alternative sources of legislative jurisdiction to accomplish its objectives. For example, the Court concluded in *Oregon v. Mitchell* that Congress exceeded its authority under Section Five of the Fourteenth Amendment when it lowered the minimum voting age from twenty-one to eighteen in state elections.[407] *Mitchell*, of course, was decided before the adoption of the Twenty-Sixth Amendment. Section One of the Twenty-Sixth Amendment states that "[t]he right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by

403 376 U.S. 254 (1964).
404 2 LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW 1395–96 (4th ed. 1995).
405 *Id.* at 1396.
406 *Id.*
407 400 U.S. 112 (1970).

any State on account of age."[408] The Twenty-Sixth Amendment itself accomplished what the statute sought to do, making further substantive legislation unnecessary. Section Two of the Twenty-Sixth Amendment states that "Congress shall have power to enforce this article by appropriate legislation."[409] It is very similar to Section Five of the Fourteenth Amendment, so it probably could be used to abrogate the states' Eleventh Amendment immunity under the rationale of *Fitzpatrick*. If a state were to discriminate against eighteen- to twenty-year-olds with respect to electoral matters, Congress could use Section Two of the Twenty-Sixth Amendment to subject that state to suits brought by private individuals in federal court to redress the alleged constitutional violations. The same principle would apply to the Enforcement Clauses of the Fifteenth, Nineteenth and Twenty-Fourth Amendments.

Congress has the power of the purse and, therefore, can use the Taxing and Spending Clause to accomplish many of its objectives. Under *South Dakota v. Dole*, Congress is empowered to condition the receipt of federal funds on the states' compliance with certain policy directives.[410] Perhaps Congress should use this power more aggressively in order to meet some of its broader objectives.

There are already signs that Congress is using this power, along with its powers under other constitutional provisions, to achieve objectives similar to those that prompted the enactment of the Religious Freedom Restoration Act. For instance, the Religious Land Use and Institutionalized Persons Act of 2000[411] attempts to mitigate the damage to religious freedom that was done by the *Smith* and *Flores* decisions. The Act states:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person . . . is in furtherance of a compelling governmental interest; and . . . is the least restrictive means of furthering that compelling governmental interest.[412]

This legislative mandate

> applies in any case in which . . . the substantial burden is imposed in a program or activity that receives Federal financial assistance; or . . . [in which] the substantial burden affects, or removal of that

408 U.S. CONST. amend. XXVI.
409 *Id.*
410 483 U.S. 203 (1987).
411 42 U.S.C. §§ 2000cc–2000dd-1 (2000).
412 42 U.S.C. § 2000cc-1(a) (2000).

> substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.[413]

It is clear from the language of the statute that Congress sought to use its powers under the Spending Clause, as well as its powers under the Foreign, Interstate and Indian Commerce Clauses, to compensate for the narrow construction given to the Fourteenth Amendment's Enforcement Clause in *Flores*. A similar provision of the Religious Land Use and Institutionalized Persons Act restricts governmental land use regulations that substantially burden the ability of people to freely exercise their religion.[414]

In *Cutter v. Wilkinson*, the U.S. Supreme Court unanimously held that the Religious Land Use and Institutionalized Persons Act did not violate the Establishment Clause of the First Amendment.[415] Justice Ginsburg, who delivered the opinion of the Court, noted that the Religious Freedom Restoration Act at issue in *Flores* had "lacked a Commerce Clause underpinning or a Spending Clause limitation to recipients of federal funds."[416] Nevertheless, she made it clear that the Court was not deciding whether the Religious Land Use and Institutionalized Persons Act was a valid exercise of the Commerce and Spending Clauses, thereby limiting the Court's holding in *Cutter* to the Establishment Clause issue.[417] The U.S. Court of Appeals for the Sixth Circuit had found the Act to be in violation of the Establishment Clause, making an inquiry into the bases for legislative jurisdiction unnecessary.[418] The U.S. Supreme Court, reversing the Court of Appeals, found the "institutionalized-persons provision compatible with the Establishment Clause because it alleviates exceptional government-created burdens on private religious exercise."[419] Since the Court of Appeals never addressed the Spending and Commerce Clause issues, the U.S. Supreme Court did not address them either.

In any event, the Religious Land Use and Institutionalized Persons Act is undoubtedly valid under both constitutional provisions. Under *Dole*, Congress has wide latitude to condition the receipt of federal funds on the states' compliance with certain federal legislative mandates. In the alternative scenario, the Act contains a jurisdictional element that limits its application to a

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413 42 U.S.C. § 2000cc-1(b) (2000).
414 42 U.S.C. § 2000cc(a)(1) (2000).
415 125 S. Ct. 2113, 2123 (2005).
416 *Id.* at 2118.
417 *Id.* at 2120 n.7.
418 Cutter v. Wilkinson, 349 F.3d 257, 268–69 (6th Cir. 2003), *rev'd* 125 S. Ct. 2113 (2005).
419 *Cutter,* 125 S. Ct. 2113, 2121 (2005).

discrete category of cases in which commerce is affected. Such a jurisdictional element was lacking in the Gun-Free School Zones Act at issue in *Lopez* and the Violence Against Women Act at issue in *Morrison*. The breadth of Congress's power under the Commerce Clause was illustrated by the Court's recent decision in *Gonzales v. Raich*, which held that the power vested in Congress by the Commerce Clause and the Necessary and Proper Clause "includes the power to prohibit the local cultivation and use of marijuana in compliance with [state] law."[420] In a concurring opinion, Justice Scalia noted that, "[w]here necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce."[421]

The Supremacy Clause of Article VI states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[422]

As the Court noted in *Missouri v. Holland*: "Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States."[423] Consequently, treaties can be used to expand federal legislative jurisdiction. In order to bring back the Violence Against Women Act that was invalidated in *Morrison*, President George W. Bush could sign a treaty with a foreign power that pledges each nation to take the steps necessary to protect women from gender-motivated violence. The Senate could proceed to give its advice and consent to the treaty pursuant to Article II. At that point, a new source of legislative jurisdiction would come into being. Such a treaty may not be self-executing for purposes of the standard discussed in *Foster & Elam v. Neilson*[424] and *United States v. Percheman*,[425] but the Necessary and Proper Clause would give Congress the power to enact legislation designed to implement the treaty. Congress could enact a statute identical to the one invalidated in *Morrison*, thereby creating a cause of action under federal law for victims of gender-motivated violence. It could be called the Violence Against Women Treaty Act, and it would be "necessary and

420 125 S. Ct. 2195, 2199 (2005).
421 *Id.* at 2216 (Scalia, J., concurring).
422 U.S. CONST. art. VI.
423 252 U.S. 416, 433 (1920).
424 27 U.S. (2 Pet.) 253, 314 (1829).
425 32 U.S. (7 Pet.) 51, 89, 94 (1833).

proper for carrying into Execution"[426] the President's powers under the Treaty Clause.

There are also more direct ways in which Congress could confront the federal courts. In *Nixon v. United States*, the U.S. Supreme Court held that challenges to the procedures used by the Senate to try impeachment cases present nonjusticiable political questions.[427] The same is likely true of challenges to the grounds for impeachment, particularly since Article I gives the House of Representatives "the sole Power of Impeachment" and the Senate "the sole Power to try all Impeachments."[428] Therefore, federal courts have no constitutional authority to review impeachment determinations made by the House and Senate.[429] If the House were to bring impeachment charges against a federal judge, the only recourse available to that judge would be an argument for acquittal in the Senate. If the Senate were to convict such a judge and effectuate his or her removal from office, such a determination would likely be final and incapable of review. Notwithstanding the overtly confrontational nature of the impeachment process and the political pressures that sometimes prevent its use, it remains an option available to Congress when judges evade their responsibilities or usurp legislative authority.

Congress also has the power to regulate the jurisdiction of the federal courts. Congress can use this power to keep the courts in check, as it did during the events leading up to *Ex parte McCardle*.[430] In that case, the U.S. Supreme Court was unable to reach the merits because Congress had repealed the underlying jurisdictional statute. As the Court explained, "[j]urisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."[431] Congress can deal with judicial excesses by amending the jurisdictional statutes that give the federal courts their power to decide cases and order relief.

Finally, the option once proposed by President Franklin D. Roosevelt remains available to Congress at all times. 28 U.S.C. § 1 states that "[t]he Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum."[432] Since the Constitution prescribes no number, Congress has the power to

426 U.S. CONST. art. I, § 8.

427 506 U.S. 224, 228, 238 (1993).

428 U.S. CONST. art. I, §§ 2–3.

429 Joseph R. Thysell, *Senate Rule XI and the Impeachment of Federal Judges*, 29 S.U. L. REV. 77, 82 (2001) (discussing judicial review of Senate impeachment proceedings).

430 74 U.S. (7 Wall.) 506 (1869).

431 *Id.* at 514.

432 28 U.S.C. § 1 (2000).

create more seats on the U.S. Supreme Court. Such a move would, of course, dilute the importance of the votes of the existing members of the Court. The fact that there are nine Justices is solely the result of a statutory mandate. There is no constitutional impediment to a federal law designed to pack the Court.

There is a political equilibrium in Washington that usually prevents Congress from taking these drastic steps. With two major political parties and countless other factions comprising a diverse Congress, it is unlikely that any significant legislative initiatives to curtail abuses by the federal courts will pass in the near future. Each party or faction is afraid that another will reap the benefits of a stronger Congress, and this dynamic prevents the body as a whole from acting to reassert its authority.

In any event, Congress must not remain impotent when its authority is undermined. For an entire decade, Congress has seen the Judiciary restrict Congress's powers in a relentless manner. Perhaps the U.S. Supreme Court's decisions in *Hibbs*, *Lane* and *Goodman* are a sign that the Court is finally starting to retreat. Time will ultimately tell if this is the case. Chief Justice John G. Roberts, Jr., and Justice Samuel A. Alito, Jr., have now replaced Chief Justice Rehnquist and Justice O'Connor, and the direction that the Court will take in the future remains uncertain. Perhaps the Court's two newest members will show more deference to Congress than Chief Justice Rehnquist and Justice O'Connor did, thereby decreasing tensions between America's legislators and jurists. If the Court continues to usurp Congress's authority, however, Congress will have no choice other than to act.

That is not to say that all judges deserve to be condemned. Most members of the Judiciary serve the American people with the highest level of respect for our constitutional tradition. Nevertheless, the same is true of those who serve as elected officials. The power that they exercise comes from the people who elect them, and our Constitution confirms that "We the People" are the ultimate authority in this country.[433] Congress simply cannot remain silent when unelected judges usurp the authority of the people. While judges are entitled to respect when they carry out their role in the constitutional design, they must learn to show a greater degree of respect for America's elected officials. The courts, after all, have no real power to enforce their decisions. They rely on the Executive Branch to enforce their judgments, and the Executive Branch has to rely on Congress to supply the needed resources. Under our Constitution, there are three co-

433 U.S. CONST. pmbl.

equal branches of government, none of which is superior to the others.

Homicide by Necessity

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> I observe a famine at sea, I observe sailors casting lots
> who shall be kill'd to preserve the lives of the rest,
>
> . . . .
>
> . . . [A]ll the meanness and agony without end I sitting
> look out upon,
>
> See, hear and am silent.
>
> —WALT WHITMAN, *I Sit and Look Out* (1860), *reprinted in* THE PORTABLE WALT WHITMAN 190 (Michael Warner ed., 2004).

INTRODUCTION

In philosophy we sometimes consider the question, put by way of hypothesis, of how we should act in the midst of a calamity, disaster, or other danger, if it is apparent that we can save our own life only by the destruction of another's. We can hardly imagine that such a question would have much practical importance, or that a court would ever need to rule upon conduct under such circumstances, or, for that matter, that we would ever personally encounter an ordeal in which we face a dilemma between self-sacrifice and the sacrifice of another.

In fact, there have been numerous instances of homicide by necessity, some of which have resulted in murder or manslaughter convictions, and others which have passed quietly into history with no action taken by the authorities. This topic, homicide by necessity, refers to the killing of innocents in order to produce a greater good or avert a greater evil—usually to save a greater number of lives.

At the outset, we immediately run into a problem. At common law and almost universally in modern law, the necessity defense has been consistently denied in cases where the actor commits intentional homicide in order to avert a greater evil. Virtually all other categories of crimes and torts, even treason, are eligible for the necessity defense, provided that all of the elements of the defense are proven; but intentional homicide is not. Numerous statutory enactments of the necessity defense specifically preclude the defense in connection with intentional homicide.[1]

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[1] For example, the Missouri necessity statute justifies conduct that "would otherwise constitute [a] crime other than a class A felony or murder." MO. ANN. STAT. § 63.026 (West 2006). *See also* KY. REV. STAT. ANN. § 503.030 (West 2003) ("[N]o justification can exist under this section for an intentional homicide.").

On the other hand, from a philosophical standpoint, the intentional killing of innocents, as in the Trolley Problem,[2] may well be *morally* permissible, based on utilitarian and other philosophical arguments. The strictly philosophical view is that if we must choose between killing a few and letting many die, it is better to kill the few.[3] But from a legal standpoint, as we will see, courts have come to the opposite conclusion in real, rather than hypothetical, cases. Courts have suggested that it is difficult to see how there is a benefit to society in the intentional kill-

2 Judith Jarvis Thomson, *The Trolley Problem,* 94 YALE L.J. 1395 (1985); *see also* Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, *in* VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 19 (1978). Judith Jarvis Thomson describes the Trolley Problem essentially as follows:

> Edward is the driver of a trolley whose brakes have failed. On the track ahead of him are five people; the banks are so steep that they will not be able to get off the track in time. The track has a spur leading off to the right, and Edward can turn the trolley onto it. Unfortunately, there is one person on the right-hand track. Edward can turn the trolley, killing the one; or he can refrain from turning the trolley.
>
> If Edward does nothing, the trolley will proceed on its path and run over and kill the five people on the track ahead. If he throws the switch, thereby diverting the trolley to the right track, the trolley will instead run down and kill one person.
>
> Thus, we have a situation of imminent harm threatening the lives of five people. The actor can eliminate the danger only by inflicting harm on another interest, namely on the innocent worker located on the other track. The action is sure to kill that person. The question is whether it is *morally* permissible, or indeed morally required, to turn the trolley so as to avert a greater evil, but end up killing someone who was not otherwise in harm's way.
>
> It seems that most everyone would agree that the trolley operator is permitted to, or even justified in choosing the lesser evil by throwing the switch and diverting the trolley, thereby averting the imminent death of five, in preference for the death of one.
>
> It is hard to say why most of us would agree that the right thing to do in the trolley case is to divert it to the right track and, in effect, affirmatively, actively, kill one person rather than, by doing nothing, passively allow five to die. Clearly, Edward would be violating the right to life of the one who is killed. Still, our intuitions are that throwing the switch is the right thing to do. His motives are excellent in that he acts with a view to saving five, but it is an intentional killing all the same.
>
> Another element of the problem involves the distinction between killing and letting die. The trolley, being out of control, and left to its own devices, will cause the death of five people. Human intervention, however, can change its course, in which case instead of passively letting the five die, the actor will "kill" the one person instead. If letting die were so much better than killing, regardless of the numbers involved, then the proposal that Edward turn the trolley would be out of the question.

Id. The trolley problem is not just hypothetical. Railroad officials in Los Angeles county reported a decision to divert a runaway freight train onto a side track—knowing derailment was likely—rather than let it continue on course to downtown Los Angeles. *See* Kurt Streeter et al., *Runaway Train Jumps Tracks in Commerce,* L.A. TIMES, June 21, 2003, at A1.

3 *See, e.g.*, GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 198–200 (1957).

ing of innocents even though the action results in the saving of lives. Lives are not amenable to ready quantification, and therefore courts are just not comfortable with allowing defendants to assert a necessity defense by "measuring the comparative value of [life]."[4] At the same time, there is a minority view that the defense is or should be available in cases involving intentional homicide. Yet again, the overwhelming majority of courts are particularly reluctant to entertain the necessity defense to justify intentional homicide because of the deontological sense that it is morally repugnant to balance two harms when one of them involves killing an "innocent and unoffending"[5] person.

This constraint on the application of the necessity defense is similar to the common law principle that duress is not available as a defense to a defendant accused of murder. On this point Blackstone said that someone under duress "ought rather to die himself than escape by the murder of an innocent."[6] It seems intuitive that, since neither duress, coercion, nor compulsion are defenses to murder, and these defenses are in the nature of excuses, then much less could necessity, a justification, be advanced as a defense to murder.[7]

It should be noted that the necessity defense *is* available in cases of criminally negligent homicide such as second degree ve-

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4 John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law,* 36 HOUS. L. REV. 397, 405 (1999). Indeed, the dilemma of choosing who and how many innocents to kill is so unsettling an issue that sometimes it is evaded or avoided in judicial opinions. For example, in *Regina v. Dudley & Stephens,* (1884) 14 Q.B.D. 273 (U.K.), discussed below, the jury took the unusual step of rendering a special verdict that only found the facts, and submitted the question of guilt or innocence for the judge to decide.

5 *Dudley & Stephens*, 14 Q.B.D. at 286.

6 WILLIAM BLACKSTONE, 4 COMMENTARIES *30.

7 In the law there is a difference, sometimes not entirely clear, between an act that is excused and an act that is justified. Justification focuses on the act itself under the circumstances. The defense will seek to prove that while that conduct appears to be a prima facie violation of the law, the conduct is not wrongful because the act is appropriate for policy reasons. If an act is justifiable for one person, it is justifiable for anyone else in the same circumstances. For example, the justification of self-defense is available to all actors in the same circumstances.

Excuse, on the other hand, focuses on the actor rather than the act. With excuse, we admit that an actor's conduct is wrongful but we do not hold the actor responsible for the behavior. A successful defense of excuse represents a legal conclusion that the act was wrong, but liability is inappropriate because of some circumstances inhering in the actor, such as insanity, duress, infancy, or mistake. One asks whether an actor should be excused only after one has determined that the act was not justified. If the act were justified, there would of course be nothing to excuse. If the conduct of an actor is excused under the law, only the particular person is excused. For example, an insanity defense is not available to all those who commit similar acts, but only to the actor in the particular circumstances considered. The perpetrator who is incapable of perceiving right from wrong due to insanity, or the person who labors under a mistake of fact, the sleepwalker, and so forth, are actors of whose actions we may disapprove intensely, but whom in appropriate circumstances we excuse rather than punish.

hicular manslaughter. For instance, in the New York case *People v. Maher,*[8] the defendant was involved in a minor traffic accident.[9] The driver of the other vehicle became belligerent and started to reach into the back seat of his car. The defendant feared that he was going to produce a weapon, so he returned to his car and fled the scene. The defendant, while speeding down the street, struck and killed a pedestrian. At trial he sought to justify his speeding on the grounds that this conduct was necessary as an emergency measure to avoid a perceived attack that was about to occur.[10] The Court of Appeals held that the defendant was entitled to have the jury consider whether his speeding was justified under the necessity doctrine.[11]

The cases discussed in this article involve people in extreme circumstances: faced with imminent peril of death by starvation; death by drowning in an overloaded, rickety lifeboat; and other exigencies. The choice of evils is either for everyone in the group to die, or to kill one or more members of the group in order to save a greater number. In the shipwreck cases, the killing is in order to cannibalize the remains of the victim, so that the greater number of survivors may have sustenance and avert their own deaths by starvation. We see in these extreme situations that people caught up in the crisis will inevitably kill one or more of their group, either by democratic lot-drawing, or by the sheer principle of the stronger overcoming the weaker.

I. ELEMENTS OF THE NECESSITY DEFENSE

The necessity doctrine states that certain conduct, though it violates the law and produces a harm, is justified because it averts a greater evil and hence produces a net societal gain.[12] Granville Williams expressed the necessity defense this way: "[S]ome acts that would otherwise be wrong are rendered rightful by a good purpose, or by the necessity of choosing the lesser of two evils."[13] He offers this example:

> Suppose that a dike threatens to give way, and the actor is faced with the choice of either making a breach in the dike, which he knows will result in one or two people being drowned, or doing nothing, in which case he knows that the dike will burst at another point involving a whole town in sudden destruction. In such a situation, where there is an unhappy choice between the destruction of one life and the destruc-

8 594 N.E.2d 915 (N.Y. 1992).
9 *Id.*
10 *Id.* at 916.
11 *Id.*
12 *See* Joseph J. Simeone, *"Survivors" of the Eternal Sea: A Short True Story,* 45 ST. LOUIS U. L.J. 1123, 1140–41 (2001).
13 WILLIAMS, *supra* note 3, at 198.

> tion of many, utilitarian philosophy would certainly justify the actor in preferring the lesser evil.[14]

The utilitarian idea is that certain illegal conduct ought not to be punished because, due to the special circumstances of the situation, a net benefit to society has resulted.[15] This utilitarian rationale is sometimes criticized as "ends-justifying-the-means."[16] The doctrine finds it justifiable, especially under exigent circumstances, to break the letter of the law if doing so will produce a net benefit to society.

Another commentator has observed: "[T]hese [justified] acts are ones, as regards which, upon balancing all considerations of public policy, it seems desirable that they should be encouraged and commended even though in each case some individual may be injured or the result may be otherwise not wholly to be desired."[17] It has been opined that the necessity doctrine "represents a concession to human weakness in cases of extreme pressure, where the accused breaks the law rather than submitting to the probability of greater harm if he does not break the law."[18]

English and American courts have long recognized the defense of necessity.[19] The idea, in its simplest form, is that it is unjust to penalize someone for violating the law when the action produces a greater good or averts a greater evil. Had the unlawful action *not* taken place, society would have endured a greater evil than that which resulted from violating the law. Therefore, under the necessity doctrine, those who violate the law in certain circumstances are justified in doing so.

With the necessity defense there will always be a *prima facie* violation of the law, and in our discussion the violation will be the intentional killing of innocent people.

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14 *Id.* at 199–200.

15 *Id.*

16 As Justice Brandeis said in his famous dissent in *Olmstead v. United States*:

> In a government of laws, existence of the government would be imperiled if it fails to observe the law scrupulously. . . . Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

277 U.S. 438, 485 (1928).

17 JUSTIN MILLER, HANDBOOK OF CRIMINAL LAW 189 (1934).

18 A.J. Ashworth, *Reason, Logic and Criminal Liability,* 91 L. Q. REV. 102, 106 (1975).

19 Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil,* 65 J. CRIM. L. & CRIMINOLOGY, 289, 291–96 (1974).

There is a six-prong test for someone to invoke the necessity defense. The defendant must prove "(1) that he was faced with a choice of evils and chose the lesser evil; (2) that he acted to prevent imminent harm; (3) that he reasonably anticipated a direct causal relationship between his conduct and the harm to be avoided; and (4) that there were no other legal alternatives to violating the law."[20] The fifth prong is that "the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue."[21] Finally, a sixth prong generally has been held to require that the circumstances occasioning the necessity were not caused by the negligent or reckless acts of the defendant in the first instance.[22]

In our discussion I will refer to these six prongs as follows: (1) the choice of evils prong; (2) the imminence prong; (3) the causal nexus prong; (4) the legal way out prong; (5) the preemption prong; and (6) the clean hands prong. In the context of intentional homicide, we might frame the prongs as follows:

(1) The choice of evils prong. In these cases the choice of evils is either death of the entire group by starvation (or by drowning) or killing someone in order to cannibalize his flesh (or ejecting someone from the boat in order to lighten it and save the others from drowning). There is a clear cost-benefit calculus in that the action will result in a net saving of lives. Since the necessity doctrine is based on a cost-benefit analysis, it would seem that this prong would be satisfied in situations where killing a few innocents will result in saving a greater number of innocent lives.

(2) The imminence prong. This is perhaps the most problematic prong. How imminent is the threat of death in situations where one faces starvation? Is it possible to go on a bit longer without sustenance? Perhaps it will be feasible to catch a sea creature and eat it. Perhaps a rescue ship will soon appear on the horizon. To what extent do the tensions and panic in the group provoke a kind of riot or anarchy? How imminent is the threat of death in situations where a lifeboat is overloaded? If people are able to bail out water to stabilize the boat, is that not a sign that the situation is not truly imminent?

(3) The causal nexus prong. The action taken in the cases

20 United States v. Aguilar, 883 F.2d 662, 693 (9th Cir. 1989).

21 Commonwealth v. Brugmann, 433 N.E.2d 457, 461 (Mass. App. Ct. 1982); *see also* Missouri v. Diener, 706 S.W.2d 582, 585 (Mo. Ct. App. 1986) (quoting similar language).

22 United States v. Agard, 605 F.2d 665, 667 (2d Cir. 1979) (holding that the necessity defense "will not constitute a valid legal excuse when the defendant has recklessly or negligently placed himself in a situation in which it was probable that he would be [forced to choose the criminal conduct]").

considered all appear to meet this prong in that the action of killing will usually have the direct result of saving a greater number of lives. For example, by cannibalizing the flesh of the victim, or by ejecting people from an overloaded or rickety lifeboat, the remainder of the group will then be in a condition to survive.

(4) The legal way out prong. If people in a lifeboat are facing imminent death unless some of their party is sacrificed, it would seem that there is no legal solution to the situation. The parties are, as it were, in a state of nature where ordinary vehicles of the law are inaccessible. There is no opportunity to seek a court injunction. If a lifeboat is in imminent danger of sinking, there simply may be no reasonable "legal" alternative than to randomly eject passengers to lighten the boat, thereby saving a greater number.

Alternatively, if people in such a situation anticipate the danger, then, time permitting, should they take to drawing lots to select who should be ejected before the boat begins to sink? As we will see, the drawing of lots ("sortition") has been advanced as a kind of legal protocol to which participants may bind themselves. If so, might sortition absolve the actors from a charge of murder? If so, this would seem to contradict the common law principle that consent is no defense to intentional homicide. What if some members of the group object to the drawing of lots? Might lots be drawn for them by proxy? If the person selected refuses to be killed, might he be justified in using self-defense to prevent the others from ending his life? If the only legal means of avoiding killing is for everyone to go down with the boat or for everyone to starve to death, from society's perspective is the latter the preferable result?

(5) The preemption prong. The weight of authority precludes a defendant from asserting the necessity defense in intentional homicide cases. Thus, in the cases considered, this is the decisive prong in preventing the actors from being acquitted. We might question whether the refusal of courts to allow the necessity defense in such cases has any deterrence value. That is, will the prospects of being prosecuted for murder deter people in actual emergencies from killing some of their group in order to save a greater number, when otherwise all will perish? If not, should the law punish where punishment is not likely to be an effective deterrent?[23]

[23] *See generally* Walter Harrison Hitchler, *Duress as a Defense in Criminal Cases,* 4 VA. L. REV. 519, 521–22 (1917) ("Punishment for deterrence should be inflicted only where it is possible to deter."); Newman and Weitzer, *Duress, Free Will and Criminal Law,* 30 SO. CAL. L. REV. 313, 313 (1954) ("If a person commits an act under compulsion, responsibility for the act cannot be ascribed to him . . . . Punishment of the actor would be misdi-

(6) The clean hands prong. In some instances, certain individuals may have been reckless or negligent in bringing about the necessitous circumstances in the first place—by recklessly navigating the ship and causing it to founder, by setting to sea in an unseaworthy vessel, by failing to repair rickety lifeboats before embarking on the voyage, by failing to provide an adequate number of lifeboats, or by failing to provide adequate provisions that might be transferred to the lifeboats.

II. HISTORICAL EXAMPLES OF HOMICIDE BY NECESSITY

The Greek historian Herodotus reported that during a great famine in Egypt in 1201 AD, some people killed and ate little children.[24] In turn, they were held accountable and burned at the stake.[25] The corpses were, in turn, devoured by the starving population.[26]

A seventeenth-century account of cannibalism in connection with a shipwreck was reported by Dutch physician Nicholaus Tulpius.[27] The ship, carrying seven Englishmen, had set sail from the Island of St. Christopher in the Caribbean for an overnight cruise to a nearby island. A storm drove them so far out to sea that they could not get back to port for seventeen days, and they had inadequate provisions. After eleven days, the men agreed to draw lots to decide who should die to satisfy the hunger of the others; lots were also cast to select an executioner. The man who had suggested the idea turned out to be the victim once the lots were drawn. He was killed; the crew drank his blood and ate his body. The boat was cast on the shore of the Isle of St. Martin after seventeen days at sea. Upon their arrival, the Governor pardoned the survivors without any trial.[28]

The international law commentator, Pufendorf, remarked on this "story of some Englishmen" as follows:

> To feed on man's flesh, in the desperate extremity of famine, when no other sustenance can be procured, is a lamentable, indeed, but not a sinful expedient. But as for those instances when in distress and want of all provisions, men have been killed to preserve their fellows, either by compulsion, and against their consent, or else by the determination of lot, the decision of them is a point of some difficulty and uncertainty. Inasmuch as whatever the law against [murder] suggests on one side, the sharpness of hunger pleads as loud on the other;

rected and futile since it would deter neither him nor others . . . .").

24 NEIL HANSON, THE CUSTOM OF THE SEA 121 (John Wiley & Sons, Inc. 1999) (1999).

25 *Id.*

26 *Id.*

27 *Id.* at 126.

28 *Id.*; Herbert Stephen, *Homicide by Necessity,* 1 L. Q. REV. 51, 57 (1885); *see also* A.W. BRIAN SIMPSON, CANNIBALISM AND THE COMMON LAW (1984).

> and the belly, that advocate without ears: especially considering that unless this *unhappy* means was made use of, the whole company must have inevitably perished. This is one of those cases in which a man ought to die rather than commit the fact, it being directly contrary to the laws of both God and nature. To this purpose we have a story of some Englishmen, who being tossed in the main ocean without meat or drink, killed one of their number on whom the lot fell, and who had the courage not to be dissatisfied, assuaging in some measure with his body their intolerable and almost famished condition: whom when they at last came to shore, the judges absolved of the crime of [murder].[29]

Thus, Pufendorf suggests that one should prefer to die rather than to kill an innocent in the face of death by starvation, but that the act of murder might be "absolved."

Soldiers of Napoleon's army on the long retreat from Moscow killed some of their own in order to survive.[30] Cannibalism among escaped convicts in Australia and explorers in remote regions has been documented.[31] There were no survivors of Sir John Franklin's expedition to the Arctic in 1845, but rescuers reported mutilated corpses and the contents of kettles that indicated cannibalism had occurred.

In 1765, the *Peggy* ran into incessant storms in the Atlantic that destroyed its sails.[32] The food and water ran out, and the crew began to starve. The crew told the captain that they had drawn lots and that an Ethiopian slave, who was being transported in slave trade, drew the short straw. The slave was shot dead, cooked and eaten. About four days later the crew was rescued by a passing ship.[33]

A famous painting in the Louvre, *Radeau de la "Méduse"* (*The Raft of the Medusa*), by Theodore Gericault, painted for the Paris Salon in 1819, depicts a historical event.[34] In June, 1816, the French frigate "*Medusa* sailed with a four-ship convoy to establish a garrison in Senegal, which had been repatriated to France . . . after the defeat of Napoleon . . . at Waterloo."[35]

> *Medusa* was originally built as a 44-gun frigate. With the end of the Napoleonic Wars in 1815, she was converted to a troop transport, and 30 of her guns were removed. . . . The captain of the convoy, . . . de

29 Stephen, *supra* note 28, at 56 (quoting SAMUEL PUFENDORF, JUS NATURAE ET GENTIUM (Basil Kennett trans., London 1729) (1672)).

30 HANSON, *supra* note 24, at 122.

31 *Id.* at 122–23.

32 *Id.* at 126.

33 *Id.* at 126–27.

34 SIMPSON, *supra* note 28, at 116; LINCOLN P. PAINE ET AL., SHIPS OF THE WORLD: AN HISTORICAL ENCYCLOPEDIA 333 (1997).

35 PAINE, *supra* note 34, at 333.

> Chaumareys, . . . [had] no previous command experience. . . . [and was] [p]ressured for a quick passage by the new governor of Senegal.[36]

De Chaumareys, sailing with 400 passengers and crew, pressed ahead of his squadron (in violation of the Naval Ministry's orders), then crossed the treacherous Arguin Bank off the coast of West Africa, where the ship ran aground. The ship did not sink, but stuck in a sandbar. De Chaumareys made efforts to refloat the ship, but this failed because he refused to jettison any of her fourteen three-ton cannons. A gale on July 5 only worsened the ship's predicament.

About half of the ship's passengers then boarded the ship's six lifeboats, and eventually made it to Saint-Louis. For the remainder, a huge raft was constructed from spars, planks, barrels, and loose rigging, and approximately 157 people boarded it with limited provisions. The raft was crudely constructed, about sixty-five feet by twenty-three feet, had no oars and no means of navigation, and was hopelessly overcrowded.[37] They set off for the African coast but encountered rough seas and difficulty staying afloat. Over a two-week period, there was general panic and mutiny, and wholesale killings occurred. Many engaged in cannibalism. In the next few days, more acts of panic and violence occurred, following which only thirty men remained, fifteen of whom were wounded from the melee that had occurred. The fifteen men who were injured were thrown overboard by the other fifteen men who were somewhat more able-bodied. On the seventeenth day adrift, the remaining fifteen were rescued.[38]

The episode caused a major political scandal in France. The scandal focused on accusations of "incompetence, callousness and cowardice" on the part of de Chaumareys.[39]

> De Chaumareys was tried on five counts but acquitted of abandoning his squadron, of failing to refloat his ship and save her cargo of gold, and of abandoning the raft. He was found guilty of incompetent and complacent navigation and of abandoning *Medusa* before all her passengers were off. The last verdict carried the death penalty, but de Chaumareys was sentenced to only three years in jail. In 1980, the remains of the *Medusa* were identified by divers on the Arguin Bank some 50 kilometers off the coast of Mauritania.[40]

In 1829, an instance of shipwreck and cannibalism was reported in connection with a British ship, the *Granicus,* which had

36 *Id.*

37 J. B. HENRY SAVIGNY & ALEXANDER CORREARD, NARRATIVE OF A VOYAGE TO SENEGAL IN 1816, at xiii (The Marlboro Press 1986) (1818).

38 HANSON, *supra* note 24, at 125–26.

39 PAINE, *supra* note 34, at 333.

40 *Id.*

foundered off an uninhabited island in the Gulf of St. Lawrence.[41] A party of explorers later came upon a crude hut where the survivors had found shelter:

> Inside were the carcasses of four human beings with their heads, legs, and arms cut off and their bowels extracted.
>
> A cooking pot over the long extinct ashes of a fire contained more human flesh. The blood-spattered walls and ceiling suggested that the victims had not gone quietly to their deaths.[42]

There were no survivors. A body, possibly the last of the crew to live, was found intact but dead, in a hammock.

An account of the American whaling ship, the *Essex,* inspired Melville to write *Moby Dick.*[43] The ship sank in the South Pacific in November 1820, after being rammed repeatedly by a whale. The crew took to three small boats, and the occupants of each boat later engaged in the custom of drawing lots.[44] In addition, some of the men died of natural causes and their bodies were eaten. It has been suggested that the deaths from "natural causes" were in fact murder, and that the majority of "instances of lots being drawn were rigged or fabricated afterwards to conceal the murder of a disliked or disposable member of the company."[45]

It was relatively common for ships to catch fire in the nineteenth century. The fires were caused by carelessness in the lighting of matches, or by passengers smoking their pipes in their berths, perhaps falling asleep. While smoking below deck was generally against shipboard rules, it nonetheless was frequently done.[46] Many fires were caused by stevedores smoking recklessly among bales of cotton in the cargo. Cotton will smolder for days if excluded from the air before it bursts into flames. A large number of ships were destroyed from the igniting of tar, oil, or cotton waste in the storerooms.

There appears to have been in many such cases some difficulty in deploying lifeboats. They were often stowed in positions that required great skill to get them out free of damage, and there were never enough lifeboats for more than a fraction of the passengers. People would violently rush the boats; there would be lack of discipline, trampling down of the weak, and boats

41 HANSON, *supra* note 24, at 123.
42 *Id.*
43 *Id.* at 131.
44 *Id.*
45 *Id.* at 132.
46 *See The Dangers of the Sea, by the Captain of an Ocean Steamer,* THE ECLECTIC MAGAZINE OF FOREIGN LITERATURE, May 1875, at 623.

would often be overloaded and, consequently, would capsize.[47]

For example, in 1874, the *Cospatrick,* a 1200 ton teak-hulled ship carrying 433 crew and passengers, caught fire and sank in the seas off New Zealand.[48] The lifeboats could only accommodate half of the people, and there was such great difficulty getting them launched that only two of them got off, carrying only eighty-one passengers and crew. Those who did not get onto lifeboats ended up dying. It was reported that the captain threw his wife overboard to drown rather than burn, and leaped in after her to drown as well.

Of the two lifeboats, one, containing forty-two people, became lost in a gale and was never seen again. The people in the second boat soon started to suffer from extreme thirst and exposure. Some were thrown overboard to reduce overcrowding. Others were sacrificed and then their flesh was eaten. After ten days adrift they were picked up by a British ship, with only five survivors, two of whom died within a couple of days. It appears that the remaining three were not prosecuted for any crimes.[49]

Also in 1874, a coal ship, the *Euxine,* caught fire.[50] When all attempts to control the fire failed, the crew of thirty abandoned ship in lifeboats. The captain and crew set out in a convoy of three boats for St. Helena. The boats soon parted from one another and some of the survivors ended up casting lots for a sacrifice. An Italian sailor drew the fatal lot and meekly allowed himself to be killed; his starving associates drank his blood and ate his flesh.[51] A legal proceeding was brought in Singapore, but the parties were released.[52]

In 1893, three of the four survivors who had been clinging to the waterlogged hulk of the *Thekla* for thirteen days drew lots and killed the fourth.[53] Upon being rescued, the Norwegian authorities investigated the matter, but did not institute formal charges. In 1899, the *Drot* foundered in a hurricane on the Mississippi River.[54] "Six of the crew constructed a raft from the wreckage and cast themselves adrift. One [crew member] went mad and threw himself overboard. Another, apparently dying, was killed and his blood drunk, and the same fate befell a third man shortly afterwards." The three remaining men then agreed

47 *Id.* at 625.
48 HANSON, *supra* note 24, at 128.
49 *Id.* at 128–29; *Sayings and Doings*, HARPER'S BAZAAR, Feb. 13, 1875, at 111.
50 SIMPSON, *supra* note 28, at 176–80.
51 *The Dangers of the Sea, supra* note 46, at 626.
52 HANSON, *supra* note 24, at 134.
53 *Id.* at 300.
54 *Id.*

to cast lots and the loser accepted his fate and bared his breast to the knife. After the two survivors were rescued, the German consul later sought to extradite them for murder, but the United States authorities delayed and then dismissed proceedings.[55]

The doctrine of necessity supports action taken by a ship captain in closing off certain parts of the vessel to save the ship from flooding, even if that means certain death for the seamen who are trapped. For example, on May 23, 1939, while the United States submarine *Squalus* was practicing a crash dive, the main induction valves failed to close and water poured into the engine rooms.[56] The submarine sank to the ocean floor more than 200 feet below the surface. The two engine rooms and the after torpedo room were closed off in order to prevent the water from pouring into the rest of the vessel. Twenty-six men were trapped in those rooms, and they drowned. The remaining thirty-three in the other parts of the submarine were eventually rescued.[57] The man who actually closed the bulkhead door is reported to have said when rescued, "I wish to make it clear that I acted according to the requirements of my duty in closing the bulkhead door. I have the utmost sorrow for my shipmates who died, but I would not hesitate to do the same thing if similar circumstances required . . . ."[58] The action of closing the bulkhead door had the clear consequence of trapping the men inside, with the certainty that they would drown, but this choice was the lesser evil in that it resulted in a net saving of lives.

In 1987, an incident occurred during the sinking of the ferry *Herald of Free Enterprise* at Zeebrugge, during which an Army corporal and dozens of other passengers were trapped on the sinking ferry.[59] Their only means of escape was via a rope-ladder, but a man was blocking it and was frozen in panic in the midst of rising waters. "After repeatedly shouting at him to move, the corporal ordered those below him to pull the man off the ladder" because his immobility was seriously jeopardizing the safety of others who were in danger of drowning. "They did so and he fell into the water and drowned, while the others made their escape."[60]

The coroner reported that the killing appeared to be "a reasonable act of what is known as self-preservation . . . that also includes in my judgment, the preservation of other lives; such kill-

55 *Id.*
56 NAT A. BARROWS, BLOW ALL BALLAST! 286 (1940).
57 *See* CARL LAVO, BACK FROM THE DEEP ch. 5 (1994).
58 BARROWS, *supra* note 56, at 172.
59 HANSON, *supra* note 24, at 301.
60 *Id.*

ing is not necessarily murder at all."[61] No criminal charges were brought.

III. HOMICIDE BY NECESSITY: THE MINORITY VIEW

The minority view was expressed in dictum in an early federal case. Supreme Court Justice H. Brockholst Livingston, sitting as a circuit court judge, wrote:

> If the necessity which leaves no alternative but the violation of law to preserve life, be allowed as an excuse for committing what would otherwise be high treason, parricide, murder, or any other of the higher crimes, why should it not render venial an offence which is only malum prohibitum, and the commission of which is attended with no personal injury to another.[62]

Here, in dictum, Justice Livingston apparently presumed that the necessity defense is available for "treason, parricide, murder" and other high crimes, so that in the case at bar, involving a less serious crime of violating an embargo by entry into a forbidden port, necessity was allowed as a defense.

In modern times, the view that necessity ought to be available as a defense to intentional homicide is explicitly mentioned in the Model Penal Code, based upon a utilitarian cost-benefit analysis assessing whether the killing results in the net saving of lives, hence producing a greater good for society.[63] The Model Penal Code, which seeks to inform and influence state lawmakers, supports the intuitive view that intentionally killing an innocent is legally justifiable under certain circumstances where the result is the net saving of innocent lives.[64] This minority view suggests that it is counterintuitive to deny the necessity defense when killing a few may help avert the killing of many others. The Commentary to the Model Penal Code says:

> It would be particularly unfortunate to exclude homicidal conduct from the scope of the defense. For, recognizing that the sanctity of life has a supreme place in the hierarchy of values, it is nonetheless true that conduct that results in taking life may promote the very value sought to be protected by the law of homicide. Suppose, for example, that the actor makes a breach in a dike, knowing that this will inundate a farm, but taking the only course available to save a whole town. If he is charged with homicide of the inhabitants of the farm house, he can rightly point out that the object of the law of homicide is to save life, and that by his conduct he has effected a net saving of innocent lives. The life of every individual must be taken in such a case to be of

61 *Id.*
62 The William Gray, 29 F. Cas. 1300, 1302 (C.C.D. N.Y. 1810) (No. 17,694).
63 MODEL PENAL CODE § 3.02 cmt. 3 at 14–15 (1985).
64 *Id.*

> equal value and the numerical preponderance in the lives saved compared to those sacrificed *surely should establish* legal justification for the act.[65]

Thus, it is advanced by the Commentary that homicidal conduct to increase the number of people remaining alive should be regarded as justifiable under the necessity doctrine.[66] The last sentence of this section was modified from the 1958 Tentative Draft of the Model Penal Code. The earlier version said: "The life of every individual must be assumed in such a case to be of equal value and the numerical preponderance in the lives saved compared to those sacrificed *surely establishes an ethical and legal justification for the act.*"[67]

Evidently, the newer version of the Commentary backed off from ascribing *ethical* approval of intentional homicide in the context of the necessity defense, and softened its approach by changing "surely establishes" to "surely should establish."

The Commentary to the Model Penal Code supports the view with a chilling hypothetical known as the Mountaineer Case[68]: Suppose two people are climbing a mountain. The climbers are held together by a rope. At one point, they both slip and slide over a precipice. The rope, still holding them both, becomes dangerously frayed. It clearly will not hold both of them much longer. Both face imminent death if nothing is done. Should the upper climber cut loose the lower climber, letting him fall to his death, and thus enable himself to climb up to safety? By doing so, the one climber will accelerate the death of the other slightly, but also avoid the greater evil, namely, the certain death of both.

The Commentary says this:

> [A] mountaineer, roped to a companion who has fallen over a precipice, who holds on as long as possible but eventually cuts the rope, must certainly be granted the defense that he accelerated one death slightly but avoided the only alternative, the certain death of both. Although the view is not universally held that it is ethically preferable to take one innocent life than to have many lives lost, most persons probably think a net saving of lives is ethically warranted if the choice among lives to be saved is not unfair. Certainly the law should permit such a choice.[69]

Here, the comment specifically notes there is a lack of unanimity as to the *ethics* of killing an innocent to save a greater number of lives, but that "most persons probably think" it is ethi-

65 *Id.* (emphasis added).
66 *Id.* at 14–16.
67 MODEL PENAL CODE § 3.02 cmt. 3, at 8 (Tentative Draft 1958) (emphasis added).
68 MODEL PENAL CODE § 3.02 cmt. 3, at 14–15 (1985).
69 *Id.* at 15.

cally permissible, presumably on utilitarian grounds, and that in any event the law ought to "permit such a choice" under the circumstances.

From a *moral* standpoint the upper climber may feel that the action would be impermissible under any circumstances because it would be the intentional killing of an innocent person. One might prefer to die honorably rather than be a survivor at the cost of another's life. Would the upper climber be in a better moral position if he asked permission of the lower climber to cut the rope? He might say, "Jim, there's no hope, the rope is failing and we will both go down; if I cut the rope at your end I can climb to safety—what do you say?" From a legal standpoint, on the other hand, "consent" to intentional killing is almost universally unlawful, as we will explore below.

One might consider whether the climbers in the Mountaineer Case owe duties to one other. The climbers, by consenting to be roped together, at least impliedly agree to use due care in aiding one another in, as it were, a joint venture. The idea of implied consent involves "an inference arising from a course of conduct or relationship between the parties, in which there is a mutual acquiescence or a lack of objection under circumstances signifying assent."[70] But the implied agreement between the climbers, one might plausibly argue, does not extend to exigent circumstances where their bodily integrity is in great jeopardy.[71] Moreover, in exercising due care, it is not entirely clear what the upper climber could do under the circumstances to aid the lower climber. It has been suggested that mountaineers who agree to rope themselves together when scaling mountains have an implied understanding that in the case of imminent peril, it is justifiable to cut the rope in order to save a greater number:

> If one loses his grip, the rope may save a life by stopping the fall—but the rope also creates a risk, for the falling climber may take the others down with him. By agreeing to rope up, each member of the group exposes himself to a chance of death because of someone else's error or misfortune. In exchange he receives protection against his own errors or misfortunes. Each accepts a risk of death to reduce the total risk the team faces, and thus his portion of the aggregate risk. Each agrees, if only implicitly, that if one person's fall threatens to bring all down, the rope may be cut and the others saved.[72]

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70 Allstate Ins. Co. v. State Farm Mut. Auto. Ins. Co., 195 S.E.2d 711, 713 (S.C. 1973).

71 The right to bodily integrity is a fundamental tenet of common law. Related to this notion is the right of a person to consent to what another does to impact his bodily integrity. *See, e.g.,* Eileen L. McDonagh, *My Body, My Consent: Securing the Constitutional Right to Abortion Funding,* 62 ALB. L. REV. 1057, 1061 (1999).

72 Frank H. Easterbrook, *The Case of the Speluncean Explorers: Revisited,* 112 HARV.

What about treating the Mountaineer Case as one of self-defense? The lower climber's tug on the rope is an unconsented invasion of the bodily integrity of the upper climber, and poses an imminent threat to the upper climber's life. The lower climber, albeit completely innocently and through no fault of his own, imperils the life of the upper climber by the tug of the rope. The upper climber had originally consented to be linked by the rope for the purpose of mutual safety, but did not agree to be pulled to his death under these circumstances. The tugging of the rope upon his body is, as it were, a trespass even though it was utterly involuntary on the part of the lower climber.

While it is the *rope* that directly poses the danger because it is coming apart, the lower climber, simply by being where he is at the time, is an innocent aggressor who poses an imminent threat to both the upper climber and himself. That is, the weight of the lower climber against the frayed rope exacerbates the frayed condition of the rope, and thereby imperils both of their lives. Under normal circumstances, the lower climber would not pose this threat, but in light of the rope's damaged state, the threat is real and present. The upper climber, however, can protect himself from imminent death by taking action in cutting the rope below him and then pulling himself up.

The aggressor is innocent of wrongdoing, and in a sense the aggression does not emanate from the lower climber, but emanates from the condition of the rope. On the other hand, as we noted above, it is arguable that the tugging of the lower climber's weight violates the agreement the climbers had to remain roped together. Thus, under the circumstances, the upper climber has a right to take defensive measures against what is, in a sense, *unlawful* aggression—aggression in violation of the scope of their mutual obligations in the mountain climbing venture.

Perhaps the Mountaineer Case is analogous to the situation of a viable fetus that threatens the mother's life. The pregnant woman is not expected to sacrifice her life to promote the well-being of the fetus inside her who needs her body at the expense of her own life.[73] Moreover, both the mother and fetus may likely die unless the fetus is sacrificed. Prior to *Roe v. Wade,* the doc-

L. REV. 1913, 1916 (1999).

[73] This argument draws upon Judith Jarvis Thomson's defense of abortion rights because no woman has a moral obligation to consent to an imposition as demanding as pregnancy. *See* Judith Jarvis Thomson, *A Defense of Abortion, in* RIGHTS, RESTITUTION, AND RISK 1 (William Parent ed., 1986). Moreover, the Supreme Court has ruled that the Due Process Clause protects an individual's right to bodily integrity. *See, e.g.,* Rochin v. California, 342 U.S. 165, 172–73 (1952) (reversing the conviction of defendant for possession of morphine, based on evidence procured by forcibly administering an emetic, inducing him to vomit capsules of the drug swallowed during arrest).

trine of medical necessity provided a defense to the performance of an otherwise illegal abortion to save the life of the mother.[74] The rationale behind medical necessity in such cases was a kind of self-defense: the mother has the right to defend herself against the needy and life-threatening fetus within her by expelling the fetus, even at the cost of the fetus's life.

The Commentary concludes that the issue "is a matter that is safely left to the determination and elaboration of the courts."[75] The Model Penal Code approach has not been adopted by any state. Moreover, numerous states have rejected the Model Penal Code's approach, either by increasing the burdens on a defendant interposing the necessity defense,[76] or by disallowing the defense to a charge of intentional homicide in the first place.[77]

IV. THE NAZI HOLOCAUST CASE

Another situation involving the killing of a person who is an innocent threat is a chilling account from the Nazi holocaust. A group of Jews was hiding from the Nazis.[78] They sought to prevent the Nazis from discovering their hiding place, but a crying baby jeopardized their safety. The group smothered the baby to death in order to prevent the Nazis from discovering their hiding place and killing them all.[79] A rabbi was asked to analyze the facts, and rendered the opinion that the action was permissible "since the baby would have been killed along with all the others if the Nazis had found them."[80] The rabbi added that the action was not required, but permissible (i.e., excusable) and that it would have been an act of holiness not to kill the infant under the circumstances.

The baby was an innocent threat to the others. In the absence of action to suppress the baby's crying, all of the people in the group, including the baby, would die at the hands of the Nazis. The choice of evils was either to do nothing, and allow the Nazis to discover the entire group, with the inevitable outcome

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74 Roe v. Wade, 410 U.S. 113, 117–18 (1973).

75 MODEL PENAL CODE § 3.02 cmt. 3 at 14 (1985).

76 Some states require that the defendant show that the threatened harm *clearly* outweighed the harm caused by the defendant. *See* 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 124(g) (1984). Others require that the defendant show by a preponderance of the evidence that the evil averted was greater than the evil caused. Eric Rakowski, *Taking and Saving Lives*, 93 COLUM. L. REV. 1063, 1151 n.193 (citing 2 ROBINSON, *supra*, § 124(c) (Supp. 1988)).

77 *See, e.g.,* SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 785 n.5 (1983) (collecting examples of states limiting the necessity defense).

78 Marilyn Finkelman, *Self-Defense and Defense of Others in Jewish Law: The* Rodef *Defense,* 33 WAYNE L. REV. 1257, 1278–79 (1987).

79 *Id.*

80 *Id.*

that they would all be killed, or to sacrifice the baby in order to save a greater number of people. The action to suppress the baby's cries (i.e., smother the baby, resulting in its death), in fact resulted in a greater number of lives saved.

If we compare the Nazi case to the Mountaineer Case, we will find significant similarities, and only a couple of differences. The entire group in the Nazi case, and both climbers in the Mountaineer Case, faced imminent death. In the Mountaineer Case, there was a net saving of one life; in the Nazi case, there was a net saving of several lives. The survival of the greater number could not occur without the sacrifice of the baby, who would die in any event. In the Mountaineer Case, the survival of the upper climber could not occur without the sacrifice of the lower climber, who would die in any event. Thus, in both cases, a net saving of life can occur only by killing someone. In both cases, the victim is a threat *in light of the circumstances*. In the Mountaineer Case, it is the *rope* that poses the danger because it is breaking, and this threat is exacerbated by the weight of the lower climber. In the Nazi case, it was not the baby itself, but the *crying* of the baby, that posed the threat. And this crying was not really the threat—it was the *Nazis* who posed the danger because they were close to finding the group's hiding place, and this threat was exacerbated by the presence of the crying baby.

In both cases, the action of killing results in the death of someone who otherwise would have died very soon. That is, in the Nazi case, if the group did nothing, the baby (and the entire group) would have ended up dying in short order. The death of the baby by smothering shortened the life of the baby by a short time; similarly, in the Mountaineer Case, cutting the rope shortened the life of the lower climber by a short time.

In the Mountaineer Case, the parties owed a duty to one another as a result of their agreement to be roped together but, as mentioned, that duty may well cease in the face of danger to their lives. In the Nazi case, duties are certainly owed by the parents to insure the proper health and welfare of the baby. It would be difficult to find authority for the proposition that parental duties might "cease" in exigent circumstances, but as noted above, the rabbi who considered the case, in ruling that the action was permissible, apparently excused the breach of parental duties in that instance.

We might consider whether the Nazi case is susceptible to analysis based on self-defense. This would lead us into murky terrain. A self-defense analysis in the Nazi case would be hard to support in part because the action of the baby's crying can hardly be said to be an act of "aggression," much less *unlawful* aggression against the others, as is customary in a standard case of self-defense. True, the crying posed an imminent threat of being detected by the Nazis, but this was hardly a *bodily* invasion or otherwise an act of physical aggression to the others. Much less is the crying in any sense *unlawful.* The crying was at best an indirect threat.

In the Mountaineer Case, as we argued above, the lower climber's tug on the rope is an unauthorized attack on the bodily integrity of the upper climber. This invasion, however innocent, when coupled with the frailty of the rope, posed an imminent threat to the upper climber's life. Of course, under normal circumstances, that is, if the rope were in sound condition, the lower climber's tugging on the rope over the precipice would not pose this threat.

The baby's crying would also not normally pose a threat to the life of the others. Only when coupled with the Nazis on the prowl did the crying become a danger. Still, the baby's crying under the circumstances seems causally removed from the real threat to the group. At least in the Mountaineer Case we can plausibly direct a defensive move by cutting the rope and, once that is completed, the danger ceases to exist. In the Nazi case, if the "defensive" move is accomplished (i.e., smothering the baby), the *real* danger does not go away—the Nazis might still find the group one way or another and end up killing them. Thus, killing the baby might not avert the real danger. It may enable the group to elude detection, but the slightest cough or movement or other noise by someone else in the group could lead to their doom. In the Mountaineer Case, cutting the rope *will* avert the real danger.

The Nazi case, like the Mountaineer Case, is best analyzed under the necessity doctrine, in part because the circumstances involve a weighing of evils, and the action taken resulted in a net saving of lives. The danger was imminent. There was no legal way out. The actors were not responsible for bringing about the necessitous circumstances. The action was calculated to be causally effective in averting the greater evil. The only impediment under the necessity doctrine is that under the majority view, the necessity defense is not available in cases of intentional homicide.

V. STATUTORY LAW ADDRESSING HOMICIDE BY NECESSITY

Most statutory enactments on the necessity defense are silent on the question of whether the defense is available in cases of intentional homicide. In the absence of statutory guidance, courts that have considered the question invariably say, based on common law principles, that necessity is no defense to intentional homicide.[81]

Kentucky makes it explicit that necessity is not available as a defense in cases of intentional homicide.[82] The Kentucky statute reads in relevant part:

> (1) Unless inconsistent with the ensuing sections of this code defining justifiable use of physical force or with some other provisions of law, conduct which would otherwise constitute an offense is justifiable when the defendant believes it to be necessary to avoid an imminent public or private injury greater than the injury which is sought to be prevented by the statute defining the offense charged, *except that no justification can exist under this section for an intentional homicide.*[83]

Missouri's statute also precludes the necessity defense in cases of murder, and precludes use of the defense in class A felonies: "[C]onduct which would otherwise constitute any crime other than a class A felony or murder is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury . . . ."[84]

Under the Wisconsin necessity statute, a defendant charged with murder is entitled to have the charges reduced to manslaughter if the elements of the necessity defense are proven. In that case, "if the prosecution [in which the necessity defense is invoked] is for first-degree intentional homicide, the degree of the crime is reduced to 2nd-degree intentional homicide."[85]

It may seem counterintuitive to preclude the necessity defense in homicide cases when the result is a net saving of lives, because "in so many other areas of human life we believe that we have an obligation to ensure the survival of the maximum number of lives possible."[86] For instance, in triage where emergency workers seek to ensure the survival of the maximum number of lives, necessity dictates that workers focus on rescuing one group of innocents over another for utilitarian reasons.[87] Suppose two groups of mine workers are trapped in a mine shaft, and due to the exigencies of the emergency, and mindful of the safety of the rescue team, only one group of equally blameless people who are trapped can be saved. If one group consists of thirty people and

81 *See, e.g.,* R.I. Recreation Ctr., Inc. v. Aetna Cas. & Sur. Co., 177 F.2d 603, 605 (1st Cir. 1949) ("[It] appears to be established . . . that . . . necessity will never excuse taking the life of an innocent person . . . .").

82 *See* KY. REV. STAT. ANN § 503.030 (West 2003).

83 *Id.* (emphasis added).

84 MO. ANN. STAT. § 563.026 (West 1999).

85 WIS. STAT. ANN. § 939.47 (West 2005).

86 John Harris, *The Survival Lottery,* 50 PHIL. 81, 82 (1975).

87 *See, e.g., id.*

the other consists of five people, most of us would think that there is no question but to rescue the larger group simply because that will save more lives. In choosing to rescue one group over another, the workers recognize that they are sacrificing a few so that a greater number of people may live. Some innocents will die, but we regard this as a benefit to society in light of the net gain in lives saved. One might consider whether the distinction in the triage case is one between killing and letting die, while in cases of homicide based on necessity, the defendants have killed an innocent victim by deliberate, direct action.

VI. THE LANDMARK HOMICIDE BY NECESSITY CASES

In this section we consider two court decisions that squarely deal with the deliberate killing of unoffending and unresisting persons. Both cases involve exigent circumstances on the high seas and survivors in lifeboats. The first, *United States v. Holmes,* is an 1842 case involving the charge of manslaughter on the high seas. The second is *Regina v. Dudley & Stephens,* an 1884 English case involving a charge of murder done in order to cannibalize the remains of the victim.

What these cases have in common is that survivors are cast together in a lifeboat with scant provisions, and they are adrift for several days or even weeks without any apparent rescue in sight. In the *Holmes* case, the lifeboat itself is unstable and overloaded, and bad weather threatens to capsize the boat. In both cases, either by rational deliberation or by chaotic frenzy, a decision is made to kill one or more of the group either to cannibalize the victim's flesh or to eject people from the group and thereby lighten the boat. Once the survivors are rescued, authorities evaluate the situation and decide to prosecute those who had a hand in the homicide.

A. *United States v. Holmes*

The most famous American case that considers the necessity defense in connection with the intentional killing of innocents was the 1842 case of *United States v. Holmes*.[88] The case evoked considerable sympathy in the press in favor of Alexander William Holmes, a crew member of the *William Brown,* who was charged with manslaughter on the high seas.

The *Holmes* case is notably the only one in Anglo-American law that explicitly suggests, in dictum, that the necessity defense might be appropriately invoked in the killing of innocents where

88 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383).

an imminent danger threatens the entire group with death, *provided a fair method of sacrifice is employed.* However, the court held that the necessity defense did not apply to the facts in this case.[89]

On April 19, 1841, an American ship, the *William Brown,* was en route from Liverpool to Philadelphia carrying seventeen crew and sixty-five passengers when it hit an iceberg 250 miles southeast of Cape Race, Newfoundland, and rapidly went down. There were two lifeboats, not large enough for everyone, and one of them was in a precarious condition.

The captain informed the passengers that they could not all be saved by the boats, but that whoever wanted to should immediately proceed to get in. In an interesting—and later a legally significant—twist, virtually all of the crew members saved themselves by boarding the lifeboats, together with thirty-nine passengers. The captain, the second mate, seven of the crew, and one passenger got into the smaller boat, filling it to capacity. The first mate, eight seamen, including Holmes, and thirty-two passengers got into the larger boat, known as the long-boat, filling it beyond capacity. There were about twice as many as the boat could hold under the most favorable conditions of wind and weather.

> Just as the long-boat was about to pull away from the wreck, Holmes, hearing the agonized cries of a mother for her little daughter who had been left behind in the panic, dashed back at the risk of instant death, found the girl and carried her under his arm into the long-boat.[90]

The remainder of the passengers, thirty-one in number, remained on board the ship and perished when it sank. "The boat had provisions for about six or seven days, ... [and] [t]he mate had a chart, quadrant and compass. The weather was cold, and the passengers, being half clothed, much benumbed."[91]

The next day, at daybreak, the captain said that he would try to head in the direction of Newfoundland, and the long-boat, which was somewhat unmanageable, should fend as best as could be managed. He instructed the mate, one Rhodes, how to steer for land and told the crew to obey all his orders. Rhodes told the captain that the boat was unmanageable because it was in bad condition, and that he would have to cast lots and throw some of the passengers overboard. The captain replied, "[D]on't talk of it

89 *See id.*

90 EDMOND CAHN, THE MORAL DECISION: RIGHT AND WRONG IN THE LIGHT OF AMERICAN LAW 61 (1956).

91 *Holmes*, 26 F. Cas. at 362.

now, but leave it to the last resort."[92]

The two lifeboats parted ways. The captain and the others in his boat were picked up after six days on the open sea, and brought to land.[93] The boat with Rhodes, Holmes and the others was continually in great jeopardy. It had started to leak upon being launched, and the passengers had to bail out water with buckets to make her hold her own. The plug came out more than once, was lost, and a makeshift plug was fashioned. The crew thought that the boat was too unmanageable to be saved. Even without the leak, the crew believed that the boat could not support even half her company. The slightest irregularity would have capsized the boat. "If she had struck any piece of ice she would inevitably have gone down. There was great peril of ice for any boat."[94] The crew discussed among themselves that since the boat was unmanageable and overloaded, it would be necessary to cast lots and throw some overboard. Later, on the first day at sea and about twenty-four hours after the initial launching, heavy rain poured down, and winds and waves splashed over the boat's bow. At about 10 p.m., Holmes "and the rest of the crew began to throw over some of the passengers, and did not cease until they had thrown over 14 male passengers."[95] Not one of the crew was cast over.[96]

Two additional passengers, both women, apparently flung themselves overboard in an act of devotion and affection to their brother, whom Holmes had thrown overboard, thus making for sixteen people jettisoned.[97] These, with the exception of two married men and a small boy, constituted all the male passengers aboard.

In jettisoning the passengers, the only rule that Holmes followed was "not to part man and wife, and not to throw over any women."[98] Apparently, he also followed a "rule" of sparing all of the crew. "No lots were cast, nor had the passengers, at any time, been either informed or consulted as to [the decision of Holmes and the other crew members to jettison the male passengers.]"[99] The next day, Wednesday, two men who were very stiff with cold, and who had hidden themselves, were thrown over despite there was no necessity for it, for the boat was no longer overloaded. Perhaps the greatest tragedy of this case was that

92 *The Case of the William Brown,* THE L. REP., Dec. 1842, at 339.
93 *See* CAHN, *supra* note 89, at 61.
94 *Holmes*, 26 F. Cas. at 360–61 (citing the Captain's and second mate's depositions).
95 *Id.* at 361.
96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.*

later on Wednesday the long-boat was picked up by the ship, *Crescent,* and all the persons who had not been thrown overboard were thus saved. Had some semblance of order and prudence prevailed, and had the crew been willing to wait just another day before throwing over the fourteen passengers on Tuesday night, and the two others on Wednesday morning, all likely would have been saved.

The survivors were taken to Le Havre, and the crew was arrested, but after statements were made, they were released from jail and no charges were brought.[100] The *Times* of London remarked, "The frightful necessity of sacrificing part of the passengers for the safety of the rest is fully proved."[101] However, upon their return to the United States, a grand jury indicted Holmes under a 1790 federal statute for manslaughter committed upon the high seas.[102]

A great deal of publicity preceded and accompanied the trial, which took place one year after the incident.[103] There was considerable public consternation as well.[104] Holmes was thought to be a hero because, as noted above, he had rescued the little girl who had been left behind on the sinking ship, and he had taken over the direction of the lifeboat because the first mate, Rhodes, became increasingly unable to act decisively. In addition, Holmes was instrumental in sighting and signaling the ship that rescued them.[105] The case was tried before United States Supreme Court Justice Henry Baldwin, who was presiding as trial judge. The prosecutors were William Morris Meredith, who later became Secretary of the Treasury, and George Mifflin Dallas, later Vice President of the United States.

It was Holmes' defense that the homicide was necessary to avert the deaths of the entire group of survivors in the long-boat.[106] The prosecution argued that the crew had certain duties to protect the passengers, not jettison them; that the wholesale jettisoning of passengers by Holmes was indefensible; and that if the circumstances were so extreme that human sacrifice needed to be resorted to, a mode of selection should have been agreed

100 *See* HANSON, *supra* note 24, at 135.

101 *See id.*

102 *See Holmes*, 26 F. Cas. at 362–63. From the record of the case, it appears that Holmes was the only party indicted, though the record shows that other seamen participated in the throwing overboard of the passengers. Holmes was indicted only with respect to manslaughter against one passenger. The grand jury rejected an indictment of murder. *See* HANSON, *supra* note 24, at 135.

103 *See Holmes*, 26 F. Cas. at 363.

104 *See* LEO KATZ, BAD ACTS AND GUILTY MINDS 20 (1987).

105 *See Holmes*, 26 F. Cas. at 362.

106 *Id.* at 364.

upon by all:

> We protest against giving to seamen the power thus to make jettison of human beings, as of so much cargo; of allowing sailors, for their own safety, to throw overboard, whenever they may like, whomsoever they may choose. If the mate and seamen believed that the ultimate safety of a portion was to be advanced by the sacrifice of another portion, it was the clear duty of that officer, and of the seamen, to give full notice to all on board. Common settlement would, then, have fixed the principle of sacrifice, and, the mode of selection involving all, a sacrifice of any would have been resorted to only in dire extremity. Thus far, the argument admits that, at sea, sailor and passenger stand upon the same base, and in equal relations. But we take . . . stronger ground. The seaman, we hold, is bound, beyond the passenger, to encounter the perils of the sea. To the last extremity, to death itself, must he protect the passenger. It is his duty. It is on account of these risks that he is paid. It is because the sailor is expected to expose himself to every danger, that, beyond all mankind, by every law, his wages are secured to him.[107]

The prosecution cited, among other things, a principle stated by Francis Bacon:

> [T]he law imposeth it upon every subject that he prefer the urgent service of his prince and country before the safety of his life. . . . "[I]f a man be commanded to bring ordnance or munition to relieve any of the king's towns that are distressed, then he cannot, for any danger of tempest, justify the throwing of them overboard; for there it holdeth which was spoken by the Roman when he alleged the same necessity of weather to hold him from embarking: 'Necesse est et ut eam; non ut vivam [It is necessary that I go on, it is not necessary that I live].'"[108]

This seems an odd argument to throw into the equation. The principle stated in the quoted passage of Bacon appears in his discussion of the necessity doctrine concerning the jettisoning of cargo from a ship in distress.[109] Bacon made a distinction between the justified throwing of ordinary cargo to save the passengers and ship, and cargo in the form of munitions being transported in the pursuit of a war effort of the sovereign. No one in the long-boat was transporting munitions in "the urgent service of his prince and country," so the Bacon quote was not germane the facts at issue.

In arguing for acquittal, Holmes' attorney said that since the jury was not present at the scene of the catastrophe, it would be

107 *Id.* at 363–64.

108 *Id.* at 364 (citing SIR FRANCIS BACON, *A Collection of Some Principal Rules and Maximes of the Common Laws of England*, *in* THE ELEMENTS OF THE COMMON LAWS OF ENGLAND, Regula V at 32 (photo. reprint 2004) (1630)).

109 *See* SIR FRANCIS BACON, *A Collection of Some Principal Rules and Maximes of the Common Laws of England*, *in* THE ELEMENTS OF THE COMMON LAWS OF ENGLAND, Regula V at 32 (photo. reprint 2004) (1630).

a precarious matter for them to second-guess the defendant's assessment of the imminent danger of death that existed at the time. Holmes' attorney cited *The Mariana Flora,*[110] in which the Supreme Court said, "It is a different thing . . . to sit in judgment upon this case, after full legal investigations, aided by the regular evidence of all parties, and to draw conclusions at sea, with very imperfect means of ascertaining facts and principles which ought to direct the judgment."[111] The argument here is that the necessity defense turns on the reasonableness of the actor's conduct at the time it occurred, based on conclusions drawn under imperfect circumstances. Therefore, it would be unfair to evaluate a defendant's acts at sea in hindsight, based on all the evidence scrupulously gathered after the emergency was over.

Holmes' attorney also argued, in concurrence with what the prosecution had asserted, that the custom of the sea prescribes the casting of lots in exigent circumstances, but that in this case there was no time for this mode of selection. Holmes' attorney argued that the evidence indicated that there was cry of the boat's sinking, that it was dark and rainy, that the plug was missing and that there was every reason to fear that she was fast filling with water.[112] The attorney argued:

> Lots, in cases of famine, where means of subsistence are wanting for all the crew, is what the history of maritime disaster records; but who has ever told of casting lots at midnight, in a sinking boat, in the midst of darkness, of rain, of terrour, and of confusion? To cast lots when all are going down, but to decide who shall be spared, to cast lots when the question is, whether any can be saved, is a plan easy to suggest, rather difficult to put in practice. . . . The sailors adopted the only principle of selection which was possible in an emergency like theirs,—a principle more humane than lots. Man and wife were not torn asunder, and the women were all preserved. Lots would have rendered impossible this clear dictate of humanity.[113]

The defense also asserted, in a novel and clever argument, that all in the boat were reduced to a state of nature so that Holmes (and presumably everyone else in the boat) was no longer a sailor, but a drowning man. Being in a state of nature, Holmes and the other sailors were no longer bound by any duty to the passengers, but instead everyone in the boat was on equal footing. Holmes' attorney argued this point as follows:

> But if the whole company were reduced to a state of nature, then the sailors were bound to no duty, not mutual, to the passengers. The

110 *Holmes*, 26 F. Cas. at 365 (citing The Mariana Flora, 24 U.S. (11 Wheat.) 1, 51–52 (1826)).

111 *Id.*

112 *Id.* at 361.

113 *Id.* at 365.

> contract of the shipping articles had become dissolved by an unforeseen and overwhelming necessity. The sailor was no longer a sailor, but a drowning man. Having fairly done his duty in the last extremity, he was not to lose the rights of a human being, because he wore a roundabout instead of a frock coat. We do not seek authorities for such doctrine. The instinct of these men's hearts is our authority,—the best authority. Whoever opposes it must be wrong, for he opposes human nature. All the contemplated conditions, all the contemplated possibilities of the voyage, were ended. The parties, sailor and passenger, were in a new state. All persons on board the vessel became equal. All became their own lawgivers; for artificial distinctions cease to prevail when men are reduced to the equality of nature. Every man on board had a right to make law with his own right hand, and the law which did prevail on that awful night having been the law of necessity, and the law of nature too, it is the law which will be upheld by this court, to the liberation of this prisoner.[114]

The state of nature argument, well articulated by Holmes' lawyer, was that at some point in certain extreme circumstances, we are reduced to the "equality of nature," and we are no longer governed by rules, but by circumstances. He was suggesting that in the long-boat, the group was no longer subject to the social contract within which fundamental rights subsist. According to this argument, at the point where the boat was in imminent peril of going down, all of the people in the boat were on equal footing, with no one owing any duties to anyone else. The crew and passengers were free to engage in a melee in which the strongest would overcome the weakest, or by chance, some would hold on while others would be jettisoned.[115]

Justice Baldwin denied that the people in the boat were in a "state of nature" and no longer subject to the law or duties. However, he did say that a true state of nature case would divest the taking of life from unlawfulness:

> For example, suppose that two persons who owe no duty to one another that is not mutual, should, by accident, not attributable to either, be placed in a situation where both cannot survive. Neither is bound to save the other's life by sacrificing his own, nor would either

114 *Id.* at 366.

115 Hobbes theorized that, in a literal sense, a state of nature may have existed in the early development of the human species, and there was no system of law and order. It was a violent world. In a state of nature there are no values, rules, norms or laws, no contracts or agreements, and no duties. In that context, the brutishness of man's nature would have gone unrestrained because there was nothing to restrain it. The will to survive knew no bounds, under the maxim, "Every man for himself." In a state of nature, then, the situation is kill or be killed. If a conflict occurred in a state of nature, it was resolved by recourse to violence: "And therefore if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies; and in the way to their End . . . endeavour to destroy . . . one an other." THOMAS HOBBES, LEVIATHAN 184 (C.B. Macpherson ed., Penguin Classics 1985) (1651).

> commit a crime in saving his own life in a struggle for the only means of safety.[116]

Justice Baldwin here speaks of people "who owe no duty to one another," and later in the opinion he points out that Holmes and the other sailors in fact owed certain duties to the passengers, and breached those duties by jettisoning the passengers. But in the above passage, Justice Holmes suggests that in a true state of nature situation, no one has the duty to save another's life by sacrificing one's own life, and it is not unlawful to save one's own life in a struggle for the only means of safety.

Holmes' attorney, in arguing that his client should be acquitted, offered the following impassioned description of the necessitous circumstances:

> [T]his case should be tried in a long-boat, sunk down to its very gunwale with 41 half naked, starved, and shivering wretches,—the boat leaking from below, filling from above, a hundred leagues from land, at midnight, surrounded by ice, unmanageable from its load, and subject to certain destruction from the change of the most changeful of the elements, the winds and the waves. To these superadd the horrours of famine and the recklessness of despair, madness, and all the prospects, past utterance, of this unutterable condition. Fairly to sit in judgment on the prisoner, we should, then, be actually translated to his situation. It was a conjuncture which no fancy can imagine. Terrour had assumed the throne of reason, and passion had become judgment.[117]

Justice Baldwin had no difficulty acknowledging the viability of the doctrine of necessity: "[T]here are certain great and fundamental principles of justice which, in the constitution of nature, lie at the foundation and make part of all civil law, independently of express adoption or enactment."[118] Justice Baldwin added:

> [I]t is the law of necessity alone which can disarm the vindicatory justice of the country. Where, indeed, a case does arise, embraced by this "law of necessity," the penal laws pass over such case in silence; for law is made to meet but the ordinary exigencies of life. But the case does not become "a case of necessity," unless all ordinary means of self preservation have been exhausted. The peril must be instant, overwhelming, leaving no alternative but to lose our own life, or to take the life of another person. An illustration of this principle occurs in the ordinary case of self-defense against lawless violence, aiming at the destruction of life, or designing to inflict grievous injury to the person; and within this range may fall the taking of life under other circumstances where the act is indispensably requisite to self-

116 *Holmes*, 26 F. Cas. at 366; *see infra* note 129.
117 *Id.* at 364.
118 *Id.* at 368.

existence.[119]

It is worth noting that the language used, "instant, overwhelming, leaving no alternative," appears to have gotten its initial imprimatur in 1837, with the words of then-Secretary of State Daniel Webster in the *Caroline* case.[120] Webster opined that to justify anticipatory self-defense in the law of war, a state must demonstrate the "necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."[121] In this passage, Justice Baldwin also emphasizes that the necessity defense requires, among other things, evidence that "all ordinary means of self preservation have been exhausted."[122]

Justice Baldwin found that the evidence fell short of what was required under the necessity doctrine, saying that the witnesses did not testify "in a manner entirely explicit and satisfactory in regard to the most important point, viz. the degree and imminence of the jeopardy at 10 o'clock on Tuesday night, when the throwing over began."[123] It is hard to understand how he could have disputed the imminence of the danger, for the evidence revealed that the boat was overloaded, rain was falling, the passengers were overpowered by exhaustion and cold, the boat had a considerable amount of water in it, they were constantly working to bail out the water, the makeshift plug was not effective, and some men started yelling, "The boat is sinking. The plug's out. God have mercy on our poor souls."[124] Does it not seem clear from this evidence that "all ordinary means of self preservation" had been exhausted?

Justice Baldwin added that Holmes was an experienced seaman "who, from infancy, had been a child of the ocean," and was not the sort of person to be "causelessly alarmed."[125] The callous throwing out of the two men the morning after the initial jettisoning would seem to fall altogether outside the scope of the

119 *Id.* at 366.

120 *See* SHARON KORMAN, THE RIGHT OF CONQUEST 103 (1996). The *Caroline* incident occurred during a Canadian insurrection against the Crown in 1837, when a British officer authorized an armed band of marauders to cross into the United States to burn the *Caroline,* a U.S. ship docked in port, and cut it loose, sending it crashing over Niagara Falls. The officer believed that the ship was going to be used to provide support for the insurrection. It is generally agreed that the British action was improper. Lord Ashburton sent Webster a letter of apology for the incident. *Id.* at 103–04.

121 *Id.* Webster added a further caveat, which has come to be known as the proportionality test, that the state must do "nothing unreasonable or excessive: since the act, justified by the necessity of self-defense must be . . . kept clearly within it." *Id.*

122 *Id.*

123 *Holmes*, 26 F. Cas. at 361.

124 *Id.*

125 *Id* at 365.

necessity doctrine in that the boat no longer was overloaded and clearly had been stable through the night, albeit not without difficulty, so that there was no longer imminent danger of sinking.

Justice Baldwin instructed the jury that if there is a guilty verdict, the degree of punishment should be tempered by a sense of mercy towards those who acted under extremely difficult circumstances, but that giving a favorable interpretation to evidence in order to mitigate an offense is different from justifying the act. He charged the jury as follows:

> In such cases the law neither excuses the act nor permits it to be justified as innocent; but, although inflicting some punishment, she yet looks with a benignant eye, through the thing done, to the mind and to the heart; and when, on a view of all the circumstances connected with the act, no evil spirit is discerned, her humanity forbids the exaction of life for life. But though . . . cases of this kind are viewed with tenderness, and punished in mercy, we must yet bear in mind that man, in taking away the life of a fellow being, assumes an awful responsibility to God, and to society; and that the administrators of public justice do themselves assume that responsibility . . . .[126]

Perhaps the decisive moment in the case was Justice Baldwin's next charge to the jury regarding the duties owed by owners of common carriers to passengers. He noted the general obligation of passenger-carriers to do everything for the safety of those who commit themselves to their care, and said that this obligation does not come to an end in a time of extreme peril. It is the obligation of the sailors to prevent the occurrence of death of passengers. An emergency or a situation that Holmes' attorney sought to characterize as a "state of nature" does not divest the crew of their very specific duty to attend to the safety of passengers. Indeed, as one commentator later said,

> [T]hough the circumstances of the long-boat might appear so desperate as to cancel all other social conventions and civil obligations, this one they could not cancel because it was expressly conceived and designed to yoke him in just such a plight, to bind him in conscience and in law, and to drive him open-eyed and willing to whatever course might be necessitated, including his own extinction.[127]

Justice Baldwin said to the jury,

> A familiar application of this principle presents itself in the obligations which rest upon the owners of stages, steamboats, and other vehicles of transportation. In consideration of the payment of fare, the owners of the vehicle are bound to transport the passengers to the place of contemplated destination. Having, in all emergencies, the conduct of the journey, and the control of the passengers, the owners

126 *Id.* at 366.

127 CAHN, *supra* note 90, at 69.

> rest under every obligation for care, skill, and general capacity; and if, from defect of any of these requisites, grievous injury is done to the passenger, the persons employed are liable. The passenger owes no duty but submission. He is under no obligation to protect and keep the conductor in safety, nor is the passenger bound to labour, except in cases of emergency, where his services are required by unanticipated and uncommon danger. Such . . . is the relation which exists on shipboard. The passenger stands in a position different from that of the officers and seamen. It is the sailor who must encounter the hardships and perils of the voyage. Nor can this relation be changed when the ship is lost by tempest or other danger of the sea, and all on board have betaken themselves, for safety, to the small boats; for imminence of danger can not absolve from duty. The sailor is bound, as before, to undergo whatever hazard is necessary to preserve the boat and the passengers. Should the emergency become so extreme as to call for the sacrifice of life, there can be no reason why the law does not still remain the same. The passenger, not being bound either to labour or to incur the risk of life, cannot be bound to sacrifice his existence to preserve the sailor's. The captain, indeed, and a sufficient number of seamen to navigate the boat, must be preserved; for, except these abide in the ship, all will perish. But if there be more seamen than are necessary to manage the boat, the supernumerary sailors have no right, for their safety, to sacrifice the passengers. The sailors and passengers, in fact, cannot be regarded as in equal positions. The sailor . . . owes more benevolence to another than to himself. He is bound to set a greater value on the life of others than on his own. And while we admit that sailor and sailor may lawfully struggle with each other for the plank which can save but one, we think that, if the passenger is on the plank, even "the law of necessity" justifies not the sailor who takes it from him. This rule may be deemed a harsh one towards the sailor, who may have thus far done his duty, but when the danger is so extreme, that the only hope is in sacrificing either a sailor or a passenger, any alternative is hard; and would it not be the hardest of any to sacrifice a passenger in order to save a supernumerary sailor?[128]

This amazing passage in the annals of jurisprudence made it clear that if the exigencies in a lifeboat become so extreme that human sacrifice is necessary, there must still be some semblance of law and order in the matter. Thus, the captain and so many seamen as are needed to navigate the boat should be exempt, and if more sailors are in the boat than are necessary for its management, the sailors are to be sacrificed sooner than the passengers. Justice Baldwin went so far as to say, in this passage, that even should the circumstances come to a struggle between a sailor and a passenger over a plank which can save but one, the sailor has the legal duty to refrain from wresting it from the pas-

128 *Holmes*, 26 F. Cas. at 366–67.

senger.[129]

Holmes was found guilty of manslaughter on the high seas. The jury may well have determined that not all of the sailors were absolutely necessary for the preservation of the lifeboat, and that the crew ought to have selected among themselves those to be jettisoned, or that Holmes should have somehow selected members of the crew to be jettisoned instead of the passengers who were thrown out.

A legal commentator of the day disagreed with the supererogatory duty that Justice Baldwin said the crew owed to passengers in time of overwhelming calamity. The commentator seemed to echo Holmes' lawyer's state of nature argument, by asking in a situation where the sailor's vessel has been annihilated whether it was not the case that

> the sailor is . . . no longer a sailor, but a drowning son of humanity, valuing his life as dearly as any other's, and brought perhaps to his extreme peril by that very faithful discharge of duty which forbade him to quit his post till the last joints of the ship went asunder? Must a sailor consider his life the measure of damages for not carrying a passenger safely, when the winds, and waves, and icebergs forbid it?[130]

The commentator added this:

> Sailors are not, to be sure, to desert the passengers in peril, and stealthily secure their own safety; but fairly and heroically having done their duty, then, if placed in a common peril, we say their rights as men are not to be lost sight of under the name of sailors. They are not to forfeit the privileges of a common humanity, because they have voluntarily submitted themselves to marine despotism . . . . Heroism may dictate such a sacrifice on their part for those whom they consider under their care, but when that care can no longer be rendered without self-destruction, where is it written in the bond that it shall be required?[131]

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129 Perhaps the best example of a state of nature case is that classic one known as two-men-and-a-plank, originally formulated by Francis Bacon, but also attributed to Cicero. *See* BACON, *supra* note 109, at 29–30. Cicero's prior version of this case is known as the famous "Plank of Karneades," in which he stated that if two sailors were cast adrift on a plank adequate to support only one until rescue came, each could try to be the survivor without criminal liability. Klaus Bernsmann, *Private Self-Defence and Necessity in German Penal Law and in the Penal Law Proposal—Some Remarks,* 30 ISRAEL. L. REV. 171, 185 (1996). Here is Bacon's description of the case:

> [I]f divers be in danger of drowning by the casting away of some boat or barge, and one of them get to some plank, or on the boat's side to keep himself above water, and another to save his life thrust him from it, whereby he is drowned; this is neither se defendendo nor by misadventure, but justifiable.

BACON, *supra* note 109, at 29–30. The Latin term *se defendendo* means "upon a principle of self-preservation" or self-defense.

130 *The Case of the William Brown, supra* note 92, at 347.

131 *Id.*

Another commentator, Supreme Court Justice Benjamin Cardozo, in a passage from his book, *Law and Literature,* seems to take an even stricter approach than Justice Baldwin does on the question of homicide by necessity:

> Where two or more are overtaken by a common disaster, there is no right on the part of one to save the lives of some by the killing of another. There is no rule of human jettison. Men there will often be who, when told that their going will be the salvation of the remnant, will choose the nobler part and make the plunge into the waters. In that supreme moment the darkness for them will be illumined by the thought that those behind will ride to safety. If none of such mold are found aboard the boat, or too few to save the others, the human freight must be left to meet the chances of the waters. Who shall choose in such an hour between the victims and the saved? Who shall know when the masts and sails of rescue may emerge out of the fog?[132]

Some years later, another commentator of the *Holmes* case opined that the killing was morally wrongful:

> I am driven to conclude that otherwise—that is, if none sacrifice themselves of free will to spare the others—they must all wait and die together. For where all have become congeners, pure and simple, no one can save himself by killing another. In such a setting and at such a price, he has no moral individuality left to save. Under the terms of the moral constitution, it will be *wholly* his self that he kills in his vain effort to preserve himself. The "morals of the last days" leave him a generic creature only; in such a setting, so remote from the differentiations of normal existence, every person in the boat embodies the entire genus. Whoever saves one, saves the whole human race; whoever kills one, kills mankind.[133]

In sentencing Holmes, Justice Baldwin said that many circumstances in the dreadful affair were of a character to commend him, yet the case was such that some punishment was required; the court had the power to impose imprisonment of three years and a fine of $1,000, but in view of all the circumstances, and especially since Holmes had already been confined for several months, the judge would make the punishment more lenient. Justice Baldwin then sentenced Holmes to six months imprisonment at hard labor, in solitary confinement, and a fine of twenty dollars.[134]

It has been suggested that in cases of this type executive clemency, or a pardon, may well be the only recourse.[135] There

132 BENJAMIN N. CARDOZO, LAW AND LITERATURE 113 (Fred B. Rothman & Co. 1986) (1931).

133 CAHN, *supra* note 90, at 71.

134 United States v. Holmes, 26 F. Cas. 360, 369 (C.C.E.D. Pa. 1842) (No. 15,383).

135 *See* Lon L. Fuller, *The Speluncean Explorers,* 62 HARV. L. REV. 616, 619 (1949).

was considerable sympathy in favor of Holmes in the press. Efforts were made by the Seamen's Friend Society to obtain a pardon from President Tyler, but the President refused, apparently because Justice Baldwin failed to concur.[136] Later, however, the President issued a pardon that relieved Holmes of his fine.[137]

1. Sortition—Drawing Lots to Decide Who Should Die

In the *Holmes* case, Justice Baldwin suggested to the jury that the crew and passengers recognized they were in grave peril, and that they may have had an opportunity to agree among themselves on some way of deciding who should be sacrificed to save the others. He instructed the jury that, had due deference been given to the different status of passengers and crew members, and had lots been used to select from each group, the defense of necessity might have been available.

Justice Baldwin in effect set forth a rule of lot-drawing among those in peril:

> [I]f the source of the danger have been obvious, and destruction ascertained to be certainly about to arrive, though at a future time, there should be consultation, and some mode of selection fixed; by which those in equal relations may have equal chance for their life. By what mode, then, should selection be made? The question is not without difficulty; nor do we know of any rule prescribed, either by statute or by common law, or even by speculative writers on the law of nature. In fact, no rule of general application can be prescribed for contingencies which are wholly unforeseen. There is, however, one condition of extremity for which all writers have prescribed the same rule. When the ship is in no danger of sinking, but all sustenance is exhausted, and a sacrifice of one person is necessary to appease the hunger of others, the selection is by lot. This mode is resorted to as the fairest mode, and, in some sort, as an appeal to God, for selection of the victim. . . . For ourselves, we can conceive of no mode so consonant both to humanity and to justice; and the occasion, we think, must be peculiar which will dispense with its exercise. If, indeed, the peril be instant and overwhelming, leaving no chance of means, and no moment for deliberation, then, of course, there is no power to consult, to cast lots, or in any such way to decide; but even where the final disaster is thus sudden, if it have been foreseen as certainly about to arrive, if no new cause of danger have arisen to bring on the closing catastrophe, if

136 The court reporter, John William Wallace, added the following to the end of the *Holmes* case:

> NOTE. Considerable sympathy having been excited in favour of Holmes, by the popular press, an effort was made by several persons, and particularly by the Seamen's Friend Society, to obtain a pardon from the executive. President Tyler refused, however, to grant any pardon, in consequence of the court's not uniting in the application. The penalty was subsequently remitted.

Holmes, 26 F. Cas. at 369.

137 *See* KATZ, *supra* note 104, at 22.

> time have existed to cast lots, and to select the victims, then, as we have said, sortition should be adopted. In no other than this or some like way are those having equal rights put upon an equal footing, and in no other way is it possible to guard against partiality and oppression, violence and conflict. What scene, indeed, more horrible, can imagination draw than a struggle between sailor and sailor, passenger and passenger, or, it may be, a mixed affray, in which, promiscuously, all destroy one another?[138]

The appeal to God in the above passage seems to hearken to the book of *Jonah,* where the throwing of lots suggests that a higher power (namely, God) is responsible for selecting the victim.[139] The procedure thus serves to deflect responsibility from the men who are the true actors in the killing. The procedure also seems to recall the medieval practice of trial by combat and other ordeals that men would agree to undertake in order to reach a determination of which party shall live and which one shall die—presumably at the hands of God, for whatever dispute may be at issue.

Thus, Justice Baldwin in effect confirmed the rule of drawing lots, or of engaging in some other fair procedure, to determine who should be sacrificed for the sake of the survival of a larger number. Only in this way could there be justification, or at least excuse, for homicide. The idea seems to be that if there is time for consultation, or if the circumstances could have been foreseen, and all might reasonably agree that killing one of the group under certain foreseeable circumstances would tend to maximize the number of lives saved, the group may then agree upon some mode of selection, and agree to be bound by it. They would then agree to forestall sacrificing the victim until a prescribed circumstance of extremity occurs. Justice Baldwin suggested that the people in the boat knew that they were in danger, and that they had time to cast lots before the danger became truly imminent. Therefore, there could have been a mutual consultation of all on board as to the necessity of throwing over some of their member. No one had a right to say who must be thrown out. The drawing of lots would eliminate the arbitrariness of leaving the life and death decisions to the stranded crew and passengers in a moment of panic, and remove the possibility of the decision being made by those who are physically able to overpower the weaker ones. Under this protocol, the selection of those to be sacrificed is legally permissible, and even commendable.

If the crew and passengers had agreed to cast lots and abide

138 *Holmes*, 26 F. Cas. at 367.

139 *See Jonah* 1:7 (stating that lots were thrown to determine whose presence was the occasion for God's causing the storm).

by the results, suppose one of the victims changed his mind and resisted? According to Justice Baldwin:

> When the selection has been made by lots, the victim yields of course to his fate, or, if he resist, force may be employed to coerce submission. Whether or not "a case of necessity" has arisen, or whether the law under which death has been inflicted have been so exercised as to hold the executioner harmless, cannot depend on his own opinion; for no man may pass upon his own conduct when it concerns the rights, and especially, when it affects the lives, of others. We have already stated to you that, by the law of the land, homicide is sometimes justifiable; and the law defines the occasions in which it is so. The transaction must, therefore, be justified to the law; and the person accused rests under obligation to satisfy those who judicially scrutinize his case that it really transcended ordinary rules.[140]

Once having accomplished the drawing of lots, the people must then wait until such time as they might be saved, or until the circumstances indicate no hope other than miraculous preservation, so that the time for lightening the boat would have arrived. The first to be sacrificed should submit to the fate ordained by the casting of lots, or else be forced to submit.

Justice Baldwin suggested that the passengers should be exempt from the sortition. Also exempt would be the captain or officer in charge of the lifeboat and so many of the crew as are needed to navigate the boat. Perhaps the captain or master in charge should pick those of the crew to assist in navigation, or if they are all eligible to navigate the vessel, a preliminary drawing of lots should determine which of the crew would be assigned to navigation and hence be exempt. Following that, all the nonexempt crew should submit to the drawing of lots so that, to use Justice Baldwin's words, "those in equal relations may have equal chance for their life." The passengers might draw lots amongst themselves, presumably exempting women and children, but only in the event the boat needed to be lightened to a further extent beyond the crew who were first in line to be sacrificed.

The case suggests that this protocol should be engaged in before an imminent emergency, so as to avoid the sort of melee and chaos that occurred. As to *when* a point of time comes that the danger to life and limb is "instant, overwhelming, leaving no alternative," presumably it would be up to the captain or officer in charge to decide and to order that the sacrifice be carried out forthwith, according to the sortition previously agreed upon. This way the result would minimize the infringement of others'

140 *Holmes*, 26 F. Cas. at 367.

rights and put all parties on a level playing field. The course undertaken by Holmes bypassed any semblance of consultation, and vested in him alone the right to say who should be thrown out. Moreover, Holmes unfairly singled out passengers for jettison instead of other sailors.

Unanswered in the opinion of this case are the following issues: If one or more people dissent from the drawing of lots in the first instance, would that have legal bearing on the drawing of lots? Or, if a dissenting minority objected to the drawing of lots, could the majority overrule the objection and proceed with the sortition? If someone refused to participate, could that person's lot be selected by proxy? Would it be lawful to take the life of a person who refused to draw lots? Would it be murder if someone who had refused to draw lots, but who was selected for sacrifice by proxy, in self-defense killed someone who was attempting to throw him overboard?

A mystery in this case is why Holmes threw over fourteen men rather than a smaller number, and why he jettisoned passengers only, thus sparing all of the crew. Once Holmes commenced with throwing out passengers, if the concern was that the boat needed to be lightened, he might have stopped during this engagement to see if the boat had become appreciably more stable as a result, to see if there was any reasonable chance of safety without the further destruction of lives. Was it because, as Holmes' lawyer argued, "having proceeded so far in the work of horrour, the feelings of the crew became, at last, so disordered as to become unnatural?"[141] And finally, why did Holmes jettison the two additional passengers the following day, when by all accounts the boat had become stable, and there was no further necessity?

Whether Justice Baldwin's dictum on drawing of lots was an accurate summary of the law then, and whether it reflects the law today, are unsettled issues. The idea of consenting to the drawing of lots would seem to embody an established moral principle of the law: *volenti non fit injuria* ("No wrong is done to one who consents"). Conduct that would be tortious or criminal ceases to be wrongful if the person harmed has legal capacity and gives informed consent for the invasion. However, this legal maxim has its limits. For instance, a victim's consent to a criminal assault does not act as a bar to criminal prosecution:

> [W]hatever may be the effect of a consent in a suit between party and party, it is not in the power of any man to give an effectual consent to that which amounts to, or has a direct tendency to create, a breach of

141 *Id.* at 365.

> the peace; so as to bar a criminal prosecution. In other words, although a man may by his consent debar himself from his right to maintain a civil action, he cannot thereby defeat proceedings instituted by the Crown in the interests of the public for the maintenance of good order . . . . He may compromise his own civil rights, but he cannot compromise the public interests.[142]

Justice Baldwin's dictum pertaining to the drawing of lots apparently is in conflict with the foregoing legal constraint. In addition, Justice Baldwin's dictum is in conflict with philosophical prohibitions stated by Kant and other deontologists. Kant asserts that human beings have unconditional value, and he therefore rejects homicide by necessity. He says:

> This imagined right is supposed to give me permission to take the life of another person when my own life is in danger, even if he has done me no harm. It is quite obvious that this conception implies a self-contradiction within jurisprudence, since the point in question here has nothing to do with an unjust assailant on my own life, which I defend by taking his life . . . .[143]

Necessity killing is impermissible because an innocent person is "used" merely as a means to save the lives of others.[144] Necessity killing is wrong to Kant because "the victim deserved to be treated as something other than a means to other people's ends."[145] Since all human beings have unconditional value, it is always inappropriate to use any human being, even one's own being, merely as a means to some end. Kant has this to say:

> Man cannot dispose over himself because he is not a thing; he is not his own property; to say that he is would be self-contradictory; for in so far as he is a person he is a Subject in whom the ownership of things can be vested, and if he were his own property, he would be a thing over which he could have ownership. But a person can not be a property and so cannot be a thing which can be owned, for it is impossible to be a person and a thing, the proprietor and the property.
>
> Accordingly, a man is not at his own disposal. He is not entitled to sell a limb, not even one of his teeth.[146]

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142 Regina v. Coney, (1882) 8 L.R.Q.B. 534, 553 (U.K.) (citation omitted).

143 IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 35 (John Ladd trans., 2d ed. 1999) (1797).

144 *But see* Eric Rakowski, *Taking and Saving Lives,* 93 COLUM. L. REV. 1063, 1109–10 (1993) (arguing that a Kantian can support necessity killing on the ground that the affected person would rationally choose that result). Such presumed consent makes necessity killing compatible with the Kantian premise of respect for the choices of rational individuals.

145 Cass Sunstein, *The Case of the Speluncean Explorers: Revisited,* 112 HARV. L. REV. 1883, 1888 (1999); *see also* David Shapiro, *Foreword: A Cave Drawing for the Ages*, 112 HARV. L. REV. 1834, at 1846–47 (describing the utilitarian justification for necessity killing).

146 IMMANUEL KANT, *Duties Towards the Body in Respect of Sexual Impulse*, *in* LECTURES ON ETHICS 165 (Louis Infield, trans., Hackett Publishing Co. 1980) (1930).

This passage is directed to the idea that human beings cannot sell themselves into slavery or indentured service. If it is impermissible to sell oneself into slavery or to sell even a limb, then it would seem that consenting to the casting of lots in a lifeboat situation and thereby agreeing to being utterly destroyed would be even more strongly prohibited.

Kant also argued that we are trustees of our own lives in that we regard life as so precious and sacred that we naturally want to be guardians over it. Kant said that "our duties towards ourselves are of primary importance . . . [because] nothing can be expected from a man who dishonors his own person."[147] In consenting to the sacrifice, the victim violates duties to himself by, in effect, agreeing to commit suicide: "But suicide is in no circumstances permissible. Humanity in one's own person is something inviolable; it is a holy trust; man is master of all else, but he must not lay hands upon himself."[148] In casting of lots to decide who should be sacrificed, the person sacrificed is treated as a thing or so much deadweight to be jettisoned from the boat, rather than respected as a rational agent.

However, Kant argued that the penal law would have no deterrent effect in such cases:

> There could be no penal law assigning the death penalty to a person who has been shipwrecked and finds himself struggling with another person—both of them in equal danger of losing their lives—and in order to save his own life, pushes the other person off the plank on which he had saved himself. For no threatened punishment from the law could be greater than losing his life . . . . [A] penal law applied to such a situation could never have the effect intended, for the threat of an evil that is still uncertain (being condemned to death by a judge) cannot outweigh the fear of an evil that is certain (being drowned). Hence, we must judge that, although an act of self-preservation through violence is not inculpable, it still is unpunishable . . . .[149]

Kant's idea is that the sanction of the law by way of future punishment cannot serve to deter one who acts to overcome the fear of immediate death. Accordingly, in such a case the law is incapable of controlling the accused's conduct and responding to it with any punishment at all. Viewing the act as criminal will not serve to deter future acts, nor provide a rehabilitative function. So Kant appears to claim that on the one hand the killing is wrongful in cases of necessity, but on the other hand, self-preservation under the circumstances is so strong an instinct

147 IMMANUEL KANT, *Duties to Oneself*, *in* LECTURES ON ETHICS, *supra* note 146, at 117–18.

148 IMMANUEL KANT, *Suicide*, *in* LECTURES ON ETHICS, *supra* note 146, at 151.

149 KANT, *supra* note 143, at 36.

that no sanction of the law can be effective in preventing the wrong. To allow the wrong to go unpunished, while at the same time arguing that it is a culpable act, seems itself to be a contradiction.

We might compare the *Holmes* case to the Mountaineer Case. The Mountaineer Case seems analogous to the *Holmes* case in that, broadly speaking, the imminent danger to be averted emanated from the very people who were to be sacrificed. In *Holmes*, the excess weight of people in the rickety lifeboat, compounded by bad weather, endangered the lives of the whole group. The only way to save a larger number was to jettison some of the people from the boat. In the Mountaineer Case, too, the extra weight of the lower climber, compounded by the frailty of the rope, was the danger that posed an imminent threat to life and limb of both climbers.

A distinction between the Mountaineer Case and *Holmes* is that in *Holmes* there was a duty of the sailors to protect the lives of the passengers. This duty was not canceled in the midst of a disaster, and if anyone was to be sacrificed, it was the sailors' duty to go first, except for those needed to navigate the boat. Also, in *Holmes* there were apparently enough crew members whose sacrifice would have lightened the boat sufficiently to make it safe for the passengers and the remaining crew, without the need of throwing off *any* passengers. In the Mountaineer Case, whatever duties may have existed between the climbers based on their agreement to be roped together were discharged under the circumstances of the emergency the climbers faced. Moreover, there was but one person to be sacrificed, and it was plainly the lower climber. No method of choosing needed to be invoked because there was one, and only one, person whose sacrifice would result in a net saving of life.

B. *Regina v. Dudley & Stephens*

Let us now turn to another famous case, *Regina v. Dudley & Stephens,* in which the necessity doctrine was invoked in the context of cannibalism on the high seas.[150] This dramatic and emotional survivor story came some forty years after the *Holmes* case. The facts of the case reveal how far men will go to save themselves when faced with impending death.

The case is of tremendous importance in that it categorically rejects the necessity defense, under English law, with respect to intentional killing of an innocent even if it results in saving a

150 Regina v. Dudley & Stephens, (1884) 14 Q.B.D. 273 (U.K.).

greater number of lives. It specifically rejects the holding of the *Holmes* case regarding the drawing of lots. According to *Dudley & Stephens*, one has a duty to sacrifice oneself rather than to kill another.

There is a fundamental difference between the facts in the *Holmes* case and the facts in *Dudley & Stephens*. In *Holmes* the danger to the group emanated from the members of the group themselves—their number and weight, compounded by bad weather and the flimsiness of the lifeboat, created the danger that they would all drown. In *Dudley & Stephens,* no one in the lifeboat posed a threat to the safety of the others. The danger was the prospect of death by starvation, and the source of this threat was simply the lack of provisions in the boat. In both cases, however, the killing involved using a person or persons solely as a means to an end.

In *Dudley & Stephens,* two lifeboat survivors were charged with murder in connection with cannibalizing a young cabin boy who was stranded with them on a lifeboat. The facts of the case are as follows: Thomas Dudley was captain of a fifty-two foot yacht called the *Mignonette,* which sailed on May 19, 1884, from Southampton, England for a 16,000-mile journey to Sydney, Australia, to deliver the boat to its new owner. Also aboard were two crewmen, Edward Stephens and Edmund Brooks, and a seventeen-year-old cabin boy, Richard Parker.[151]

The crew set out into the South Atlantic. Everything went well until July 5, some 1600 miles from the Cape of Good Hope, when they encountered very strong winds and heavy cross-seas. The boat started to capsize and proceeded to sink very rapidly. They had only five minutes to get into the dinghy. They were not able to get any water or supplies into the dinghy other than a couple of cans of turnips. In the following days they managed to collect some rain water and caught a sea turtle which they dried out and ate.[152]

The group managed to survive by eating rations of the turtle and the turnips. On July 16, Dudley suggested that they may have to sacrifice one of the group so that the others might live to see a rescue. Brooks said he was against drawing of lots to determine who should die to save the others. The matter was dropped.[153]

On July 13, suffering from a lack of water, they began to drink their own urine. On July 20, Parker, the cabin boy, in an

151 SIMPSON, *supra* note 28, at 13–60.
152 *Id.* at 46–48, 57–59.
153 *Id.* at 58–61.

act of desperation, began drinking seawater, and became delirious and comatose.

On July 24, the nineteenth day, with no rescue ship in sight and believing that he and the others were on the verge of starvation, Dudley again broached the idea of sacrifice and proposed that they draw lots. Brooks again objected. Both Brooks and Stephens said that they believed they would see a ship the next day. Finally, on the morning of July 25, Dudley and Stephens agreed to kill Parker. Parker was lying on the bottom of the boat, groaning but not moving. Dudley went to him and told him that his time had come, offered a prayer, and put a knife into his throat, killing him. In the ensuing horrible scene, the three men drank Parker's blood and ate his still warm liver and heart. They fed upon Parker's body for four days. On the morning of July 29, a sail was sighted, and the men were rescued. The men made no secret of what had happened, and the gruesome, bloody remains of Parker's body lay in plain sight.[154]

On September 6, 1884, the survivors arrived at Falmouth, England, and they were closely questioned by officials about the incident. The survivors did not believe they had done anything criminal. Dudley told the people at the Customs House of their adventure with gusto, and insisted on keeping the knife that he had used to kill Parker. News quickly spread of the sailors' ordeal, and the men were regarded as heroes for what they had endured. The survivors were therefore stunned when they were placed under arrest and charged with murder. The mayor of Falmouth and the prosecutor both received death threats for their roles in prosecuting the survivors.[155]

The men were transferred to London, and were greeted by the public with respect. The local press editorialized:

> It is utterly impossible that men can endure the tortures of nineteen days' starvation, the exquisite agony of a long continuing thirst, the anguish of mind and the prospect of excruciating death . . . without the mind becoming in a measure at least deranged; and without thus becoming to the fullest extent irresponsible for their actions.[156]

The matter filled the world's press.[157]

The men were tried for murder at Exeter:

> Daniel Parker, Richard Parker's eldest brother, forgave Dudley in open court, and shook hands with him. Parker's family planted a

154 *Id.* at 58–70.
155 KATZ, *supra* note 104, at 24.
156 SIMPSON, *supra* note 28, at 81.
157 *Id.* at 83.

tombstone on Richard's grave that read:

> Though he slay me, yet I will trust him.
>
> (Job, xiii, 15)
>
> Lord, lay not this sin to their charge.[158]

The defendants contended that their cannibalism was not murder because it was necessary to preserve their own lives.[159] In a most unusual move, the jury returned a special verdict, specifying the facts that they found but indicating that they were not in a position to render a verdict as to guilt or innocence. The jury said,

> [I]f the men had not fed upon the body of the boy they would probably not have survived to be so picked up and rescued, but would within the four days have died of famine. That the boy, being in a much weaker condition was likely to have died before them. That at the time of the act in question there was no sail in sight, nor any reasonable prospect of relief. That under these circumstances there appeared to the prisoners every probability that unless they then fed or very soon fed upon the boy or one of themselves they would die of starvation. That there was no appreciable chance of saving life except by killing some one for the others to eat. That assuming any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men.[160]

Thus, the jury specifically made the factual finding that had the three crew members not fed upon the boy's body or someone else's body, they would very likely have died of starvation within the four days that it took until the rescue vessel sighted them. The jury also made clear that if there had been the need to sacrifice one, there was no basis to justify sacrificing the weakest of their number.

The matter was then referred to an appellate panel of five judges, headed by Chief Justice Lord Coleridge. Lord Coleridge authored the court's opinion. He flatly rejected the necessity defense under the circumstances of intentional killing of an innocent person. He was worried that allowing courts to formulate unclear or open-ended exceptions to criminal culpability would weaken the rule of law:

> Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognised excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called "necessity." But the

158 KATZ, *supra* note 104, at 24.
159 *See* Regina v. Dudley & Stephens, (1884) 14 Q.B.D. 273, 281 (U.K.).
160 *Id.* at 275.

> temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children . . . impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country, least of all, it is to be hoped, in England, will men ever shrink . . . . It would be a very easy and cheap display of commonplace learning to quote from Greek and Latin authors, from Horace, from Juvenal, from Cicero, from Euripides, passage after passage, in which the duty of dying for others has been laid down in glowing and emphatic language as resulting from the principles of heathen ethics; it is enough in a Christian country to remind ourselves of the Great Example whom we profess to follow. . . .
>
> It is not suggested that in this particular case the deeds were "devilish," but it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime. . . .
>
> . . . [A] man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime. It is therefore our duty to declare that the prisoners' act in this case was wilful murder, that the facts as stated in the verdict are no legal justification of the homicide; and to say that in our unanimous opinion the prisoners are upon this special verdict guilty of murder.[161]

In the above passage, Lord Coleridge referred to the general duty to preserve one's life, and to a special duty in a shipwreck situation imposed by moral necessity "not to live, but to die."[162] This self-sacrifice is compelled by "duty of dying for others" and according to Lord Coleridge is recognized in war and supported by the "Great Example" of Jesus.[163]

We might question the reasoning here. The self-sacrifice of soldiers in war, compelled by duty, is something that is anticipated by those who enlist; that is, it may be expected that some soldiers will not return, but that the war effort is undertaken to avert a greater evil, and thus the ultimate sacrifice of some sol-

161 *Id.* at 286–88.
162 *Id.* at 287.
163 *Id.*

diers results in a net benefit to society under the circumstances. In comparison, the men who embarked on the *Mignonette* were not engaged in a dangerous undertaking that would produce some benefit to society; the sacrifice of one or all of them would serve no beneficial societal purpose. The other example given by Lord Coleridge of a sacrifice compelled by duty, the sacrifice on the Cross, is a sacrifice that, for believers, resulted in the forgiveness of sin. The self-sacrifice alluded to by Lord Coleridge with respect to the men in the lifeboat would have had the consequences of saving no one.

Still, the opinion made clear that "[i]t is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's life."[164] Lord Coleridge, in rejecting defense arguments, commented that the *Holmes* case,

> in which it was decided, correctly indeed, that sailors had no right to throw passengers overboard to save themselves, but on the somewhat strange ground that the proper mode of determining who was to be sacrificed was to vote upon the subject by ballot, can hardly . . . be an authority satisfactory to a court in this country.[165]

Lord Coleridge also suggested that the necessity defense in the context of homicide would be unworkable. He questioned how the necessity defense could be invoked when it comes to measuring "the comparative value of lives."[166] His worry was that the necessity defense in cases such as this would ask too much of the jury, who simply lack the ability to weigh the comparative value of lives. And, in fact, the jury in *Dudley & Stephens* was in such a quandary that by issuing a special verdict mentioned above, they left it to the judges to decide guilt or innocence.

Lord Coleridge also worried about the slippery slope, suggesting that allowing a necessity defense in this case could encourage people in other situations to take the law into their own hands. The defense of necessity "might be made the legal cloak for unbridled passion and atrocious crime."[167] He was concerned about the potential for mistaken and self-interested judgments, both about the need for anyone to die, and about who was to be killed:

> It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that

164 *Id.*
165 *Id.* at 285.
166 *Id.* at 287.
167 *Id.* at 288.

> the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen. Was it more necessary to kill him than one of the grown men? The answer must be "No" . . . .[168]

Lord Coleridge characterized the jury's special verdict as implying that there was a good chance that the killing in fact was *not* necessary: "They might possibly have been picked up next day by a passing ship; they might possibly not have been picked up at all; in either case it is obvious that the killing of the boy would have been an unnecessary and profitless act."[169] This assertion is puzzling in that it seems to contradict the jury's findings. By saying the killing was "unnecessary and profitless," Lord Coleridge seems to suggest that the act had no causal efficacy in averting the danger of death by starvation. However, as mentioned above, the jury specifically said that, had the men not partaken of the flesh of one of their own, they very probably would have died within the four days before the rescue vessel came upon the scene, and the men had no reason to expect another vessel to appear on the horizon any time soon.

Lord Coleridge said that the necessity defense cannot be used to save one's life at the expense of another, and that this case is different from cases of justifiable or excusable homicide, as those terms have been used throughout centuries of common law. Even if the peril were imminent and the danger plainly apparent, and even though it resulted in the net saving of lives, the killing of Parker was not justified under the necessity doctrine. Coleridge thought that they ought to have refrained from killing, waiting instead until somebody died of natural causes and then consuming his flesh, or, if waiting would result in the death of all of them, they should simply accept their fate.

In pronouncing the defendants' sentence, Lord Coleridge said:

> There is no safe path for judges to tread but to ascertain the law to the best of their ability and to declare it according to their judgment; and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that prerogative of mercy which the Constitution has intrusted to the hands fittest to dispense it.[170]

Lord Coleridge then sentenced the prisoners to be executed by hanging.[171]

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168 *Id.* at 287–88.
169 *Id.* at 279.
170 *Id.* at 288.
171 *Id.*

The day after the trial, the *Times* said in an editorial:

> The matter will be heard in the Court above, we may assume, with every disposition to give the prisoners the benefit of any doubt as to the law. Even should they be pronounced technically guilty of the offence charged against them, we may be sure that the prerogative of pardon will be exercised; in this instance it would be impossible, in view of the expression of opinion of the jury to allow the Law to take its course.[172]

Shortly thereafter, the prisoners obtained a reprieve from the Crown, which commuted the sentence to six months' imprisonment.[173] At the time, reprieves were exercised by the Home Secretary.

Lord Coleridge may have been incorrect in his slippery slope concern—that to allow the necessity defense in this case might result in people taking the law into their own hands and asserting necessity as a "legal cloak for unbridled passion and atrocious crime."[174] The case did not involve chronic criminals who characteristically undervalue moral considerations or others' interests. Dudley and Stephens did not consider the issue lightly while they were castaways, but raised it carefully, discussed it, deferred it, and then acted when it seemed reasonable to suppose that they would otherwise starve to death. In addition, the fact remains that there was a net saving of lives.

Lord Coleridge might have disposed of the case by allowing the necessity defense, but finding that the actors failed to prove all of the elements of the defense. The clean hands prong holds that a person who has recklessly or negligently created a danger may not invoke the necessity defense to justify actions taken in a choice of evils situation. That is, the necessitous circumstances must not be brought about by negligence or recklessness on the part of the actor. Lord Coleridge could have found that Dudley, as an agent of the yacht's owner, was responsible for the circumstances that occasioned the yacht to sink because, before setting sail, he apparently refused to replace rotting wooden beams and made less costly repairs instead.[175] If he had replaced the beams, the yacht may well have withstood the storm.

It appears that Lord Coleridge simply found that on the basis of the choice of evils prong, it was unreasonable as a matter of law for Dudley and Stephens to decide that killing the innocent

172 Michael G. Mallin, *In Warm Blood: Some Historical and Procedural Aspects of* Regina v. Dudley and Stephens, 34 U. CHI. L. REV. 387, 396 (1967) (quoting an editorial that appeared in the London Times on Nov. 7, 1884).

173 *Id.* at 288 n.2.

174 *Dudley & Stephens*, 14 Q.B.D. at 288.

175 PAUL H. ROBINSON, CRIMINAL LAW CASE STUDIES 15 (2d ed. 2002).

boy was a lesser evil than allowing the entire group to die of starvation. The judge decided that the men made a wrong value choice, that the value asserted was not greater than the value denied, because the value of each person's life is incommensurable.

This case specifically diverges from *Holmes* on whether drawing lots is a permissible measure to take in extreme circumstances. Justice Baldwin noted in *Holmes* that it has been the custom, almost universally practiced in cases of extreme hunger and thirst, for shipwrecked seamen to draw lots to determine who should be sacrificed to save the lives of the rest.[176] Lord Coleridge specifically said that this principle is not one recognized by English law.[177]

As mentioned, Dudley had suggested the drawing of lots, and Brooks refused to have anything to do with it. Might Dudley have been on better legal footing if instead he had insisted upon casting lots, over the protest of Brooks, rather than himself selecting Parker as the sacrifice? As noted above in the discussion of drawing lots, the custom of the sea holds that if the majority of the group agrees that the casting of lots is necessary, they may proceed to draw lots, and lots may be drawn by proxy for anyone who refuses to agree to the casting of lots.

Of course, the problem here was that Parker himself was in and out of consciousness and may not have been in a position to say if he agreed to the casting of lots. Brooks clearly said he was unwilling. That left Dudley and Stephens, which is only two out of four—not a majority. Perhaps this consideration is purely academic because Lord Coleridge clearly said that even if the victim had been selected fairly, the act would nonetheless be punishable as murder.

In a necessitous situation, those who oppose drawing lots may simply be willing to take a chance that a rescue will come upon the scene before death's grip takes hold. Those who would rather not participate may prefer to die than eat human flesh.

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176 United States v. Holmes, 26 F. Cas. 360, 365 (C.C.E.D. Pa. 1842) (No. 15,383).

> Cannibalism occurred so often among sailors that it became a customary practice, complete with its own rituals. As surely as they knew that drinking sea-water would send them mad and kill them, all seamen were also aware that if they were starving, one of their number must be killed and eaten.
>
> The victim was to be selected by casting lots. He was then bled to death so that his blood might be drunk, for thirst rather than hunger was usually the greater peril. The heart and liver—which were full of blood and the most perishable meats—were eaten at once. The rest of the body was then butchered.

HANSON, *supra* note 24, at 123–24.

177 *Dudley & Stephens*, 14 Q.B.D. at 285.

They would have nothing to gain by participating, as they would not consume the dead person's flesh if they won. They would not be acting unfairly to the others because they would be foregoing all possible benefit. Or, even if there is no chance of help arriving in time, they might wish to gamble on the charity of those who survive to share any flesh they cannot eat. But it would seem unfair to allow nonparticipants in the sortition to eat what they are given, because they had avoided the risk of dying by not participating in the lottery.

We might compare the *Dudley & Stephens* case to the Mountaineer Case. In both cases the victim was facing imminent death. In *Dudley & Stephens* the cabin boy was delirious, starving, dehydrated, and in a severely weakened state. His death might have come in a day or so. In the Mountaineer Case, the peril was almost instantaneous; death would come in a few seconds. In the Mountaineer Case it is supposed that the action would be permissible without the consent of the victim. In *Dudley & Stephens* the action was taken without the consent of the victim.

There is one major difference: the cabin boy in *Dudley & Stephens* was not a threat to the other men. The danger to the other men was the looming threat of death by starvation, owing to the lack of provisions on the boat and their inability to catch anything from the sea except for the turtle, which had already been consumed many days before. In the Mountaineer Case, the lower climber was a threat in light of his weight against the frail rope. In both cases, the act of killing violates Kant's injunction not to treat another solely as a means to an end. However, in the Mountaineer Case the action still seems excusable because it closely resembles self-defense, while in the *Dudley & Stephens* case the killing very specifically uses the victim as a means to an end—in order to obtain sustenance from his body—and the situation in no plausible way resembles self-defense. Indeed, during the trial the defense did not introduce any argument suggestive of self-defense.

The implication of *Dudley & Stephens* is that human life is very precious, that human life is to be protected at all costs except for the traditional defenses of justification and excuse, and that innocent life may not be taken or sacrificed even to preserve the lives of a greater number.

The issues raised by the *Holmes* and the *Dudley & Stephens* cases suggest that the fundamental question behind the defense of necessity pertains to a choice of values. As one commentator put it, "although the defence of necessity is subjective as to facts, it is objective as to values. . . . [and] involves deciding whether, on a social view, the value assisted was greater than the value defeated."[178]

The question may be asked whether in extreme circumstances the law of homicide serves any deterrent function. Where groups of people are faced with circumstances such as described in these two cases, in which they must grapple with the instinct for self-preservation, legal rules and the consequences of breaking the law are not likely to influence actual behavior. In other words, confronted with a choice between the possibility of future criminal punishment and a more certain and immediate death, it logically follows that most actors will choose the former. In such situations it is not obvious that any of us would have responded differently. The actors in such cases are not a threat to society because the circumstances are so unique. It is exceedingly unlikely that the offenders would ever be faced with another situation that might call for necessity killing. Thus, punishment in such situations would seem to do little by way of deterring future conduct of the same sort. That is likely what prompted the relatively light sentence of six months' imprisonment in *Holmes,* and the reprieve from the Crown in *Dudley & Stephens.*

VII. THE SPELUNCEAN EXPLORERS

We now turn to a different treatment of necessity in the context of homicide, articulated in a celebrated 1949 Harvard Law Review article, *The Speluncean Explorers.*[179] The article presents a hypothetical case in which five men who were trapped in a cave cast lots to determine who should be killed (and cannibalized) to save the others. It is a philosophical piece, or thought experiment, laid out in the form of an imaginary appellate decision of the "Supreme Court of Newgarth, 4300."[180] The author states that the case "was constructed for the sole purpose of bringing into a common focus certain divergent philosophies of law and government."[181]

The facts of the Speluncean Explorers Case are as follows: Five explorers are trapped in a cave with scant provisions. On the twentieth day of their plight, they find a radio that enables them to establish communication with the rescue party working to free them. Engineers in charge of the rescue effort advise them that the rescue will take at least ten more days to complete.

178 GLANVILLE WILLIAMS, THE CRIMINAL LAW: THE GENERAL PART § 239 (2d ed. 1961).
179 *See* Fuller, *supra* note 135, at 616.
180 *Id.*
181 *Id.* at 645.

Physicians inform them that, considering the rations they have remaining and their state of health, they have very little chance of surviving to see the rescue. The lead physician also tells them that they will be able to survive until the rescue if they consume the flesh of one person.[182]

At the outset, we may observe that the explorers had a strong basis in fact for concluding that they were in imminent peril of dying by starvation. They were so advised by the committee of medical experts, which informed the explorers that if they did not eat, there was "little possibility" of their survival until day thirty, when the rescuers were expected to reach them. Under these facts, all five very likely would have died had they passively awaited rescue. Under the necessity doctrine, clearly the imminence of danger prong was satisfied. This is dissimilar to *Dudley & Stephens* in which Lord Coleridge refused to conclude that the situation justified killing anyone, much less the cabin boy: "They might possibly have been picked up next day by a passing ship; they might possibly not have been picked up at all; in either case it is obvious that the killing of the boy would have been an unnecessary and profitless act."[183]

After the Speluncean explorers received the advisory from the medical experts, Roger Whetmore, a member of the group, suggested they roll dice to decide who should be sacrificed for the others. They all agreed to proceed, but then Whetmore changed his mind and said he would prefer to wait another week. On the twenty-third day, the others decided to roll the dice, but Whetmore refused to participate. The others rolled the dice for Whetmore and the throw went against him. The others promptly killed and consumed Whetmore. On the thirty-second day, the rescue team reached the four, and they were saved. In the rescue effort, ten workmen were killed in removing rocks from the opening of the cave.[184] As the story proceeds, the four were charged with murder, convicted and sentenced to death.[185]

The article goes on to set forth the text of the "appeal" of this case. There were several decisions rendered by the fictitious appellate judges. One of the judges wrote, "If this Court declares that under our law these men have committed a crime, then our law is itself convicted in the tribunal of common sense, no matter what happens to the individuals involved in this petition of error."[186] But the judge went on to declare that the men should be

182 *Id.* at 617.
183 Regina v. Dudley & Stephens, (1884) 14 Q.B.D. 273, 279 (U.K.).
184 Fuller, *supra* note 135, at 616–18.
185 *Id.* at 616, 618–19.
186 *Id.* at 620.

vindicated because the explorers found themselves in a state of nature, and that the law was suspended:

> This conclusion rests on the proposition that our positive law is predicated on the possibility of men's coexistence in society. When a situation arises in which the coexistence of men becomes impossible, then a condition that underlies all of our precedents and statutes has ceased to exist. When that condition disappears, then it is my opinion that the force of our positive law disappears with it.[187]

He further said:

> The proposition that all positive law is based on the possibility of men's coexistence has a strange sound, not because the truth it contains is strange, but simply because it is a truth so obvious and pervasive that we seldom have occasion to give words to it. Like the air we breathe, it so pervades our environment that we forget that it exists until we are suddenly deprived of it. Whatever particular objects may be sought by the various branches of our law, it is apparent on reflection that all of them are directed toward facilitating and improving men's coexistence and regulating with fairness and equity the relations of their life in common. When the assumption that men may live together loses its truth, as it obviously did in this extraordinary situation where life only became possible by the taking of life, then the basic premises underlying our whole legal order have lost their meaning and force.[188]

The idea here is much the same as the one the defense sought to advance in the *Holmes* case, i.e., that the law of the realm no longer applies because the actors were in a state of nature.[189] The usual principles that regulate the relations of one person to another are absent.[190] The Speluncean explorers were

> as remote from our legal order as if they had been a thousand miles beyond our boundaries. Even in a physical sense, their underground prison was separated from our courts and writ-servers by a solid curtain of rock that could be removed only after the most extraordinary expenditures of time and effort.[191]

The judge admitted that there are certain difficulties in determining at what point in time a group of individuals passes from a "state of civil society" to that of "the law of nature."[192] "Was it when the entrance to the cave was blocked, or when the threat of starvation reached a certain undefined degree of intensity, or when the agreement for the throwing of the dice was made?"[193]

187 *Id.*
188 *Id.* at 620–21.
189 *Id.* at 621.
190 *Id.*
191 *Id.*
192 *Id.* at 626.
193 *Id.*

The judge went on to opine that because positive law no longer applied to them, it was necessary for the parties to draw "a new charter of government appropriate to the situation in which they found themselves."[194]

Another judge in the "appellate" opinion strenuously objected to the state of nature defense. He said of the code that might be applied in a state of nature:

> What a topsy-turvy and odious code it is! It is a code in which the law of contracts is more fundamental than the law of murder. It is a code under which a man may make a valid agreement empowering his fellows to eat his own body. Under the provisions of this code, furthermore, such an agreement once made is irrevocable, and if one of the parties attempts to withdraw, the others may take the law into their own hands and enforce the contract by violence . . . .[195]

If the Speluncean Explorers Case had come before Justice Baldwin in *Holmes*, it is likely that the state of nature argument would be rejected just as it was with respect to the men in the long-boat. However, Justice Baldwin may well have reversed their convictions on other grounds—that they undertook a fair mode to determine who should die, and that the necessity defense applies to killing in the circumstances described.

An interesting complication in the Speluncean Explorers Case is that Whetmore was opposed to the casting of lots, but the majority supported the plan. This brings into sharp focus the question of whether a majority should be permitted to override the objection, cast a lot for the dissenter by proxy, and enforce the result against him should he be the unlucky one. Justice Baldwin approached the issue in this way: "When the selection has been made by lots, the victim yields of course to his fate, or, if he resist, force may be employed to coerce submission."[196] This suggests that if all the participants agree to the lottery in the first place, then the results may be enforced against the losing party, but does not address the situation in which a dissenter refuses to participate at all. The answer to this concern is that, as mentioned above, it simply seems fair that the majority can compel a dissenter to participate in the sortition, to cast lots for the dissenter by proxy if need be, and to enforce the result by force. This, of course, presupposes that all the other elements of the necessity doctrine are operative.

This would be fair in a situation where it is a question of jettisoning people from a lifeboat in order to lighten the load and

194 *Id.* at 622.
195 *Id.* at 627.
196 United States v. Holmes, 26 F. Cas. 349, 367 (C.C.D. Me. 1858) (No. 15,382).

save all of the remaining people. But if the necessity involves killing for the purpose of cannibalizing, it seems fair to exempt whoever does not wish to eat flesh, and to focus only on those who will partake. The dissenter would simply take his chances of surviving to see a rescue. Whetmore may have preferred to die rather than eat human flesh. If so, he would have had nothing to gain by participating, as he would not consume the dead person's flesh if he had won. His refusal to participate would not be unfair to the others because he would be foregoing all possible benefit.

The fact that Whetmore was an unwilling victim brought the following comment by another one of the fictitious judges:

> Suppose, however, that Whetmore had had concealed upon his person a revolver, and that when he saw the defendants about to slaughter him he had shot them to death in order to save his own life. My brother's reasoning applied to these facts would make Whetmore out to be a murderer, since the excuse of self-defense would have to be denied to him. If his assailants were acting rightfully in seeking to bring about his death, then of course he could no more plead the excuse that he was defending his own life than could a condemned prisoner who struck down the executioner lawfully attempting to place the noose about his neck.[197]

This seems to be an accurate assessment of the way the necessity doctrine would operate under the circumstances, as noted in the above quote of Justice Baldwin.

It is worth remembering that in *any* situation in which the necessity doctrine applies, someone's rights are going to be violated. That is the starting point of the doctrine—that there is a choice of evils, and that in order to avert the greater evil the law is going to be violated; someone will be harmed, but this harm will be the lesser evil. The action taken pursuant to necessity is almost always against the will of someone whose rights are to be violated. For example, one who demolishes a house in order to make a firebreak and prevent a fire from spreading to an entire town may likely be met with resistance by the homeowner. But the action will be justified, third parties are permitted to help enforce the action, and the person whose rights are being violated is not entitled to resist.

Another of the fictitious judges who ruled that the Speluncean explorers were innocent said that in "usual conditions" we are inclined to think that human life has absolute value, but that

> [t]here is much that is fictitious about this conception even when it is

197 Fuller, *supra* note 135, at 627.

> applied to the ordinary relations of society. We have an illustration of this truth in the very case before us. Ten workmen were killed in the process of removing the rocks from the opening to the cave. Did not the engineers and government officials who directed the rescue effort know that the operations they were undertaking were dangerous and involved a serious risk to the lives of the workmen executing them? If it was proper that these ten lives should be sacrificed to save the lives of five imprisoned explorers, why then are we told it was wrong for these explorers to carry out an arrangement which would save four lives at the cost of one?
>
> Every highway, every tunnel, every building we project involves a risk to human life. Taking these projects in the aggregate, we can calculate with some precision how many deaths the construction of them will require; statisticians can tell you the average cost in human lives of a thousand miles of a four-lane concrete highway. Yet we deliberately and knowingly incur and pay this cost on the assumption that the values obtained for those who survive outweigh the loss. If these things can be said of a society functioning above ground in a normal and ordinary manner, what shall we say of the supposed absolute value of a human life in the desperate situation in which these defendants and their companion Whetmore found themselves?[198]

Another judge noted that the action of the defendants may have lacked the requisite *mens rea* required of murder if they acted to kill Whetmore in self-defense: "The statute concerning murder requires a 'willful' act. The man who acts to repel an aggressive threat to his own life does not act 'willfully,' but in response to an impulse deeply ingrained in human nature."[199]

The judge went on to say that self-defense "obviously" could not apply to the facts of this case: "These men acted not only 'willfully' but with great deliberation and after hours of discussing what they should do."[200] The Speluncean explorers had ample time to coolly discuss their situation. They realized they were in peril, and deliberated on how to proceed should the threat of dying reach a certain threshold of imminence. They reached a majority consensus, and they decided to cast lots in the fairest possible way, with the lot for the dissenter, Whetmore, being cast for him by proxy. (As mentioned above, they might have been on stronger legal footing had they allowed Whetmore to opt out of the lottery.) Their action, preceded by careful deliberation, would seem to be precisely the kind of sortition that Justice Baldwin endorsed in the *Holmes* case.

Self-defense is an act to deflect an unlawful and aggressive threat against one's person. The action of self-defense must be

198 *Id.* at 623.
199 *Id.* at 629.
200 *Id.*

directed to an aggressor who poses an imminent threat of an unlawful attack.[201] The means employed in self-defense must be reasonable, not disproportionate, in relation to the danger posed. Self-defense might not be justified or excused if there is an opportunity to retreat.[202] According to the Restatement (Second) of Torts, if the imminent danger might be avoided simply by retreating to a place of safety, the defense is not available, except that one ordinarily is allowed to hold one's ground if the unlawful attack takes place in one's home. Self-defense is not available to repel a *lawful* use of force, such as when police make a lawful arrest with the use of reasonable force. If the person claiming self-defense was responsible for bringing about or provoking the attack in the first instance, the defense will be denied. Self-defense is either a justification or an excuse, depending on the circumstances. If self-defense is asserted as a justification, then the aggressor whose interests are threatened by an act of self-defense may not claim self-defense against self-defense. Third parties may aid another in an act of justifiable self-defense.

The judge in the above passage, while conceding that self-defense does not apply to the Speluncean Explorers, seems to suggest that self-defense is an *involuntary* action. This is incorrect. While the decision to employ self-defense may be made in a split second in response to a threat, the law regards self-defense to be a volitional action.[203]

In any event, self-defense clearly does not apply to this situation. The danger that confronted the Speluncean explorers did not emanate from Whetmore any more than the danger in *Dudley & Stephens* emanated from the cabin boy. Whetmore was not an aggressor using unlawful force against the others. The threat was from the necessitous circumstances occasioned by their being trapped in the cave with no food. Whetmore was an innocent victim.

In both *Dudley & Stephens* and the Speluncean Explorers Case, the danger not was an unlawful act of aggression on the part of the victim, but was the imminent threat of death by starvation owing to the lack of provisions. Thus, in both cases the killing cannot be justified or excused based on self-defense. In both cases the killing was committed against an innocent party who not only did not consent to be killed, but who did not commit

201 720 ILL. COMP. STAT. 5/7–1 (2006).

202 RESTATEMENT (SECOND) OF TORTS § 65 (1965).

203 *Contra* Benjamin B. Sendor, *Crime as Communication: An Interpretive Theory of the Insanity Defense and the Mental Elements of Crime*, 74 GEO. L.J. 1371, 1412 (1986); Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 ST. JOHN'S L. REV. 725, 783 (2004).

an act of aggression, much less unlawful aggression, against the others.

In both cases, the killing averted a greater evil resulting in the net saving of lives. However, the Speluncean Explorers Case offers a stronger set of facts than *Dudley & Stephens* to justify necessity killing, based on the *known* imminence of the danger. The imminence of the threat was ascertained with scientific certainty because the medical experts told the explorers they all would surely die before the rescue team reached them unless they ate the flesh of one of their group. The greater evil, namely the death of all five explorers, certainly would have occurred had it not been for the choice to sacrifice one of them. In *Dudley & Stephens,* according to Lord Coleridge, the men were not sure how much longer they could go without eating, and they had no knowledge of how soon they might be rescued.

Thus, in the Speluncean Explorers Case we might analyze the elements of the defense as follows: The explorers (1) weighed the choice of evils prong based on the information given them, and deliberated about how to avert the greater evil; (2) they were precisely apprised of how imminent the threat of death was and knew how much longer they had; (3) they saw that there would be causal efficacy in killing one of the group in order to eat his flesh and thereby survive; (4) they had no legal way out other than to engage in a fair method of selection to determine who should be sacrificed; (5) they knew, or should have known, that the law prohibited necessity killing, but this obviously had no deterrent effect; and (6) they apparently were free of negligence or recklessness in bringing about the situation that caused them to be trapped in the cave with insufficient provisions.

The Speluncean Explorers Case is helpful in bringing into sharper focus the principles that were laid out in both the *Holmes* and the *Dudley & Stephens* cases. In 1999, the Speluncean Explorers Case was revisited in a thought-provoking symposium published in Harvard Law Review.[204]

VIII. INNOCENT SHIELDS OF THREATS

Robert Nozick offers a discussion of the threat posed by *innocent shields of threats:*

> Further complications concern *innocent shields of threats,* those innocent persons who themselves are nonthreats but who are so situated that they will be damaged by the only means available for stopping the threat. Innocent persons strapped onto the front of the tanks of

[204] *The Case of the Speluncean Explorers: A Fiftieth Anniversary Symposium,* 112 HARV. L. REV. 1834 (1999).

> aggressors so that the tanks cannot be hit without also hitting them are innocent shields of threats. (Some uses of force on people to get at an aggressor do not act upon innocent shields of threats; for example, an aggressor's innocent child who is tortured in order to get the aggressor to stop wasn't *shielding* the parent.) May one knowingly injure innocent shields? *If* one may attack an aggressor and injure an innocent shield, may the innocent shield fight back in self-defense (supposing that he cannot move against or fight the aggressor)? Do we get two persons battling each other in self-defense? Similarly, if you use force against an innocent threat to you, do you thereby become an innocent threat to him, so that he may now justifiably use additional force against you (supposing that he can do this, yet cannot prevent his original threateningness)?[205]

This scenario involves the unsettling situation of aggressors seeking to use hostages as shields in the process of launching an attack on others. The question from a choice of evils standpoint is whether one may knowingly injure or kill an innocent shield to stop an enemy from advancing.

The use of innocent shields of threats may take the form of a bank robber who takes a hostage to prevent police from shooting as he escapes. Police in such a case are faced with a daunting choice of evils: one choice is to let the robber flee with the hostage, with the hopes that after reaching a place of safety the hostage will be freed unharmed. The problem with this choice is that the fleeing felon may well kill or harm the hostage, and go on to further crime sprees. The other choice is to shoot at the robber using one's best efforts to aim carefully at his legs, with the result of bringing him down and freeing the hostage. With either choice, there is a good chance that the hostage will suffer grave harm or death. Thus, police may consider that shooting would be the lesser evil, since only that way could they be certain to capture the robber, and the hostage might die in either case. If the hostage might well die either way, it would be the lesser evil to shoot and capture the robber rather than allow him to be on the loose.

Ordinarily, when one takes a hostage as a shield, the logical purpose is to prevent law enforcement from shooting, and to thereby effect a getaway. In cases of hijacking, passengers have been held hostage because hijackers believed that they could be human shields to prevent the authorities from shooting down the aircraft, and the hostages serve as bargaining chips for demands made by the hijackers.[206]

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205 ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 35 (1974).

206 *History of Airliner Hijackings*, BBC NEWS, Oct. 3, 2001, http://news.bbc.co.uk/1/hi/world/south_asia/1578183.stm.

The idea of innocent shields as threats took on a new meaning with the September 11th terrorist attacks. The "innocent shields" were actually part of the plan of committing suicide in spectacular explosions. After the World Trade Center was hit and it appeared that a terrorist hijacking was in progress, with United Flight 93 some eighty miles inbound from Washington, D.C., the Vice President, based on his prior conversation with the President, authorized Air Force fighter aircraft to shoot down the hijacked aircraft.[207] Officials believed that the plane was headed towards the U.S. Capitol or the White House. Innocent people who themselves were nonthreats were so situated that they were subject to an order to be killed in order to avert a greater danger.

Air Force pilots, meanwhile, did not have a clear understanding of the rules of engagement.[208] In any event, at 10:30 a.m., before the order could be implemented, United Flight 93 went down in a field in Pennsylvania. The passengers on board apparently took action to take control of the aircraft, and their actions no doubt saved the lives of many others.[209]

Terrorists can no longer regard passenger-hostages on an aircraft to be "shields" that might protect them, because the government may find it necessary to shoot down the plane if it appears that the hijackers are intent on using the aircraft as a missile to cause horrific destruction. Under the necessity doctrine, if a passenger jet is in the hands of hijackers, the choice of whether to shoot it down must be carefully weighed in light of all the circumstances available to officials at the time.[210]

Let us consider, along the lines of the necessity defense, how officials might decide whether to issue a shootdown order.

A. The Choice of Evils Prong

The choice is either to shoot down the plane and kill everyone on board, or to allow the plane to continue on its trajectory, with the probability that it will hit a target, possibly in a densely populated area, resulting in the deaths of a significant number of innocent persons on the ground as well as destruction of prop-

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207 *See* Philip Shenon & Christopher Marquis, *Miscommunication Left Pilots Without Order on Downing Jets,* N.Y. TIMES, June 18, 2004, at A1, A17.

208 *See id.*

209 Subsequently, the German Parliament passed a law authorizing the military to shoot down civilian airplanes if it believes they are being used in a 9/11-style terrorist attack. *See World Briefing*, *Germany: New Air Security Law,* N.Y. TIMES, June 19, 2004, at A4. Poland enacted a similar law that allows the head of the Polish Air Force to order hijacked aircraft shot down as a last resort. *See World Briefing*, *Poland: Law Allows Hijacked Planes to be Shot Down,* N.Y. TIMES, Jan. 14, 2005, at A12.

210 The justification for this type of action might be separately analyzed on the basis of military necessity in response to an armed attack.

erty. With either choice, the death of everyone on the plane is inevitable. Blowing up the aircraft with a missile before it reaches its target will simply shorten their lives by a few minutes.

In considering a shootdown order, it is not necessary to weigh the number of innocent lives on the plane compared to the number of lives on the ground that might be saved. When we consider the fact that the people on board are going to die in a few minutes regardless, then shooting down the plane would seem clearly justified. The action would prevent the plane from hitting a target which, in all likelihood, would result in the death of *some* people who otherwise would not be in harm's way. Even if only a handful of people were thus saved, there would be a net saving of lives.

By shooting down the aircraft, we are not infringing the rights of those on board because their rights are already taken from them—they are destined at that point for death.[211] To some extent, this is similar to the Mountaineer Case in that the lower climber will die in a few moments no matter what is done; cutting the rope will result in his death a few moments earlier than otherwise, but will likely result in the net saving of life.

Of course, a shootdown order may still produce injuries or death to innocent bystanders on the ground. The plane would likely break into pieces, and burning debris would fall to the ground over an extended region, jeopardizing life, limb and property. In this regard, it would seem prudent to execute the shootdown order, if at all, when the aircraft is flying over an area with the least possible population.

What if the apparent target of the hijacked aircraft is a significant cultural monument, such as the Statute of Liberty, at a time when it is closed? Suppose further that there are no human guards at the site, but an automated security system is in place, so that no one (other than those aboard the aircraft) would be killed by the impact. In that case, a significant cultural monument would be saved, but there would be *no* net savings of life by shooting down the plane. Would saving a significant cultural monument, in itself, be sufficient to justify the shootdown order? What if the target of the plane were an ordinary office building, again empty and with no lives in jeopardy (other than those on the aircraft)? Would that affect the decision? What if the action averts the destruction of an empty office building, but burning

211 This is a different situation from the trolley case, discussed *supra* note 2. Diverting the trolley results in infringing the rights of someone who otherwise was *not* in harm's way and would not have otherwise been killed.

debris from the fuselage kills a number of people on the ground or causes even greater destruction of property than the building that was saved? Would the decision, in either case, be influenced by the fact that all the people aboard the plane will die in a few minutes anyway? Should the choice of evils decision weigh the likelihood of collateral consequences (such as economic repercussions, terror and fear, etc.) if the terrorists succeeded in reaching their target, against the consequences of implementing a shoot-down order?

B. The Imminence Prong

The question is whether there is imminent danger that the plane will be used as an airborne missile to produce significant or very substantial destruction, possibly in a densely populated area. What degree of imminent danger must be evident? Are officials to assess the danger based on a reasonableness standard, drawing inferences based on the descending trajectory and speed of the aircraft, and the fact that it is in control of hijackers who refuse to communicate with air traffic controllers? Is it possible to predict what target the plane is headed toward? How close to a target should the aircraft be in order to make it reasonably clear that the threat is truly imminent? Is there more time to wait and see just where the plane is going? Does it really matter what specific target the plane is headed toward if it is descending upon a populated center?

What if officials are in communication with the hijackers, who say they mean no harm, and that they are going to fly the plane to a foreign city to make a demand for the release of political prisoners? Will that militate against the necessity of shooting down the plane?

C. The Causal Nexus Prong

If officials do nothing and simply allow the plane to proceed to the target, all the lives on board as well as the additional lives and property incident to the terrorist target will be lost. If officials shoot down the plane, all persons on board the plane will likewise be killed, albeit only a few minutes sooner than otherwise, but there will likely be a net saving of lives and property. Thus, the action would very likely be causally effective in averting a greater evil. On the other hand, if shooting down the plane causes it to crash into a densely populated area, there could be further casualties and destruction of property, perhaps even exceeding what would have been the case had the terrorists continued on to the intended target.

D. The Legal Way Out Prong

Officials may have no reasonable legal alternative to a shootdown order. There is no time to seek a diplomatic solution. Terrorists in control of a hijacked aircraft may well refuse to communicate their intentions to officials, making negotiation impossible. In any event, as a matter of policy, most governments will refuse to negotiate with terrorists.

E. The Preemption Prong

As in any situation involving homicide by necessity, there is always the question of whether the action is wrong because, as a matter of law, the killing of innocents is unacceptable under any circumstances. One may debate whether it is morally required, morally permitted, or even morally prohibited to deflect the aircraft by shooting it down rather than to allow it to proceed to the target. In any event, officials would not likely be deterred by deontological constraints under the circumstances of a terrorist hijacking.

Key to the inquiry is that if nothing is done, a great many more lives will be lost than if the plane is shot down, and the people on board are going to die momentarily either way. In the final analysis, a shootdown order would not likely hinge on whether there would be a net savings of lives. Even if the hijacked aircraft were poised to hit an empty office building, with no people on the ground endangered, it would seem unrealistic to expect officials to watch the plane hit the target without doing the one thing within their power to prevent that from occurring.

F. The Clean Hands Prong

The clean hands prong holds that one who has been reckless or negligent in bringing about the necessitous circumstance may not justify action based on the necessity defense. If the government were reckless or negligent in causing the terrorists to hijack the aircraft, then the government would lack clean hands. Terrorists might argue that they are acting in response to the reprehensible acts of the government whose people they have targeted. The government is not likely to be dissuaded from issuing a shootdown order based on terrorist claims that the hijacking is justified.

IX. HOMICIDE BY NECESSITY: THE FUTURE

A modern case from Maine, *State v. Thibeault,* seems to leave open the possibility of asserting the necessity defense in the context of homicide.[212] This case involved a defendant charged with murder. He sought to introduce evidence of the necessity defense, which the judge rejected. The victim had threatened to kill the defendant's daughter, her husband and their two children (the defendant's grandchildren), and the threats were becoming more frequent and intense. As a result, the defendant was very worried about the safety of his relatives. He believed that the police were powerless to prevent the threatened harm from happening. The defendant and his son-in-law then kidnapped the victim, and the son-in-law shot him to death. The defendant said his sole intention was to kidnap the victim and frighten him into refraining from the imminent harm that had been threatened to his family members. The judge refused to instruct the jury on the necessity defense. The jury found the defendant guilty of murder.[213] On appeal, the defendant argued that it was reversible error for the judge to refuse to instruct the jury on the necessity defense. The appellate court held that nothing in the record indicated that the victim posed an imminent threat to the defendant's relatives or to anyone else, and affirmed the conviction. However, the decision suggested that had the defendant introduced evidence of imminent harm, the defense would be available with respect to a charge of murder.[214]

CONCLUSION

Perhaps the law should take a lesson from philosophy. All law is ineffective in extreme situations. In an emergency, most of us would agree that it is appropriate to take action that under ordinary circumstances would not be justified. In an emergency, we might even praise action that violates the law so long as it is done to produce a greater good or avert a greater harm. The necessity doctrine aids the courts in coming to grips with life-and-death moral dilemmas in which a defendant seeks to justify disobedience of the law for the purpose of avoiding a greater evil.

Many of the situations discussed in this article are real life cases of people acting in violation of the letter of the law in exigent circumstances, in order to avert the greater of two evils. In most necessity cases, the question of which evil is the lesser is not in dispute. No one in our society seriously disputes whether property may be destroyed to save human life or whether the crew of a disabled ship is justified in "resist[ing] the authority of the master" and stopping at a nearby port to obtain emergency

212 621 A.2d 418, 423 (Me. 1993).
213 *Id.* at 421.
214 *Id.* at 423.

repairs.[215] But in homicide cases, the question of which evil is the lesser one comes up against deontological constraints: killing one innocent person in order to save a greater number of lives is very rarely a value choice that the law allows or recognizes. Courts have suggested that it is difficult to see how there is a benefit to society in the intentional killing of innocents, even though the action results in the saving of lives. Lives are not amenable to ready quantification, and therefore courts are just not comfortable with allowing defendants to assert a necessity defense by measuring "the comparative value of lives," to quote Lord Coleridge.[216]

In a sense, the necessity defense allows us to act as individual legislators, amending a particular criminal or civil provision or crafting a one-time exception to it, when a real legislature would likely do so if presented with the same circumstances. Thus, the necessity doctrine contemplates that it is impossible to draft general laws that serve all situations.[217]

The necessity defense is inherently flexible, adjusting to general shifts in societal norms. This raises the prospect of unfairness where disagreement may exist on the extent to which a value is relative or absolute, that is, where the value question is not clear. Perhaps the most delicate question a judge has to determine is whether the defendant's choice of evils and the action taken was in fact a reasonable choice, or whether the action conflicts with some higher value. The judge will also determine whether the defendant's belief of necessity was reasonable or unreasonable under the circumstances.[218] The judge may decide that the defendant's value choice was wrong and refuse to allow the matter to go before the jury. Yet the value choice is an ultimate question of fact that would be decided by the jury if it were allowed to hear the defense. A jury will revisit what the circumstances were and decide if the action was therefore necessary.

There is always the danger that a jury will second-guess the defendant, that it will be tempted to gain insight from hindsight that was not apparent at the time. Therefore, it is important for judges to instruct the jury to evaluate the evidence based on the circumstances at the time the defendant acted, and to resist the temptation to evaluate a defendant's acts in hindsight, based on

215 *See, e.g.,* United States v. Ashton, 24 F. Cas. 873, 874 (C.C.D. Mass. 1834) (No. 14,470).

216 Regina v. Dudley & Stephens, (1884) 14 Q.B.D. 273, 287 (U.K.).

217 *See* H.L.A. HART, THE CONCEPT OF THE LAW 121–50 (1961).

218 *See, e.g.,* Graham v. State, 566 S.W.2d 941, 952 n.3 (Tex. Crim. App. 1978); PROSSER & KEETON, THE LAW OF TORTS § 37 at 236 (W. Page Keeton et al. eds., 1984) (stating that a defendant's conduct may be reasonable or unreasonable as a matter of law).

all the evidence scrupulously gathered after the emergency was over.

Despite its potential shortcomings, the necessity defense should be allowed as a justification for homicide in extreme circumstances. When a person is faced with a choice of evils, the law should tolerate the better moral decision, rather than vainly attempt to oppose the human instinct of self-preservation.

A Matter of Rhetoric: The Diversity Rationale in Political Context

*Daniel Ibsen Morales**

INTRODUCTION

The scholarly discourse regarding affirmative action in higher education has gone awry, becoming shrill[1] and calcified.[2] The discussion has come to focus excessively on the formal and the philosophical aspects of the program (What doctrine properly justifies it? Is the program moral?[3] Does it go far enough?[4]), while neglecting to consider, in a serious and methodical way, how the *realpolitik* of American race relations might be brought to bear on these more "academic" considerations. Instead of analyzing affirmative action in the shadow of platonic notions of justice, propriety, or fairness, legal academics should consider what race-based remedies are feasible in light of current political leanings, or whether affirmative action in higher education is effectively creating a more integrated workforce. A full consideration of the way in which legal reasoning intersects with the political dispute surrounding affirmative action would lead scholars towards these more productive paths of inquiry.

The problem of affirmative action scholarship written in a political vacuum has become all the more acute in the wake of

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1 *See* Lino A. Graglia, *Fraud by the Supreme Court: Racial Discrimination by a State Institution of Higher Education Upheld on "Diversity" Grounds*, 36 LOY. U. CHI. L.J. 57, 81 (2004); *see also* Brian T. Fitzpatrick, *The Diversity Lie*, 27 HARV. J.L. & PUB. POL'Y 385, 397 (2003).

2 *See generally* James Boyd White, *What's Wrong With Our Talk About Race? On History, Particularity, and Affirmative Action*, 100 MICH. L. REV. 1927 (2002) (locating the problem of racial discourse in a failure to come to terms with history).

3 *See* Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CALIF. L. REV. 685, 685 (2004).

4 *See* Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222, 1224 (1991).

former Justice Sandra Day O'Connor's majority opinion in *Grutter v. Bollinger*,[5] the landmark decision that upheld the use of race-conscious admission policies at the University of Michigan Law School. That decision relied on the so-called "diversity rationale" for affirmative action, which holds that race-conscious admissions programs are constitutionally permissible where an educational institution seeks to racially diversify its student body for the purpose of ensuring that a variety of viewpoints are represented in campus discourse.[6] Notably, this rationale excludes the possibility that a university might implement affirmative action programs in order to carry out a vision of social justice that seeks to compensate victims of past or current discrimination.

While the diversity rationale occupies a prominent place in extra-legal discourse,[7] its use as a basis for authorizing affirmative action is heavily disfavored in academic circles. Emblematically, one prominent conservative scholar entitled his terse, anti-*Grutter* screed, *Fraud by the Supreme Court*.[8] In keeping with the hyperbole of the title, the article set out to claim that *Grutter* was, in essence, the first sign of the legal apocalypse; its total disregard for the rule of law would, in the author's opinion, cause the "entire legal system . . . to denigrate into a farce."[9] The article located *Grutter's* fraudulence and deviance from traditional norms of jurisprudence in its unwillingness to adhere to minimal standards of honesty.[10] "Honesty," in the author's view, would have meant dubbing affirmative action reverse discrimination carried out in the name of a faddish social movement.

In itself, the depth of this reaction on the part of conservatives should not be particularly surprising; they have waged an assault against affirmative action for at least the past decade.[11] But the extent to which the conservative opinion on these subjects is widely shared by other academics is quite surprising. After all, few scholars of any political persuasion would stand by the *Fraud* author's side as he advocates altering the Fourteenth Amendment in an effort to reign in judicial "activists."[12] Never-

5 539 U.S. 306, 343 (2003).

6 *Id.* at 328–30.

7 It has become nearly mandatory for major institutions to have committees on race and gender which are nearly always referred to as committees on diversity. *See, e.g.*, Kirkland & Ellis LLP, Diversity, http://www.kirkland.com/OurFirm/diversity.aspx (last visited Oct. 20, 2006); Coca-Cola Company, Diversity, http://www2.coca-cola.com/ourcompany/ourdiversity.html (last visited Oct. 20, 2006).

8 Graglia, *supra* note 1, at 57.

9 *Id.* at 81.

10 *Id.*

11 *See* Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CAL. L. REV. 953 nn.1–3 (1996).

12 Lino Graglia, *Altering 14th Amendment Would Curb Court's Activist Tendencies*,

theless, prominent liberal scholars like Jed Rubenfeld, Sanford Levinson, Kim Forde-Mazrui, and Jack Balkin agree that the diversity rationale is a rhetorical sham used to justify a program whose proper constitutional authority rests on other theories.[13] Indeed, the scholarly distaste for diversity is so strong that I would hazard that the vast majority of American law professors believe it to be an illegitimate constitutional basis for affirmative action.[14]

This paper locates the source of this surprising consensus in the failure of scholars of all political persuasions to consider how the discourse of American racial politics restricts the institutional capacity of the Court. This charged atmosphere limits the scope and species of remedies that the Court can authorize, and, equally important, what rhetorical form such authorization can take. The power of racial minorities is so limited that to successfully protect these groups, the Court—the only political institution insulated from politics—must use its expressive power to steer the public discourse in ways that work to affirm the tenuous political footholds that racial minorities have managed to gain. As this article will show, the affirmative action rationales favored by the academy would catalyze political conflict and likely lead to affirmative action's repeal, whereas the diversity rationale works to minimize such discord.

This article will prove this thesis by presenting a theory of American racial politics that closely reflects the reality of limited minority political power, illustrating how other rationales for affirmative action conflict fatally with that political reality, and, finally, reading *Grutter* in a way that highlights how the decision successfully navigates this difficult political terrain. By reading *Grutter* in this way, I will ultimately show that the diversity rationale is the most effective means of securing the interests of racial minorities in the face of limited political and economic clout, as well as continuing racial prejudice. By taking this particularized tack, however, this paper aims to push scholars to expand the definition of legal reasoning to include decisions, like *Grutter*, that require a rhetoric that is more political than classically legal.

AUSTIN-AMERICAN STATESMAN, July 10, 2005, at H1.

13 *See* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 427–28 (1997); SANFORD LEVINSON, WRESTLING WITH DIVERSITY 55, 46 (2003) (quoting e-mail from Jack Balkin to Sanford Levinson stating that diversity is a code word for claims to past mistreatment); Forde-Mazrui, *supra* note 3, at 750 n.224.

14 *See* Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CAL. L. REV. 87, 122 (1979) (stating that the author has never met a professional academic who believes that diversity for education's sake motivates preferential admission).

I. MAJORITARIAN PROBLEMATICS: HOW TO SAFEGUARD MINORITY RIGHTS WITHIN A DEMOCRATIC CULTURE

This section begins with a practical question: How can the Supreme Court secure minority rights in a culture that conceives of democracy in a majoritarian way? In our democratic system the legal or philosophical justification for protecting minority rights of any kind—criminal, political, religious or racial—will always reveal the central anxiety of representational government: Where is the proper boundary of the popular will?[15] Thoughtful consideration of minority rights in a democratic system, of course, has a long history; the American founders, for their part, were terrified of democracy's tyrannical potential.[16] Still, in the popular imagination, democracy means populism: one person, one vote, never mind the rest. Americans are terribly skeptical of those institutions that would thwart their will. It is not accidental that our constitutional tradition has moved teleologically toward more direct democracy; ours is a nation suspicious of the "knowing" elite.

This ardent populism will always remain in tension with a Constitution presided over by an unelected court. Elites, those usually seeking to restrain the popular will, have sought to justify the anti-populist role of the Supreme Court by offering baroque theories of judicial review, theories that give learned expression to what is a uniquely democratic anxiety. Alexander Bickel, in his famous treatise on our constitutional government, *The Least Dangerous Branch*,[17] dubbed this particular tension the "countermajoritarian difficulty."

In that book, Professor Bickel did manage to find a place for the Supreme Court in American democracy, but he left the "difficulty" essentially unresolved, and it continues to be a generative tension in constitutional theory. Still seeking resolution, other celebrated scholars, especially John Hart Ely,[18] have built on Professor Bickel's work to the point where a canon of theory now defends the Supreme Court's power to protect minority rights. As with Bickel, though, Ely's tortured "political process theory" of

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15 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–19 (1962).

16 THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison); *see also* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1523–24 (1990).

17 Bickel, *supra* note 15, at 16.

18 *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 136 (1980) (presenting a "process" theory of judicial review allowing for the Supreme Court to intervene where democracy is dysfunctional).

judicial review does not resolve the "difficulty" at all. Indeed, both Ely's and Bickel's work might be best thought of as symptoms of the countermajoritarian difficulty, rather than cures. Nevertheless, this article presumes that the Supreme Court should play a significant role in defending—and even advancing—minority political gains,[19] a role that is especially salient where "discrete and insular minorities" are concerned.[20]

We should at this point inject a shot of legal realism into what has been a strictly abstract analysis. The countermajoritarian difficulty tangibly concerns the Justices of the Supreme Court in few cases, as the vast majority of the Court's docket mobilizes the interest of a very narrow constituency. As a result of this generally limited interest, the Court does not directly confront its countermajoritarian role except in very exceptional cases; the proximity of the "difficulty" to the consciousness of the Court is a function of the intensity of the democratic gaze, if you will. The more lay interest in the case at bar, the more cognizant the justices are of their countermajoritarian role.

In those rare instances of intense public scrutiny, the Court is forced to confront its paradoxical institutional role head-on. As the only institution that can adequately safeguard minority rights or political gains, it has an implicit duty to do so because, unlike elected representatives, the Justices will continue to sit in their capacity on the Court even in the face of majority discontent. Even so, this very advantage means that its institutional capacity is extremely limited in a representative democracy because its authority is ever-questionable. The only way that it can fend off criticism and maintain its institutional credibility is to use its rhetorical or expressive power to persuade the masses. To persuade effectively, however, the Court must craft its opinions with a public audience in mind. Such a task necessarily requires a keen understanding of how the Court's arguments will play out in the public sphere.

This method of persuasion is essential because for all that constitutional theorists like Bickel and Ely have accomplished in constructing a philosophical backbone to support the countermajoritarian role of the court, these theories will only persuade the academically inclined. And even among the thoughtful, the pull of a simple majoritarian view of democracy is quite strong. As a result, the countermajoritarian difficulty is not something that

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19 *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting that "discrete and insular minorities" might require more judicial protection).

20 *See* Cass R. Sunstein, *Justice Scalia's Democratic Formalism*, 107 YALE L.J. 529, 538 (1997) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997)).

can be transcended through theory; it will always be a concrete locus of dispute.

Accordingly, the strict-constructionist approach to judicial review preys on the populist weaknesses of academic theories like Ely's.[21] Most destructively for liberals who wish for the court to aggressively police majority excesses, the position of the strict constructionists is much more readily intelligible to a lay audience, in part because the theory's principal author, Antonin Scalia, explicitly shares the majoritarian ethos.[22]

By fixing the Constitution's meaning in a particular historical moment, strict constructionists avoid, as much as possible, the process of adapting constitutional meaning to contemporary life. Indeed, strict constructionism does an end-run around the countermajoritarian difficulty by constructing the myth that answers to constitutional questions are foreordained. Under strict constructionism there is no "difficulty" because the Supreme Court is not exercising any real power. The Court's hands are tied; it is merely doing the will of the law.[23]

The elegance of strict-constructionist jurisprudential philosophy, especially when compared to the complexity of liberal theories, is a significant tactical advantage outside the academy. In its distilled form, this conservative approach ends up looking like common sense: implement the law as written because words mean what they say. There is no similarly succinct way to advocate that the Court should intervene where politics deals too harshly with a disfavored group. Liberal theories, like Ely's, lose nearly all of their persuasive value when reduced to a sound bite, the dominant structure of public political discourse. Strict constructionism, on the other hand, is even more powerful in that truncated form.

Indeed, Bickel's succinct neologism for the problem of judicial review is itself symptomatic of the larger problem that liberal theories of jurisprudence have in insinuating themselves into the public sphere: try having a cocktail party conversation with non-lawyers about the "countermajoritarian difficulty."

In the same way, liberals have a very difficult time conveying to the culture at large the need for substantive, rather than merely formal, remedies for racism. The colorblind principles es-

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21 *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 853–55 (1989) (using the contrast between the complexity of the liberal approach and the simplicity of originalism to dismiss the possibility that liberals like Ronald Dworkin could create a workable constitutional theory).

22 *See* Sunstein, *supra* note 20, at 530, 533.

23 *See* Scalia, *supra* note 21, at 854; Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184 (1989).

poused by conservatives, of course, perfectly reflect the intuitions and the policy preferences of the American majority. The common-man appeal of conservative rhetoric is typified by the conservative refrain that affirmative action constitutes "reverse discrimination." Framing affirmative action in those terms is designed to tap in to the commonplace notion that "two wrongs do not make a right." Never mind that the "wrongs" are rather different in scope.

Such frames are powerful because affirmative action is not just another countermajoritarian program. Affirmative action and other programs that implicate race are doubly vexing. Not only do they produce the general anti-populist anxiety just discussed, i.e., the countermajoritarian dilemma, they also throw the American narrative—unceasing economic and social progress, radical equality of opportunity—into crisis by bringing to the forefront the race-based inequality that is generally repressed to sustain that myth.

The visceral quality of visual stimulus makes race[24] a particularly effective way to reveal the American narrative's mythological character, and, as a result, create a nationwide bout of cognitive dissonance.[25] How can the United States be a country of equals when one can see with her own eyes that people of color are so disproportionately poor, uneducated, and jailed?

The potency of race as the primary signifier of American inequality has been amplified by the proliferation of media that bring depictions of disparity to leafy, isolated suburbs where all is (seemingly) well. There is nothing contemporary about this phenomenon; television also played a crucial role in Martin Luther King, Jr.'s civil rights strategy. Indeed, one way to conceptualize what happened during the civil rights movement is to say that the visualization of black oppression through new technology created fissures in the American narrative that were so large that they had to be closed. In today's media-saturated environment, where newspaper readership remains in free-fall, Americans engage with their world in a way that is increasingly visual, rendering race an even more potent signifier than it was in the

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24 Though race is considered largely a social construct, there are, nevertheless, visual cues that allow race to be a functional basis for racism and racial classification, even if these break down upon close inspection.

25 Psychology's cognitive dissonance theory, which holds that individuals have a need for consistency in their thoughts and beliefs, supports this idea. *See* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (Stanford Univ. Press 1962) (1957); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 336 n.77 (1987) (attributing the "development of attitudes concerning race" at least partially to "the search for coherence").

1960s.[26]

The reader should have little trouble conjuring the latest public visualization of American racial disparity; it occurred when Hurricane Katrina hit New Orleans, Louisiana. When the citizens of New Orleans, the vast majority of them poor and black, were left behind after the storm, the national discourse undertook a discussion of why these people, so visibly distinct from the American majority, were left to fend for themselves. The social construction of America as a land of equals can only exist if each individual blinds herself to the color of the inequality she sees before her; the public consumption of images from an event like Hurricane Katrina makes such willful blindness more difficult to sustain, because it conflicts so blatantly with the predominant myth of American equality.

These are among the more benign reasons that the adjudication of racial issues is overdetermined. The resolution of racial issues is also fraught because negative racial attitudes, conscious and unconscious, persist in American society. These attitudes allow people to construct counter-narratives that account for the inequality exposed in situations like Hurricane Katrina by blaming the victims for mishandling their own lives.[27] Thus, the fact that those left behind in New Orleans were predominantly black comes to signify the inferiority of people of color, not a collective problem for which all Americans must take responsibility. From this racist viewpoint, the existence of affirmative action is intolerable: why are they, those people society marks as "less than," entitled to special dispensation?

Public discussions about race are charged, then, because they are highly disruptive to the public's workaday notions of our society, especially racist ones. The abstract colorblindness that Americans are socially required to cultivate runs up against what citizens see with their own eyes. The Court's role in such cases should be to steer the public discourse in a way that alleviates this dissonance by mending the national narrative of equality. Needless to say, for a court to alleviate such dissonance in a way that serves the interest of racial minorities is a delicate process.

In the specific case of affirmative action in higher education,

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26 *See* KENNETH L. KARST, LAW'S PROMISE LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION 69 (1993) (commenting that "television's pervasive reach" is in large part responsible for society's ingrained images of crime that "prominently featur[e] the faces of young black men").

27 See, for example, Bill O'Reilly's comments regarding Hurricane Katrina: "Many, many, many" hurricane victims who failed to evacuate New Orleans are "drug-addicted. . . . thugs." *The Radio Factor*, (Westwood One radio broadcast Sept. 13, 2005), *available at* http://mediamatters.org/items/200509150001 (last visited Sept. 25, 2006).

the narrative stakes are higher still for the Court because of the unique role that universities now play in the American mythos. Today's university is both the architect and the signifier of the American meritocracy.[28] The public has come to view universities as the gatekeepers to the American dream, and as social levelers that promise a nation free of permanent, old-world, class stratification. A Supreme Court decision that even implicitly questions the objectivity or the desirability of this imagined society of merit would provoke extreme reactions; so embedded is meritocracy in the American sense of self that an attack on it is an attack on the country's sense of being. Coupling a suggestion of merit's subjectivity, as some scholars have, with an effort to justify racial preferences will be still more inflammatory.[29]

All this is to say that the task of justifying affirmative action in higher education is among the most difficult that a Supreme Court can face, not because the program is unworthy or constitutionally unconscionable, but because its adjudication causes a painful bout of national self-reflection. The vulnerable state of the national psyche in these periods of public discourse requires the Court to issue a decision aimed at the public[30] that will mend and restore the national narrative. The diversity rationale is perfectly designed to diffuse this public tension and steer public discourse in a way that leaves America's mythical self-image intact, while giving minorities the tiniest amount of race-based wealth transfer.

Thus, the role of the Supreme Court in these cases is not to explicate the "truth" of affirmative action, as the professoriate would prefer, but to preserve the program through the judicious and politic use of language designed to influence public perceptions. Such delicacy is particularly exigent because affirmative action is constitutionally permissible, but not constitutionally mandated. Because the Court cannot, in this case, legislate the policy as a constitutional requirement, it must use its expressive

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28 *See* James Traub, *Ivory Tower Intrigues: The Pseudo-Meritocracy of the Ivy League*, SLATE, Oct. 24, 2005, http://www.slate.com/id/2128377/ (reviewing JEROME KARABEL, THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON 549 (2005) ("The selection process at elite universities is widely understood as the outward symbol, and in many ways the foundation, of our society's distribution of opportunities and rewards.")). Jerome Karabel's book argues that America's top universities "legitimate[] the established order as one that rewards ability and hard work over the prerogatives of birth." *Id.*

29 It is somewhat surprising that preferences for legacies do not inspire the same degree of animus as preferences based on race. Legacy preferences in particular undermine the cherished American myth of the self-made man. Plainly, class-based animus is less prevalent than racial animus in the United States, or perhaps legacy is a factor in admissions at so few public colleges that the animus against it is not very widespread.

30 It is journalists who translate court decisions into a format that the layperson can parse.

power to shape the public discourse in a way that allows legislative permission to stand. In this way, the Court may comply with its role to protect discrete and insular minorities. If the legal problem is so constructed, the diversity rationale can be seen for what it is: an effort to engage the political sphere in order to protect minority political gains.

II. JUDICIAL OPINIONS AS RHETORICAL PERFORMANCES

> Judicial opinions are rhetorical performances. The critic who essays an assessment of any performance, whether dramatic or judicial, must be aware, among other things, of the particular role assigned to the actor, the likely audience for the performance, and the effects sought by the performer.[31]

As a result of limited minority power, as well as the entrenched interests of the majority, the judicial opinion authorizing affirmative action must be a rhetorical performance *par excellence.* The Court must deploy its rhetoric in a way that shapes the public discourse, and thereby stabilizes (as much as possible) the political conflict surrounding the program in a way that benefits minorities. Yet, even as the diversity rationale furthers this objective, critics have assailed the rationale, calling it destructive, pretextual, or dishonest. In part, these critiques result from the failure of academics to follow Professor Levinson's advice;[32] the professoriate seldom takes full account of the context in which the Supreme Court authors an opinion. Instead, academics nearly always evaluate the Court's pronouncements as if they, academics themselves, were the Justices' primary audience. Indeed, most constitutional scholarship operates under the fiction that the persuasive values of the academy should actually dictate the Court's jurisprudence.[33]

Cass Sunstein's scholarship is a notable exception to this critical solipsism. His book, *Legal Reasoning and Political Conflict*, argues that there is a fundamental distinction between legal reasoning, i.e., what judges must do, and the enlightenment-inspired, exegetical impulse that animates the scholarly mission.

31 Sanford Levinson, *The Rhetoric of the Judicial Opinion*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 187, 187 (Peter Brooks & Paul Gewirtz eds., 1996).

32 In this author's view, Levinson fails to follow his own advice when he critiques the diversity rationale without considering who the audience for Supreme Court affirmative action decisions actually is. *See* LEVINSON, *supra* note 13, at 55–61.

33 *See, e.g.*, AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998) (arguing in part that the Court's Fourth Amendment jurisprudence is incoherent and has become unmoored from the historical understanding of what the Fourth Amendment was designed to do, i.e., to protect citizens from *unreasonable* searches and seizures). While erudite and persuasive, the book does not account for the possibility that what the author sees as logical faults in Fourth Amendment jurisprudence, like Miranda warnings, may have practical salutary effects in the real world.

Professor Sunstein argues that where courts are faced with conflicts that may be resolved on a number of levels, i.e., the philosophical, the moral, the religious or the narrowly legal, they should always choose the lowest possible level of resolution and seek to reach an accord on that basis. This kind of reasoning is, of course, a staple of common-law jurisprudence, but by adding a good dose of political theory to those traditions, Sunstein manages to re-christen this method the use of "incompletely theorized agreements."[34]

A prime example of the damage that courts may do when they fail to use incompletely theorized agreements, and seek instead to resolve disputes in the manner of academics, occurred twenty years ago in *Bowers v. Hardwick*,[35] the consensual sodomy case recently overturned in *Lawrence v. Texas*.[36]

In *Bowers*, two men were arrested for engaging in consensual sex under a Georgia anti-sodomy statute that generally went unenforced. In the majority decision, the Court upheld Georgia's right to prohibit consensual sodomy based on the long history of its proscription in America and throughout the world. The Court put forth this rationale at a time when the gay rights movement was suffering a huge setback. The spread of AIDS in the early 1980s was widely blamed on homosexuals, a belief that only served to further stigmatize the group.[37]

Sunstein's view is that *Bowers* should have been decided in the plaintiff's favor, but on the exceedingly narrow grounds that the state of Georgia should not be allowed to suddenly enforce a long-dormant law.[38] In this way, the Court would have stayed out of the political debate entirely by promulgating a highly formalistic judgment. Instead of taking that minimalist tack, however, the Court not only ruled against the plaintiffs, it engaged in a gratuitously callous analysis that only served to stir the pot of political conflict by emphasizing the long-standing religious and historical prohibition of same-sex sodomy.[39] By engaging in this

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34 *See* CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 35–38 (1996).

35 478 U.S. 186 (1986).

36 539 U.S. 558 (2003) (holding that states may not criminalize consensual sex between adults of the same sex).

37 Cecilia Chung, *Welcome to San Francisco Pride Week!*, ASIANWEEK.COM, June 22, 2001, http://www.asianweek.com/2001_06_22/opinion1_voices_prideweek.html (noting that the gay and lesbian rights movement began in the 1960s, but suffered a huge setback in the 1980s when AIDS was largely blamed on homosexuals).

38 SUNSTEIN, *supra* note 34, at 156 ("Realistically speaking, the ban on consensual homosexual sodomy is a weapon by which police officers and others harass people on invidious grounds. The existence of unenforced and unenforceable sodomy laws, used for purposes of harassment, is objectionable under the due process clause for that reason.").

39 *Bowers*, 478 U.S. at 192–194 (stating that proscriptions against homosexual sodomy "have ancient roots").

high-level historical and religious discussion, the Court did damage to the gay rights movement by authorizing the states' prohibition of the plaintiff's conduct on grounds "higher" than the law. Reifying such historical and religious theories in the form of a judicial opinion stoked religious conservatives, who had already constructed their anti-homosexual animus on a religious foundation. Moreover, by taking such a strong position on an emerging socio-political issue, and then grounding that position in a historical rationale that fell outside of its institutional expertise, the Court also ran the risk that the tide would turn against the decision, and that its understanding of history might have been flawed, as, indeed, *Lawrence* later found.

Beyond illustrating the dangers of over-zealous judging, *Bowers* also highlights the difficulty judges have in predicting future social changes. Presumably, few of the Justices in the *Bowers* majority could have imagined the extent to which gay Americans would become accepted in American society, much less that in some states homosexuals would win the right to marry.

For all its grandstanding, however, *Bowers* did not change the terms of the gay rights debate; it only affirmed the viewpoint on one side of the divide. Such an outcome is typical of judicial incursions into a broader discourse;[40] even on those few occasions where Supreme Court opinions do address a wider audience, the Court seldom manages to define the terms of the public debate. This lack of discursive command should not surprise, though. In light of the common-law understanding of a judge's role, as well as the judiciary's mandated isolation from politics, judges generally have a difficult time figuring out how their judgments will interact in the world outside the nation's courthouses. Sunstein believes that this disadvantage supports his theory of minimalist jurisprudence by proving that the task of evaluating the reception of an audience outside the judiciary is beyond the judicial ken.[41] In his view, the political discourse should be left, as much as possible, to politics.[42]

In its most extreme form, then, Sunstein's minimalist theory of jurisprudence allows no room for the Court to make any jurisgenerative pronouncements, or to take on the role the Court properly played in *Grutter*. Indeed, Sunstein believes that the Court in both *Bowers* and *Lawrence* exceeded its institutional ca-

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40 Even Justice Scalia acknowledges the public eye watching over the Court in certain cases. *See* Scalia, *supra* note 23, at 1178 (emphasizing the importance of drawing distinctions in cases that seem similar but end in different results in order to satisfy a "sense of justice" in the community).

41 SUNSTEIN, *supra* note 34, at 177.

42 *Id.* at 7.

pacity.[43] In his view, the Court should have invalidated the Texas anti-sodomy statute in *Lawrence* without overruling *Bowers*.[44] In this way, the Supreme Court would only reflect substantial changes in social norms, without seeking to further modify those norms, or further catalyze the movement that led to the initial shift.

Sunstein's view of *Lawrence*, however, is overly cautious and damaging to those groups that encounter significant societal discrimination or a denial of full individual rights. There is a middle-ground between the social-obliviousness exemplified by *Roe v. Wade*[45] (where the Court's impatience led to a thirty year conservative backlash) and the extraordinarily timid casuistry that Sunstein advocates.

In this author's view, *Lawrence* occupies that terrain. By following the fundamental shift in social attitudes, *Lawrence* manages to avoid a devastating political backlash.[46] Yet, the decision still pushes social mores forward by using official language to grant dignity to homosexual acts.[47] The *Lawrence* majority could only have accomplished this task by disavowing the callous rhetoric in *Bowers*, and replacing it with a narrative affirming homosexuals' shared humanity. Further, by formulating deliberately opaque rhetoric that may be used by other courts to expand the rights granted in *Lawrence*, the Court gave state courts a powerful tool to further amplify the scope of gay rights. True, this move has led to controversy. In the wake of the Massachusetts Supreme Court's decision granting gay marriage, in part based on *Lawrence*, many states passed constitutional amendments banning the practice.[48] While passage of those amendments is unfortunate, at least states are having meaningful political discourse about the subject of gay rights. Progress cannot occur without controversy.

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43 *See* Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27 (2003) (arguing that *Bowers* and *Lawrence* should have been decided on grounds of desuetude or equal protection, rather than substantive due process).

44 *Id.* at 32.

45 410 U.S. 113 (1973).

46 *Lawrence* has created a backlash, but it is nothing compared to what happened in *Roe*. The very fact that those who object to gay marriage have succeeded in passing amendments limiting the definition of marriage illustrates the difference; *Roe* foreclosed political debate and change, whereas *Lawrence* catalyzed it.

47 *Lawrence*, 539 U.S. at 578.

48 Thomas Roberts & Sean Gibbons, *Same-Sex Marriage Bans Winning on State Ballots*, CNN.COM, Nov. 3, 2004, http://www.cnn.com/2004/ALLPOLITICS/11/02/ballot.samesex.marriage/. However, the states that passed the amendments were so conservative that it is unlikely their state courts would have required gay marriage in the first place. These amendments merely formalize what was *de facto* true prior to their passage. *Id.*

Indeed, something real must appear to be at stake for Americans to engage in serious, difficult political conversation. If the Court were to apply Sunstein's judicial minimalism, those conversations would remain repressed because a minority group, like homosexuals or African-Americans, cannot easily force the hand of a majoritarian legislature. It is appropriate that the specter of *Roe* haunts Sunstein's minimalist theory, but *Lawrence* is not another *Roe. Roe* was damaging because it was so totalizing that it left no room for public discourse. *Lawrence* on the other hand leaves significant room for debate, while giving the polity the incentive to have the debate in the first place. *Lawrence* represents, in my view, a cautious, or, if you will, conservative progressivism that moves social mores forward without annihilating the ties that bind Americans together.

Lawrence also does not signify the limits of the Court's productive discursive political power, because, like *Bowers, Lawrence* did not change the terms of the public debate. *Lawrence* may have shaped and catalyzed gay rights discourse, but the polity still talks about gay rights using the same essential language. *Lawrence* became an occasion to discuss homosexuality generally—for politicians and advocacy groups on the right to decry the so-called "gay agenda," and for those on the left to show their solidarity with the gay-rights cause.[49] The case did not fundamentally alter this dynamic.

On occasion, though, the Court can reframe an issue in a way that actually reformulates American political discourse. Justice Powell's concurring (*de facto* controlling) opinion in *Regents of the University of California v. Bakke*[50] did just that. Powell's articulation of the diversity rationale for affirmative action altered forever the way that this nation discusses issues of race, and indeed, of difference generally. The diversity frame is

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49 *See* Associated Press, *Quotes on Gay Sex Ban Ruling*, June 26, 2003, *available at* http://www.sodomylaws.org/lawrence/lawrence.htm. Including quotations such as the following:

"If the people have no right to regulate sexuality then ultimately the institution of marriage is in peril, and with it, the welfare of the coming generations of children." Tom Minnery, vice president of public policy at Focus on the Family.

"Today's Supreme Court decision overturning a Texas law against homosexual sodomy is a defeat for public morality and America's families. This ill-conceived decision will have serious repercussions upon public health and welfare in Texas and other states that still criminalize sodomy." Rev. Louis P. Sheldon, chairman of Traditional Values Coalition.

"This ruling opens the door for new advances toward full equality and should be viewed as a challenge to legislators to help pass important legal protections for GLBT (gay, lesbian, bisexual and transgender) Americans—like employment nondiscrimination laws and comprehensive hate crimes legislation." Elizabeth Birch, executive director of the Human Rights Campaign.

50 *See* 438 U.S. 265 (1978).

so pervasive that it is nearly impossible to have a debate about affirmative action without discussing diversity, even if only to discredit it. This is particularly true because nearly every major American institution—businesses, schools, non-profits, law firms, the military—frames issues of race, gender, class, affirmative action, *ad infinitum*, as issues of diversity.[51]

What is so brilliant about diversity, and what makes the frame so effective, is that it is highly politic. Diversity talks about difference in a way that affirms commonality and community. Diversity also fits in neatly with the American myth of the cultural melting-pot. Most importantly, though, for a glass-half-full nation, diversity is *positive*, hopeful, and validating; it manages to convey a sense that we are all different and all the same. The term "difference," on the other hand, a plausible linguistic substitute for diversity, has only negative cultural connotations. Difference lacks any communal connotation; it just emphasizes a kind of solitary individualism that is antithetical to the American creed: *e pluribus unum*.

For all this country's homogeneity, xenophobia, racism, and self-segregation, people are taught that our diversity is a positive, even a constitutive American asset. Indeed, these beliefs, in part, facilitate the American process of immigration and integration. You can be an American *and* hold on to essential elements of your past identity, even as that past gradually recedes. By contrast, in Europe, immigrants can never be considered truly European.

As a result, it would be "un-American" to be against diversity: to do so would be inconsistent with a central part of the American sense of self, contrary to the American narrative, if you will. We frequently see similar rhetorical techniques in political debate. Advocates of a certain political position frame that position in a way that no one can say that they are against it without seemingly betraying widely-held social mores. The classic case occurs in the abortion rights context. What American can say they are against "choice" or oppose "life"?

Thus, Justice Powell's diversity rationale is a prominent example of a court not just shaping or catalyzing the public discourse to serve the interests of minorities, but substantially altering it. Diversity succeeds because it is perfectly adapted to thrive in our culture; it renders a difficult and painful national discussion about race largely irrelevant. With diversity, affirmative action became something that enhanced an education and

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51 *See, e.g.*, *supra* note 7; *infra* note 88 and accompanying text; *infra* note 137 and accompanying text.

the workplace, not a discussion about the terrible and endless debt that white people owed to minorities, especially African-Americans.

As Kenneth Karst argues in *Law's Promise, Law's Expression*, "[t]he clear subtext of Justice Powell's *Bakke* opinion was that he was out to save affirmative action. He plainly thought that 'diversity' admissions would blur the lines of racial division" by dismantling the opposition between merit and racial preference.[52] Diversity, then, is a way to define race as a meritorious characteristic that adds something to the educational and social experience. In this way, the diversity rationale seeks to persuade the white audience that is being asked to bear the "burden" of affirmative action that it is, in fact, benefiting from the program.

In a sense, then, unlike in *Lawrence*, the Court's aggressive reformulation of racial discourse is in fact consistent with the normative foundation of Sunstein's minimalist jurisprudence. Sunstein advocates a minimalist approach because, normatively, he believes the Court should not "crowd out" political discussions or foment any political controversy or change; the Court's role is to soothe passions. This kind of politically restorative effect is something that *Grutter*'s permutation of Powell's diversity rationale achieves, but without minimalism. Indeed, the results could not be achieved through such an approach. Judicial minimalism fails when politics are dysfunctional because, in such cases, political deliberation cannot proceed on a productive course.

This dysfunction is obvious in the case of racial discourse: Speaking openly about any form of compensation for current or past race discrimination is not possible in American democracy. Racial minorities are too powerless to force the discussion, lacking numbers and financial clout, and the American up-by-your-bootstraps ethos is antithetical to condoning an overt handout on the basis of race. Given that the Court is the only institution that can adequately defend minority rights, because of its countermajoritarian role, the Court should involve itself in the political sphere in the way that O'Connor did in *Grutter*. This involvement is particularly crucial given that, unlike in the gay rights area, minorities have secured full, formal civil rights. Those are the rights that most Americans think of as constituting equality. The substantive benefit that affirmative action confers is not obviously consistent with that conception of equality; it looks like favoritism, not corrective action.

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52 *See* KARST, *supra* note 26, at 105.

A. Why Affirmative Action is Still Important to Racial Minorities

To view the diversity rationale as an uncommon rhetorical move that is essential to the effort to safeguard minority political gains, one must of course subscribe to the idea that affirmative action is a worthwhile policy. Given its well-elaborated pitfalls, however, it is hard for academics to see it that way. Indeed, affirmative action could only be deemed a policy worth keeping if one takes on the perspective of the marginalized. Only from that point of view would a program aimed mainly at the most well-off within the group be deemed worth maintaining.

It is an understatement to say that only elite minorities benefit from affirmative action. Only 52% of Latinos and 56% of black students graduate from high school each year.[53] Of these, a mere 23% of black students and 20% of Latino students graduate with enough preparation to apply to a four-year college. Needless to say, white students graduate from high school and attend college in much higher numbers.[54]

In the face of this stark inequality, the enormous discursive energy spent on affirmative action as it applies to higher education appears farcical: so much fuss over such a minor attempt at historical remediation. Prominent scholars like Richard Delgado[55] openly question whether all this talk siphons energy away from advocacy for more substantive and broad-based remedial measures. From an economic perspective, distributing minority gains to the relatively privileged within the group is regressive. A more efficient redistributive scheme would utilize limited minority political capital in order to help those worst off in the group hierarchy, leaving the minority elite to fend for itself in the academic marketplace.

Despite affirmative action's facially regressive effects, however, a large percentage of minorities favor the program.[56] On its face, such support might appear to be a simple case of false consciousness. Lower-class blacks and Latinos use the ascendancy of elites that look like them as a proxy for evaluating their own mobility or success, sustaining a myth of minority advancement, even as conditions have, in fact, changed little for blacks and La-

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53 *See* Jay P. Greene & Marcus A. Winters, *Public High School Graduation and College-Readiness Rates: 1991–2002*, at 3 (Manhattan Inst. for Policy Research, Working Paper No. 8, 2005), *available at* http://www.manhattan-institute.org/html/ewp_08.htm.

54 *Id.*

55 *See* Delgado, *supra* note 4, at 1222.

56 *See* ORLANDO PATTERSON, THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA'S "RACIAL" CRISIS 147–69 (1997) (examining poll data on affirmative action programs).

tinos since the civil rights movement.[57]

But is this really false consciousness? Is there a better reason for most minorities to support affirmative action? If one takes a larger view of what the fall of affirmative action would signal about the state of minority political power, it is more plausible to argue that minorities are in a better position to advocate for further political gains with affirmative action still intact. For marginalized minorities who derive political power only by advocating as a unified whole,[58] it would be foolish to seek the abolition of a politically-conferred advantage, even if it is sub-optimal. Experience with discrimination, poverty and inequality has dissuaded people of color from being optimistic about the possibility of garnering more resources in affirmative action's absence. From this perspective, going backward—that is, ridding themselves of affirmative action—to move forward is unappealing and reckless. Giving up affirmative action in order to expose the gross inequality of our system would require the sacrifice of whatever limited advantage affirmative action conferred, hurting real students and citizens in the workforce in the service of the improbable possibility that an absence of minorities in higher education would inspire more substantive political and social change.

One must also account for the reaction to affirmative action's fall by the white majority. Given the prevailing reality of white domination, the loss of affirmative action would only serve as further evidence of the majority's power. The absence of minorities in America's universities would be read as proof of inferiority rather than a symptom of a fundamentally damaged system. True, minorities might be emboldened by such a defeat to fight harder in the political arena, but they might also be merely defeated.[59]

In short, affirmative action is important for minority interests because it is the only tangible advantage that racial minorities have wrested from the political system. That African-Americans, Latinos, and other underrepresented minorities have not been able to gain more from politics is an argument for maintaining affirmative action, not ending it. We should ultimately interpret the meagerness of affirmative action as a symptom of

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57 *See* DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 7–8 (2d ed. 1980).

58 *See* CATHY J. COHEN, BOUNDARIES OF BLACKNESS: AIDS AND THE BREAKDOWN OF BLACK POLITICS 10 (1999) (stating that African Americans have traditionally secured political gains by linking their fates to one another).

59 *See id.* at 9 (noting that African Americans' linked fate enables group mobilization for important issues, but also that "the majority of African Americans still lack the political, economic, and social resources necessary to participate actively in" the political process.)

how little power blacks, Latinos and other racial minorities actually have. Given that limited power, the Court is the only institution that can effectively steer the political discourse in a way that allows minorities to retain their foothold in the meritocracy.

III. THE SCHOLARLY CRITIQUE OF DIVERSITY

As the reader has no doubt gathered, the diversity rationale for affirmative action has never found favor among law professors. It would not be hyperbolic to claim that diversity is so unpopular in the academy that the infirmity of the reasoning in Justice Powell's *Bakke*[60] opinion is one of the few subjects upon which the vast majority of constitutional scholars can agree.[61] Indeed, UCLA's Kenneth Karst appears to be the only prominent constitutional scholar who actively supports it.[62] Of course, despite this consensus, scholars arrive at their disapproval from different directions.[63]

The critique of the diversity rationale comes in four basic flavors. The least troubling comes from the far right. These scholars, perhaps most prominently Lino Graglia, believe that formal equality is all that the Constitution and the Civil Rights Act require and permit.[64] From this normative perspective, affirmative action is impermissible racial discrimination and the diversity rationale is a devious lie that furthers an unconstitutional program.[65]

The second group, which includes the vast majority of scholars, consists of liberals who believe in the substantive goal of affirmative action, that is, in helping to achieve a more egalitarian society, but believe that the diversity rationale is an illegitimate or dishonest constitutional basis for the program.[66] Critics from the mainstream left object to diversity because they find the rationale intellectually or morally unfulfilling.[67]

The third group is headed by Stephen L. Carter, who in his book, *Confessions of an Affirmative Action Baby*,[68] expressed his

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60 Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978).

61 *See, e.g.*, LEVINSON, *supra* note 13, at 14, 16; Graglia, *supra* note 1, at 58–59; Peter H. Schuck, *Affirmative Action: Past, Present and Future*, 20 YALE L. & POL'Y REV. 1, 34–35 (2002).

62 Kenneth L. Karst, *Justice O'Connor and the Substance of Equal Citizenship*, 2003 SUP. CT. REV. 357, 373–75 (2003).

63 *See, e.g.*, Rubenfeld, *supra* note 13, at 445–46; LEVINSON, *supra* note 13, at 55; Graglia, *supra* note 1, at 58–59; Schuck, *supra* note 61, at 27.

64 Graglia, *supra* note 1, at 57.

65 *Id.*

66 LEVINSON, *supra* note 13, at 55–56.

67 *Id.*

68 STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991).

concern that affirmative action, and the diversity rationale in particular, stigmatized all minorities by casting doubt on their abilities and implying that there is one monolithic minority perspective.[69] Justice Thomas is also a prominent, though more extreme, exponent of this view.[70]

The fourth and last group offers the most compelling critique of affirmative action, making two related points. The first, most prominently made by Richard Delgado, argues that the conceptual framework of affirmative action casts underrepresented minorities in the role of beneficiary and scripts whites as patrons.[71] A full implementation of the radical critique of merit[72] (the idea that the dominant group has constructed the criteria that constitute merit with the express function of maintaining its dominant position),[73] the argument goes, would lead to affirmative action's outcomes without reinforcing prevailing views of white superiority. The second point, mostly insinuated by critical race scholars, is that underrepresented minorities should be wary of any program, like affirmative action, that works to uphold the fundamental structure of power by making minimal redistributive concessions.[74] This last critique has plainly Marxist, though not necessarily revolutionary, implications. Affirmative action, in this view, is a palliative (or opiate, if you will) that assuages minority aspirations just enough to prevent oppressed groups from pressing for more radical change.[75]

Despite the normative differences between these perspectives, however, they have in common the formal belief that the law should speak some form of "truth." That is, these scholars share the belief that the Court should provide a rationale for or against affirmative action that follows logically from underlying principles, or formal readings of relevant texts. The possibility that such a "logical" argument may not persuade an audience

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69 *Id.* at 2.

70 *See* Grutter v. Bollinger, 539 U.S. 306, 353 (2003) (Thomas, J., dissenting).

71 Delgado, *supra* note 4, at 1224–25.

72 *See* Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705 (1990). For example, he states that we can only rank articles "within a particular genre" and that "[t]he vast majority of recognizable genres . . . have a specifically white, ideologically moderate or conservative history. . . . built into their rules." *Id.* at 754. *See also* Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 951 (1991).

73 Richard Delgado, *White Interests and Civil Rights Realism: Rodrigo's Bittersweet Epiphany*, 101 MICH. L. REV. 1201, 1207–08 (2003). This is a Foucaultian phenomenon where the diffusion of power works to uphold the essential dynamic of domination. The radical critique of merit does not suggest that there is a conspiracy to create discriminatory criteria of "merit"; the phenomenon is more insiduous than that because it occurs *without* any conscious coordination.

74 *See* Delgado, *supra* note 4, at 1224.

75 *See id.*

outside of the academy, or worse, that it may interfere with political discourse in a way that damages the interest of those whom the program is designed to protect, is not within view of diversity's critics. As discussed in section I, *supra*, the politically independent academic bias towards the exegetical is difficult to overcome. Academics of either political persuasion rarely consider the possibility that the promulgation of what Sunstein calls "incompletely theorized agreements"[76] is an essential part of law's functionality.

This failure to consider the full context of the Supreme Court's institutional role is particularly damaging where affirmative action is concerned because minority legal gains are so tenuous that a mistake in form, a failure to craft a legal rationale that effectively persuades the proper audience, will mean a failure in substance; the majority will rally against the program and seek to repeal it.[77]

A. The Right: Blinded by Colorblindness

Most of the scholars on the right who oppose affirmative action possess a strong and uncritical belief in the ideal of a colorblind society[78] and do not seriously engage the idea that racism may be endemic to our "meritocracy,"[79] or consider racism a real and pervasive phenomenon. Further complicating the perspective of the right is their general belief in an originalist or strict-constructionist approach to constitutional interpretation. It is inherently difficult for such a theory to make room for the rights of racial minorities, because the perpetuation of slavery precipitated a pivotal compromise at the Constitutional Convention. For all their foresight and wisdom, the Founders were also men of their time who, in order to form a "more perfect" union, agreed to overrepresent and subsidize southern states by counting a slave as 3/5ths of a person. Instructively, though Justice Scalia,

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76 *See* SUNSTEIN, *supra* note 34, at ch. 2.

77 Unsurprisingly, despite the political sensitivity of *Grutter*, such mobilization is occurring. In Michigan, Jennifer Gratz, the former *Gratz* plaintiff, has spent the last three years working full-time to rally Michigan voters to pass a ballot initiative prohibiting Affirmative Action in Michigan universities. Opponents of the measure emphasized that the only reason that they had a chance of preventing its passage is because they had spent millions to reframe the issue, emphasizing the negative effects an affirmative action ban would have on women and on Michigan's economic competitiveness. This political effort to reframe the issue illustrates how important such frames are to safeguarding minority rights. Without this reframing, passage of the initiative in a state that has a white majority would be a *fait accompli*. *See* Tamar Lewin, *Campaign to End Race Preferences Splits Michigan*, N.Y. TIMES, Oct. 31, 2006, at A1.

78 *See* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind," in* CRITICAL RACE THEORY: THE CUTTING EDGE 35 (Richard Delgado & Jean Stefancic eds., 2d ed. 2000).

79 Kennedy, *supra* note 72, at 709–10; Delgado, *supra* note 72, at 945–46.

originalism's most powerful proponent, believes that *Brown v. Board of Education*[80] was rightly decided, he has admitted that the decision cannot be squared with his own approach to constitutional interpretation.[81] In itself, this failure strongly suggests that it will be difficult for decisions regarding race to follow standard jurisprudential rules. Yet, as a result of their formal and normative commitments, most conservatives do not take arguments that locate an active role for the Court in defense of minority rights very seriously.[82]

Put more pointedly, conservative scholars are generally untroubled by America's persistent racial inequality. This lack of concern prevents theses scholars from engaging their jurisprudential philosophy with the social reality of racial disparity. As a result, many of these scholars feel free to conduct a crusade against affirmative action with moral conviction. Implicitly, this conviction is driven by empathy for those whites who were passed over in the admissions process in order to admit an underrepresented minority applicant. These whites are cast as the "innocents" in the right's affirmative action passion-play.[83] The devilish villain is the liberal academic establishment that, some conservatives argue, continues to support affirmative action only to save itself from the embarrassment its members would feel in preaching liberal values to a lily-white congregation. From this perspective, mere shame, and not a normative commitment to social justice, is the primary motivating force behind affirmative action.

The diversity rationale gets under the skin of these scholars because (to their credit) they understand how effectively the rationale changes the terms of the affirmative action debate.[84] Conservatives would prefer not to discuss diversity at all. Their arguments against affirmative action would persuade the white majority much more readily if they could bypass diversity and simply dub affirmative action race-based discrimination, where

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80 349 U.S. 294 (1955).

81 Margaret Talbot, *Supreme Confidence: The Jurisprudence of Justice Antonin Scalia*, THE NEW YORKER, Mar. 28, 2005, at 40 (stating that Scalia has admitted that his originalist interpretation of the Constitution cannot be squared with *Brown v. Board of Education*).

82 *See, e.g.*, ELY, *supra* note 18, at 135 (commenting on the view of some conservatives that "the Court's role in protecting minorities should consist only in removing barriers to their participation in the political process.").

83 *See* Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 298–99 (1990) (arguing that the diversity rationale paints whites as innocents and therefore damages America's racial discourse).

84 *See* Graglia, *supra* note 1, at 57 (discussing the idea that the "diversity" rationale for affirmative action has become merely a tool for higher learning institutions to prevent embarrassment by admitting minorities).

whites suffer in place of people of color. If, alternatively, the program were grounded in a history of discrimination, conservative scholars could assert the innocence of current generations, making the case that whites of today should not pay for the sins of their fathers. Many of these scholars are plainly chagrined to have to devote their energies to dismantling the diversity rationale, which they consider to be a bald-faced lie.[85]

All of these normative beliefs are well shrouded by this group's formal commitments; they position themselves as advocates for neutral principles in a world they perceive to be equal. Moreover, these scholars tend to downplay the fact that the Supreme Court does not mandate affirmative action; in public school settings, at least, the program can be abolished by the legislature or in ballot initiatives.[86] Indeed, some liberal scholars argue that the Court's scrutiny of affirmative action is inappropriate because the program is already subject to democratic safeguards. Conservatives may shy away from this discussion because the diversity rationale makes legislative advocacy much more difficult for conservatives. Lobbying is tougher when liberal opponents can say that legislators who abolish affirmative action are against diversity.

Plainly, the normative perspective of this article is far removed from the viewpoint of conservative scholars on racial issues, and this article does not pretend to proselytize to this flock. It will, however, illustrate to conservatives how affirmative action works to facilitate many of their other strongly-held convictions. Most prominently, affirmative action solidifies the fundamental order of American society, an order which continues to favor the white elite in nearly every way, and of which nearly all of these critics are a part. That stable social order would be most disrupted by affirmative action's absence. Contrary to the view of some conservatives, affirmative action is less about saving professors from the embarrassment of fewer black students than it is about giving some substance to the myth of equal opportunities for American social advancement. As Justice O'Connor rather candidly put it in *Grutter*, universities and law schools

> represent the training ground for a large number of our Nation's leaders. . .
>
> In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership *be visibly*

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85 *See id.* at 80–82. *See also* Fitzpatrick, *supra* note 1, at 397.

86 *See* Graglia, *supra* note 1, at 59–64. Though Graglia concedes that affirmative action is constitutionally permissible, he still insists that a plain reading of the Civil Rights Act should lead the Court to conclude that any discrimination based on race is impermissible by statute.

> open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. . . . Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.[87]

Affirmative action, quite apart from being a threat to the prevailing social order, plays a prominent role in maintaining that order's essential structure. The glut of amicus briefs the Court received from the American establishment[88] defending the law school's position is strong evidence of the veracity of these assertions.

If anything, the transparency with which *Grutter* put forth its view that affirmative action is socially stabilizing should spur the mainstream left to join critical race scholars in questioning whether a program that is so well favored by the establishment is something for which progressives should be comfortable advocating. Indeed, it is a testament to the centrism of the American scholarly discourse that conservatives can even make these arguments against racial preferences in the face of evidence that such preferences serve establishment interests so very well.

Conservatives should also consider how damaging and costly it is to maintain a society with a permanent underclass. It is easy to forget that racial tensions have produced substantial violence and destruction of property in this country before.[89] In fact, affirmative action in the university setting was initiated in order to dampen increasing black militancy. Harvard, Yale and Princeton only began admitting students of color in significant numbers at the historical moment when the black power movement gained traction in the political sphere.[90] Blindness to the social implications of a formal legal policy, then, can be highly disruptive to other normative preferences of conservative scholars, like law and order.

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87 Grutter v. Bollinger, 539 U.S. 306, 332–33 (2003) (emphasis added).

88 *See* Brief for 65 Leading American Businesses as Amici Curiae Supporting Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003) (Nos. 02-241 and 02-516), 2003 WL 399056; Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (Nos. 02-241 and 02-516) 2003 WL 1787554.

89 *See, e.g.*, Kevin R. Johnson, Hernandez v. Texas*: Legacies of Justice and Injustice*, 25 CHICANO-LATINO L. REV. 153, 165 (2005) (discussing the "Zoot Suit" Race Riots); *Police Make Arrests at Neo-Nazi Rally*, MSNBC.COM, Feb. 25, 2006, http://msnbc.msn.com/id/11562166/.

90 *See* JEROME KARABEL, THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON 407 (2005).

For an example of a multicultural world *sans* affirmative action, conservatives should look to France. The Gauls have taken a radically formalistic approach to racial equality. Apart from forbidding affirmative action, the French do not even collect government statistics organized by race or ethnicity;[91] they take the metaphor of blind justice quite literally. Yet the recent riots in Paris's cités, Corbusian housing projects outside the city center filled with Arab and African immigrants who were granted citizenship but who lacked any real possibility of belonging to French society, are forcing French leaders to consider that formal equality may be worthless, and even counter-productive, unless it facilitates the material advancement of racial minorities and allows them to fully integrate into French society.[92]

As a result of the riots, the French are considering implementing an aggressive affirmative action program.[93] Acknowledging the power of the visual, just four months after the November 2005 riots, the French passed the Equal Opportunities act, which requires the Conseil Supérieur de l'Audiovisuel (CSA), France's broadcasting regulatory authority, to ensure the promotion of minorities to on-screen television roles.[94]

Moreover, scholars on the right and left who value social stability should not seek to devalue or trivialize the power of aesthetics. Humans are highly visual creatures,[95] and as a result, aesthetics can have a substantive effect in stabilizing the power structure. In a state with democratic ideals, whose citizens receive their news mainly through television, people want to see those who look like them in positions of power. When people like Justice Thomas dismiss affirmative action as aesthetic window dressing, they miss the point (or understand it too well).[96] Of course, the aesthetic power of affirmative action is only positive when you believe that the current social order is, fundamentally, worth preserving. Whether it is in the interests of minorities to

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91 David Orland, *Connerly's Racial Privacy Initiative: The Unhappy French Connection*, VDARE.COM, May 28, 2003, http://www.vdare.com/misc/orland_racial_privacy.htm; Thomas J. Sugrue, *Burn, Bébé, Burn*, DISSENT MAGAZINE, Winter 2006, http://www.dissentmagazine.org/article/?article=150.

92 John von Heyking, *The Riots of Ramadan*, JOHN M. ASHBROOK CENTER FOR PUBLIC AFFAIRS, November 2005, http://www.ashbrook.org/publicat/guest/05/vonheyking/ramadan.html.

93 *See* Associated Press, *French Presidential Hopeful Visits U.S.*, Sept. 9, 2006, *available at* http://www.townhall.com/News/NewsArticle.aspx?ContentGuid=e93fc0a0-ded4-417e-a16e-5ef9736e002c.

94 *See* Jeremy Harding, *Color Bind*, COLUM. JOURNALISM REV., July–Aug. 2006, at 40, *available at* http://www.cjr.org/issues/2006/4/harding.asp.

95 Approximately half of the human brain is dedicated to processing visual stimuli. Human Health Research, Vision, http://www.salk.edu/faculty/research/vision.php (last visited Sept. 29, 2006).

96 *See* Grutter v. Bollinger, 539 U.S. 306, 354 n.3 (2003) (Thomas, J., dissenting).

continue to participate within these structures of power is a pressing question that is beyond the scope of this article.

B. The Liberal Mainstream

The liberal mainstream reluctantly embraces affirmative action as a policy but believes that a more "honest" constitutional rationale would better validate minority interests by emphasizing how the legacy of slavery and a history of colonialism and xenophobia have damaged underrepresented minorities in a way that requires compensation.[97] Professor Kim Forde-Mazrui is typical of these scholars when he writes:

> The pursuit of diversity is not only less effective at remedying past discrimination than pursuing the latter goal directly, it may ultimately doom the remedying of past discrimination by creating the illusion that past discrimination has been remedied when it has not.[98]

Forde-Mazrui is particularly concerned with the increase in recent African and Jamaican immigrants enrolling at elite schools like Harvard. This troubles Forde-Mazrui because he wants affirmative action to be "just," and in his view justice means that scarce compensatory resources should be distributed to those who have actually suffered historical injustice perpetrated by citizens of the United States.[99] From this vantage point, recent African immigrants, who are not descended from American slaves, are taking away resources that more properly belong to others.[100] Or, alternatively, if such immigrants meet ordinary admissions criteria, that institutions are counting these applicants towards their racial goals and not increasing the proportion of black descendants of American slaves.

Diversity diminishes the possibility of historical remediation in this view because diversity, at least in elite circles, is simply code for historical remediation, yet applicants seeking the preference are not required to present any proof that they are actually descended from slaves.[101] Thus, when Harvard reports in brochures and to its trustees that *X* percent of its students are black, elites assume that the admissions office is implementing proper remediation measures, when in fact those resources have gone to many people that have suffered no past "harm."[102]

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97 *See* Forde-Mazrui, *supra* note 3, at 685 (arguing that affirmative action is justifiable as a means of making amends for past harm); *see also* Rubenfeld, *supra* note 13, at 471.

98 Forde-Mazrui, *supra* note 3, at 750.

99 *Id.* at 709–10.

100 *Id.* at 744, 749.

101 *See* LEVINSON, *supra* note 13, at 46.

102 This view is a bit limited in that it ignores the fact of present discrimination, when it is clear that such discrimination would apply to recent immigrants as well. Moreover,

Jed Rubenfeld criticizes diversity from a different angle. In Rubenfeld's view, diversity's "duplicity" attracts unnecessary attention to the policy:

> Pleading diversity of backgrounds merely invites heightened scrutiny into the true objectives behind affirmative action. This heightened scrutiny would quite properly reveal the existence of a race- or group-related purpose, rather than a genuine interest in achieving a representative diversity of perspectives.[103]

Professor Rubenfeld believes that sincere concern for diversity of perspectives would require institutions to give preference to neo-Nazi and Christian fundamentalist applicants.[104]

Despite their differences, then, Rubenfeld and Forde-Mazrui agree that diversity harms affirmative action because it has a distorted relationship to the legitimate philosophical underpinnings of what should be a remedial program. They argue that this distortion harms the reputation of affirmative action, works against the possibility of social justice, and invites unwarranted controversy and contentiousness.

Apart from these rhetorical concerns, most liberal scholars also believe that other policies would better compensate underrepresented minorities while avoiding the discriminatory pitfalls of affirmative action. For instance, Professor Rubenfeld argues forcefully that affirmative action is a constitutionally permissible program while confessing that

> [i]f I had to choose, I would probably vote to scrap the entire patchwork of affirmative action measures in this country in favor of a massive capital infusion into inner-city day care and educational facilities.[105]

Though Rubenfeld is careful to separate his opinions about the formal propriety of affirmative action from the normative wisdom of implementing the program, his policy suggestion and his distaste for the diversity rationale have their roots in the same political misapprehension.

From an objective viewpoint, Professor Rubenfeld, Professor Forde-Mazrui and other liberal academics are correct that af-

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nearly all Africans, whether enslaved or not, were negatively affected by western colonization and the slave trade.

103 Rubenfeld, *supra* note 13, at 471–72.

104 *Id.* at 471. Is it really the case that universities cannot legitimately value the perspective that minorities carry with them—first hand experience of the effects of a racialized society—over the often reactionary and freely chosen beliefs of Christian Conservatives and Neo-Nazis? In any event, in the case of Christian conservatives applying to elite, largely secular universities, strongly-held beliefs are usually plus factors on admissions committees.

105 *Id.*

firmative action and the diversity rationale are sub-optimal political outcomes. The program itself does little to ameliorate the centuries of discrimination that were so damaging to blacks,[106] it raises questions about the performance of racial stereotypes and the possibility of stigma, and it may calcify racial identity in a socially undesirable way. Moreover, it is vulnerable to the underinclusiveness argument: Why is racial diversity privileged over other forms? Worst of all, the program appears to fully satisfy no particular constituency because it is compromised on all sides.

But Forde-Mazrui and Rubenfeld's policy alternatives, each of which would require an expensive and sustained national focus on the plight of blacks and other underrepresented minorities, imply that they have critiqued affirmative action and diversity without having seriously considered what kind of race-based remediation programs are politically possible in twenty-first century America. This lack of consideration is surprising, as the impossibility of implementing a program that fulfills either of these professor's utopian suggestions should be quite plain.

The past twenty-five years of American political history have been defined by a growing political consensus, spurred by the Republican party, that the central idea of the Great Society—that government can play an active and positive role in helping its citizens—is bankrupt. In accord with this shift, affirmative action itself, a program that costs very little, has been under siege during the same period. It is highly unlikely that in this political climate a white majority would implement a radical program designed primarily to aid negatively-racialized minorities.[107]

For a more concrete example of the difficulties more "substantive" remediation would encounter, consider the suggestion that school funding be equalized between racial groups, or at

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106 Professor Rubenfeld argues that helping African-Americans should be the chief goal of affirmative action. *Id.* at 471–72. This perspective is limited and he fails to appreciate the extent to which other minorities, particularly Latinos, also have a long history of second class status. *See* Richard Delgado, *Locating Latinos in the Field of Civil Rights: Assessing the NeoLiberal Case for Radical Exclusion*, 83 TEX. L. REV. 489, 491–93 (2004) (reviewing GEORGE YANCEY, WHO IS WHITE?: LATINOS, ASIANS, AND THE NEW BLACK/NONBLACK DIVIDE (2003)).

107 It is true that some political attention has been paid to the plight of inner-city schools by the "compassionate conservative" Bush administration, but even that example proves my point. No Child Left Behind is a mandate for superior performance without any money to fund the remediation that the law requires. Scores have gone up in some jurisdictions, but per-pupil funding has not come close to being equalized. And in some ways equal isn't even enough. As Forde-Mazrui contends in his article, there are all kinds of socializations and day to day interactions that black children lack and white children have; to really reach the goal of equality of opportunity would require a "massive infusion of resources into poor black communities" for several generations. *See* Forde-Mazrui, *supra* note 3, at 749–50.

least significantly improved. In the absence of a state or federal supreme court decision that mandates equal school funding, individualistic parents will continue to be unwilling to subsidize the educations of students outside of their self-segregated (by race and class) school district boundaries. Even with such a court decision (highly unlikely even in the most liberal states), parents with means would lobby for lower property taxes or private school vouchers. This change would shift suburban school districts from a *de-facto* private school model, where small segregated community boundaries keep out the poor and the non-white, to an actual private school model, where taxes will subsidize private education or simply be lowered to allow parents to buy that education themselves. The well-entrenched freedom to direct a child's education[108] will ensure that the Court would not prevent this migration from occurring. Moreover, marginal minority communities do not possess the political or economic capital to fight against these outcomes.

The failure of liberal scholars to understand how tightly circumscribed minority political power is prevents them from considering the likely possibility that affirmative action—meager and problematic as it is—is all that the polity can implement. Once scholars acknowledge this possibility, the notion that the rationale for affirmative action should satisfy the preferences of academia diminishes. Instead, the way in which a rationale for affirmative action interacts with the political sphere, where minorities are embattled, becomes paramount.

With this change in criteria, nearly all the philosophical criticisms that liberal scholars wield against the diversity rationale become virtues. In particular, diversity's conceptual flexibility, the fact that it can mean nearly anything and be inclusive of an infinite array of characteristics, is a terrific asset in the political arena; if everyone is "diverse" in one way or another, preferences are less threatening. For her part, Justice O'Connor uses this flexibility with great skill in *Grutter*. But before we delve into a close analysis of diversity's myriad benefits, it will be useful to uncover the political flaws of grounding affirmative action in the preferred liberal rationales, ones that emphasize dark histories or continued discrimination.

1. The Shortcomings of Historically Anchored Affirmative Action Rationales

There is a legend at Yale Law School that upon learning of Ronald Reagan's re-election in 1984—in a race that was widely

108 *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 232–33 (1972).

regarded a *fait accompli*—a member of the faculty exclaimed to another professor "How could this man be reelected? I don't know a single person who voted for him and none of my friends knows anyone who voted for him. Do you?" The answer from his colleague, of course, was no, he did not know a single person who supported Ronald Reagan. Whether or not this story is true (and it likely is not), it continues to circulate around the law school, serving as a cautionary tale to those who enter Yale's cloistered environs: beware that you do not come to believe that the ideas and values expounded upon within these walls bear any direct relationship to the world outside of them.

Though Yale is particularly guilty of divorcing theory from practice, the legal academy as a whole has become more like Yale, not less.[109] The failure of liberal scholars to critically assess their favored rationales for affirmative action stems directly from this inability to appreciate that their values may differ significantly from those of the public at large. What is particularly troubling about this difficulty is that in law, unlike, say, Philosophy or English, this ivory-tower distance will frequently have a negative impact on the quality of legal scholarship because the law is not a system of reasoning that the academy actually governs. The negative impact of this myopia is clearly illustrated by scholarship that advocates for an affirmative action rationale grounded in a history of racial exclusion or evidence of continued discrimination.

The appeal of affirmative action rationales grounded in a history of oppression or continuing discrimination is, unfortunately, limited to the liberal scholars who advocate for them. These perspectives have limited persuasive power because liberal legal academics are a unique group of people with values and epistemologies that differ dramatically from most of the American population, and even most college-educated citizens. Law professors generally value rigorous logical thinking, have jobs that are, for the most part, guaranteed for life, and are unusually self-conscious about the privilege they enjoy. Though academics are overwhelmingly white and male, their extreme privilege means that they do not share the insecurities that their less accomplished brethren have felt in the aftermath of the civil rights movement, women's liberation, and the disintegration of the old social contract guaranteeing long-term employment and generous benefits.

The deep-seated resentments that have emerged from the

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109 *See* Richard A. Posner, *Madison Lecture: Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998).

transformative "progress" of the past half-century have been exploited brilliantly by the Republican party since the enactment of the 1964 Civil Rights Act. Indeed, President Johnson predicted the electoral realignment that would take place over the coming decades, commenting to an aide that by signing the act he was handing over the South, once a Democratic party stronghold, to the Republican party for "a generation."[110]

To cultivate the status anxiety that resulted from the emasculating social upheavals of the 1960's, Republicans created a strategy that Kenneth L. Karst dubs the "social issues agenda."[111] Republicans appealed to the racist, anti-feminist, and, later, anti-gay sentiments of white-male voters by using code words to bring these voters into a fold where their damaged egos could be mended. The central logic of the Republican strategy is to turn white men into victims of the new liberal establishment by convincing them that they are victimized by do-gooders who have threatened their hegemony with feminism, affirmative action, and "political correctness."

Affirmative action is particularly threatening to the status of this group of men, especially those among them who are poor or working class. More than any other group, these whites benefited from the social norms that used to prohibit women and minorities from competing with them for jobs. Though it is unlikely that many members of this group could be sold on affirmative action in any form, grounding the program in the victimization of underrepresented minorities is particularly galling to them because they have become accustomed to seeing themselves as victims of 1960s social transformations, and they conceptualize blacks, other minorities, and women as ungrateful or undeserving beneficiaries of those changes. Creating a public discourse about affirmative action based on past or current victimization raises this group's ire and gives them the tools to recruit others into their coalition.

Moreover, an affirmative action rationale rooted in minority victimization allows the program's white male opponents to recruit others to their cause because that justification runs up against other deeply-held and widely-shared American convictions. We can think of these socially constitutive beliefs as an

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110 Johnson is said to have told an aide, shortly after signing the Civil Rights Act of 1964, that "[w]e have just lost the South for a generation." John W. Lee, III, *Class Warfare 1988–2005 over Top Individual Income Tax Rates: Teeter-Totter from Soak-the-Rich to Robin-Hood-in-Reverse*, 2 HASTINGS BUS. L.J. 47, 125 (2006).

111 KARST, *supra* note 26, at 27–28 (arguing that the Republican party has tapped into this race animosity quite successfully by using code words that support its social issues agenda).

expanded version of the "American narrative" that I alluded to earlier in this article. In this narrative, our history is a parade of economic, social and political advancement, and the meritocracy is fair and just, because economic outcomes are linked to hard work and persistence, not the accident of birth.

These myths, coupled with our laissez-faire economic system, result in a populace that believes that people control their own destinies[112] (fatalism is for the Europeans). F. Scott Fitzgerald's famous line, "[t]here are no second acts in American lives,"[113] may be the most inapposite American popular quotation. Americans are highly adept at reinvention; second acts are commonplace, and third, fourth and fifth acts are not unheard of. Americans' self-identity and status are malleable; people do not believe that they are tethered to their pasts. All these beliefs are held by Americans of every race, and every income level, even though nearly every notion is contradicted by statistical evidence or a frank assessment of our history.[114]

Given, then, the American aversion to history, conviction that hard work can will us out of any circumstance, and penchant for self-reinvention, it is unlikely that a wealth-transfer policy directed on the basis of race, emphasizing a terrible history of slavery and discrimination, will gain traction in the court of public opinion; it is un-American to dwell on the negative, ugly past. Such an argument, enshrined in a political opinion, would lead to the kind of unproductive political conflict engendered by *Bowers* and *Roe*.

2. The Difficulty with the Continuing Discrimination Rationale

The other liberal suggestion, that the Court ground affirmative action in social science research illustrating how conscious and unconscious discrimination continue to adversely affect underrepresented minorities, is also wrongheaded. In essence, adopting such a rationale requires the Court to publicly accuse most Americans of being racist. A discourse framed by such an accusation will be even more inflammatory than one framed by a history of discrimination because there are now strong social norms against overt racism. Accusing people of being racist is a

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112 *See* Schuck, *supra* note 61, at 30 (reflecting the view of some affirmative action opponents who acknowledge a history of racial deprivation, but who believe that in recent years blacks have made "stunning political, economic, and social advances" that suggest that "special preferences are no longer warranted").

113 F. SCOTT FITZGERALD, THE LAST TYCOON 163 (Edmund Wilson ed., 1941).

114 *See Class Matters: A Special Section*, N.Y. TIMES, May 15, 2005, http://www.nytimes.com/indexes/2005/05/15/national/class/ (supporting the conclusion that Americans misapprehend the extent of American socio-economic mobility).

prescription for contentiousness because people refuse to believe that they harbor racial bias. Even in cases where people do admit to holding racial stereotypes, they do not conceptualize them as stereotypes; they believe them to be true. In this way, discrimination is invisible to the majority that perpetrates it.

Ironically, this denial of bias is growing stronger just as evidence of bias has grown more concrete. Mahzarin Banaji, a psychology professor at Harvard, has conducted path-breaking work that proves how deep-seated and wide ranging our unconscious biases are.[115] According to her studies, Americans hold strong negative biases against racial minorities, the elderly, and social groups to which they do not belong.[116] Despite the strength of her research and the persuasiveness of her analysis, however, Professor Banaji's own Harvard undergraduates refuse to believe that they themselves actually harbor these biases.[117] Professor Banaji's students do not doubt her research, of course. On the contrary, most of them believe that America is rife with racism; they just do not believe themselves to be racist.[118] Indeed, according to Professor Banaji, her students become quite defensive when she confronts them about their results on her bias tests. If the most privileged and intelligent undergraduates in the world are touchy about confronting their own unconscious bias, it is highly probable that the public at large will be even more unwilling to accept that their way of perceiving the world is biased in important ways.

Another recent study also uncovered significant bias against job applicants with "black" first names. In "Are Emily and Greg More Employable than Lakisha and Jamal?"[119] co-authors Marianne Bertrand and Sendhil Mullainathan found that Emily and Greg enjoyed a sizable advantage over their counterparts with traditionally African-American names. Bertrand and Mullainathan sent out nearly five thousand resumes in response to help wanted ads in the *Boston Globe* and the *Chicago Tribune*. The resumes were equalized for qualifications, though no resume sent to the same employer was identical; the most significant difference between the resumes was whether the applicants names

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115 *See* Mahzarin Banaji, *Ordinary Prejudice*, PSYCHOLOGICAL SCIENCE AGENDA, Jan.–Feb. 2001, at 8, *available at* www.apa.org/science/psa/jan01.pdf.

116 *Id.* at 9; *see also* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1513–14 (2005) (discussing and cataloging implicit bias studies by Banaji and others).

117 Banaji, *supra* note 115, at 8.

118 *Id.*

119 Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal?* 1, (Nat'l Bureau of Econ. Research, Working Paper No. 9873, 2004), *available at* http://post.economics.harvard.edu/faculty/mullainathan/papers/emilygreg.pdf, (showing that similarly qualified black candidates are disfavored even when their educational qualifications are significantly superior to white candidates).

were typically "white" or "black."

The authors found that "white" applicants were 50% more likely to receive a request for an interview than "black" applicants with equivalent qualifications.[120] More distressingly, while white applicants with higher quality resumes received 30% more callbacks as a result of their qualifications, black applicants garnered a smaller gain for the same increase in qualifications.[121] Put succinctly, according to the authors, "the gap between White and African-Americans widens with resume quality."[122] Again, despite strong social norms that discourage discrimination on the basis of race, the authors of this study found evidence of pervasive racism, even without direct visual stimulus. All these biases, however, are likely invisible to those who hold them.

This invisibility is doubly pernicious. First, it weakens the resolve to implement affirmative action programs because most people will not believe that race discrimination still exists when they do not see for themselves the evidence of overt discrimination. Second, the weakened resolve to implement affirmative action works to consolidate the existing racial order, further entrenching the invisible biases that created these racial disparities in the first place. Under these conditions, an affirmative action program anchored in history or evidence of continuing discrimination is destined to fail.

To further complicate matters, a backward-looking rationale or one based on evidence of continuing discrimination invites empirical scrutiny by structuring affirmative action in a way that encourages people to think of the program as a means of repaying the debt owed by whites to disadvantaged minorities. This "debt" frame is explicitly favored by Professor Forde-Mazrui, and implicitly favored by other liberal scholars who approve of affirmative action and disapprove of the diversity rationale. These scholars favor this structure because it is familiar: every lawyer thinks of equity in terms of tort law. Attorneys are trained to ask: "How can we make the plaintiff whole? By what amount has the plaintiff been harmed?"

The problem with applying this formulation to affirmative action in higher education is that the public process of calculating the individual "damages" that each person deserves would quantify people in a way that most Americans would consider grotesque.[123] Even assuming that such individualized considera-

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120 *Id.*
121 *Id.* at 3.
122 *Id.*
123 *See* Peter Skerry, *The Strange Politics of Affirmative Action*, THE WILSON

tion were possible, the calculations involved are daunting and uncomfortable. One would need to quantify the amount of bias that every individual minority actually encounters in order to discern the size of the societal debt that needs to be repaid. Such a calculus raises countless questions: Does society owe a debt to Puerto Ricans and Mexicans (for de facto colonialism), but not to certain first generation Cuban-Americans, who are relatively well off? Do Latinos without accents and more "European" features get less preference than mestizos and other Latinos with more "indigenous" features? What about Latinos without a Spanish surname? Do dark-skinned blacks inspire more racial animus than light-skinned blacks?

The empirical resolution of such questions may make for an interesting econometric exercise, but it is too complex and racially essentializing to be politically viable. These are discussions that the judiciary cannot have. Minorities would not want to be subjected to such an analysis, or they would bicker about the values assigned to different characteristics, and whites, who mostly do not believe that racism exists, would object to paying off the "debt" in such a complex way. Again, from the American perspective, complexity may be a sign of fraudulence. Put simply, quantifying harm in this way runs against the American preference for self-definition. Americans want to present their personal stories on their own terms; no one wants to be just another number. Justice O'Connor sensed the importance of this value.[124] This difference alone explains why she voted to overturn the Michigan undergraduate program, which used an explicitly numerical approach to admissions, and upheld the law school's "whole student" approach in *Grutter*. It is unimportant whether the different approaches produced differences in fact, *Grutter* properly locates some metaphysical procedural value in the holistic, non-numerical approach practiced at the law school.

This analysis of the pitfalls of more "academic" rationales for affirmative action also illustrates why the judicial rationale for affirmative action is so important. Affirmative action is being asked to do what is nearly impossible. It must seek to solve a problem that no one, excepting those who lack political and economic power, as well as a few elites, believes to exist. Plainly, under these conditions, a politically persuasive affirmative action policy cannot be constructed by assembling past and present social science data to make an empirical case for compensation and redistribution. On the contrary, the rationale that validates af-

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QUARTERLY, Winter 1997, at 39, 40, *available at* http://www.brookings.edu/gs/Skerry_aa.pdf.

124 Grutter v. Bollinger, 539 U.S. 306, 334 (2003).

firmative action needs to be constructed around the viewpoint of the majority. By implementing the program without an explicitly empirical focus, the program can survive by staying off the political balance sheet, where scrutiny of the policy's intricacies could lead to its abolition. The Court should embrace diversity precisely because that rationale is silent on the deeper contradictions and difficulties surrounding a subject—race—that is taboo.

3. The *Grutter* Dissent and the Problem with Numerical Emphasis

The *Grutter* dissent illustrates the problems with a rhetoric that encourages a numerical approach towards affirmative action, taking as their starting point a deconstruction of the University of Michigan law school's stated interest in attaining a critical mass of minority students. "[C]ritical mass," the dissent claims, is a "veil" that obscures the law school's attempt at "naked . . . racial balancing."[125] In particular, a close look at the law school's numbers leads the dissenters to conclude that black applicants are favored over Latinos with higher qualifications. The implication of this finding, from the dissenter's point of view, is that a program that discriminates *between* underrepresented minorities must be pernicious.

In fact, however, the law school admissions committee's "balancing" may reflect real differentials between the black and Latino racial experience, precisely the kinds of differences that a hyper-accurate, empirical affirmative action would seek to quantify. There is sociological evidence that blacks may suffer significantly more racial discrimination in American society than Latinos do.[126] For example, there are probably more Latinos than blacks that can pass for white, African-Americans have a history of slavery that most Latinos lack, and white-Latino intermarriage rates are significantly higher than black-white intermarriage rates, and still climbing.[127]

Yet, as the dissent shows, most Americans would probably be uncomfortable with a public discussion of why some minorities might deserve more preference than others. Supreme Court precedent reflects this discomfort by prohibiting "racial balancing."[128] If Justice O'Connor had actually adopted a historical or

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125 *Id.* at 379 (Rehnquist, C.J., dissenting).

126 *See* Delgado, *supra* note 106, at 497–98 nn.48–49.

127 Approximately 30% of marriages involving U.S.-born Latinos are inter-Hispanic, while only 7% of blacks marry a spouse of another race. Sharon M. Lee & Barry Edmonston, *New Marriages, New Families: U.S. Racial and Hispanic Intermarriage*, 60 POPULATION BULLETIN, June 2005, at 3, 12, 27, *available at* http://www.prb.org/pdf05/60.2NewMarriages.pdf.

128 *Grutter*, 539 U.S. at 330.

ongoing discrimination rationale in *Grutter*, she would have had to engage in this debate about differential preferences in the majority decision. Imagine the formal challenges of writing a majority decision that rationalized every inter-racial choice that the law school makes through a complex social-scientific exegesis, like the one presented above. Such discussions might satisfy liberal elites who are comfortable seeing the world in shades of gray, but to the black-white public, these complex explanations would do much to discredit the program and encourage a political movement to prohibit it.

More troubling still, public discussions of differential preferences might serve to divide racial minorities among themselves. Encouraging interracial strife of this sort damages minority interests as a whole because racial minorities can only have significant power by asserting a unified front. The *Grutter* dissent presents its finding in a way that suggests that Latinos should lobby for the spots that blacks "took away" from them or join whites in opposing the program. The dissent fails to emphasize that while Latinos may not receive quite the boost that African-Americans do, Latinos still receive preference relative to many white candidates. Thus, even if Latinos receive less preference, they are better off working with blacks to keep affirmative action than they would be were they to join with whites in seeking to abolish the program.

Blacks in particular fear this emphasis on difference because they have seen potential allies back down before. Whites have a long history of giving other disfavored groups subtle preferences and the promise of future entry into the white race in exchange for that group's refusal to align its interests with blacks.[129] During the colonial period, slave masters gave certain privileges to their white indentured servants to keep them from uniting with blacks against the landowners (this is, unsurprisingly, a favorite example among Marxists).[130] Nobel Laureate Toni Morrison expressed this history of differentiation in this way:

> If there were no black people here in this country, it would have been Balkanized. The immigrants would have torn each other's throats out, as they have done everywhere else. But in becoming an American, from Europe, what one has in common with that other immigrant is contempt for *me*—it's nothing else but color. Wherever they were from, they would stand together. They could all say, "I am not *that*." So in that sense, becoming an American is based on an atti-

129 *See, e.g.*, WILLIAM J. GARDINER, REFLECTIONS ON THE HISTORY OF WHITE SUPREMACY 7–9 (Apr. 28, 2003), http://www.uua.org/programs/justice/antiracism/Greenfiled%20Group%20Paper.pdf.
130 *Id.*

tude: an exclusion of me.[131]

When highly numerical analytic models are applied to race, they will always highlight the significant differences between the racial experiences of distinct minority groups, because such differences do exist. But because the temptation to assimilate into the system by aligning one's interests with the majority is so strong (see, e.g., Jews, Irish, Polish, *ad infinitum*), emphasizing differences between minority groups obscures their shared experiences, preventing them from joining together. Inter-racial solidarity, in short, presents a classic problem of collective action. Minorities must join together in order to create a public good, and through it all members can gain advantage. But members who can pass in certain contexts for the majority race can opt out of contributing to the common pool and thereby undermine the strength of the coalition. Thankfully, it seems as if blacks and Latinos are learning to forge common alliances (see, e.g., the recent Los Angeles mayoral race);[132] but these will always be tenuous if discourse is structured in a way that magnifies the differences between the black and Latino racial experience.

Lastly, and most importantly for racial minorities, the historical or current bias rationale perpetuates a conception of minorities as damaged, flawed, and deficient. As one scholar put it:

> [A] common theme of the last fifty years (but with roots in the writings of W.E.B. Du Bois at the turn of the century) has been the effort by racial liberals to construct African Americans as damaged and to use that "damage imagery" to build support for progressive racial policies. The arguments in favor of school desegregation in *Brown v. Board of Education* and affirmative action in the mid-1960s, for example, were premised in part on the notion that African Americans had been damaged by racial discrimination and segregation.[133]

While such a conception provides substantial philosophical justification for affirmative action, that rhetoric does harm to the minorities it is designed to help. The concept of diversity, on the other hand, transfigures this damage into a positive characteristic, a battle-scar to take pride in; it is something that grants its victims a special kind of knowledge.

In sum, the pet rationales of liberal scholars do harm to minority interests by inviting a quantitative inquiry, framing the

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131 Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585, 1602 n.59 (1997).

132 Brian MacQuarrie, *Black-Latino Alliance Buoys L.A. Mayor Candidate*, THE BOSTON GLOBE, May 4, 2005, at A1.

133 Davison M. Douglas, *Justifying Racial Reform*,76 TEX. L. REV. 1163, 1164 (1998) (reviewing DARYL MICHAEL SCOTT, CONTEMPT AND PITY: SOCIAL POLICY AND THE IMAGE OF THE DAMAGED BLACK PSYCHE, 1880–1996 (1997)) (citations omitted).

program in terms of debt, and perpetuating a damaged image of minority populations. That said, these rationales are philosophically and formally much more satisfying justifications for affirmative action. Where the Supreme Court is called upon to protect minority interests, however, their role will necessarily be more political than formally legal. By embracing a rhetoric that seeks to persuade the political majority, Justice O'Connor best serves the interests of racial minorities. Justice O'Connor's adoption of diversity, and even her decision to reject the undergraduate program's numerical emphasis in *Gratz,* were designed to appeal to this constituency. A Court that insisted on legal formalism without a thought to politics would fail in its role to defend and further minority political gains.

IV. HOW *GRUTTER*'S APPLICATION OF THE DIVERSITY RATIONALE DEFENDS MINORITY INTERESTS

With the importance of the public audience in mind, we now turn to Justice O'Connor's opinion in *Grutter.* Much has been made of O'Connor's tendency to look at adjudication from a legislator's perspective. In practice, this point of view has led O'Connor to fashion an ad hoc, pragmatic jurisprudence. This pragmatism, and her notorious penchant for balancing tests,[134] is frequently a source of scorn within the academy. I will leave for another day a discussion of whether or not such criticisms are warranted. For our purposes, however, this explicitly political point of view is the ideal perspective to bring to writing an opinion that vindicates affirmative action.

Indeed, Justice O'Connor's political radar is so finely tuned that she can detect the needs, insecurities and values of the "public," and fashion her opinion accordingly.[135] Furthermore, O'Connor undoubtedly knows that it is not really the "public" that shapes its own constitutional discourse (if constitutional scholars barely read any Supreme Court decisions, it is hardly possible that the citizenry does). Public discussion is framed, instead, by journalists and other members of the media elite. The *Grutter* decision is perfectly pitched to this constituency; it appears, like the best of plays, to be self-consciously designed to evoke particular responses in a particular audience. Once we understand that this is O'Connor's intent in *Grutter*, we can ap-

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134 Richard Brust, *Balancing Act: Her Constitutional Tests and Strategic Concurrences Helped Make Sandra Day O'Connor a Force from the Center*, ABA JOURNAL, Sept. 2005, at 34, *available at* http://www.abanet.org/journal/redesign/09fscase.html.

135 For purposes of this analysis I will operate under the fiction that we can actually determine O'Connor's intentions from the text and the context in which they were made.

preciate how skillfully she works to manipulate the public discourse.

A. From Decision to Narrative

The Law and Literature movement has sought to wring insight from the observation that lawyers are like novelists because both construct reality by telling stories through language. Though the movement has not sought to compare lawyers and reporters, journalists are also storytellers, spinning verifiable facts into yarns that appeal to their particular readerships. Moreover, unlike novelists, journalists have more than a passing relationship with the law; reporters translate the law into stories that their readership can digest.

This more general audience means that when journalists interpret Supreme Court decisions, they ask different questions than lawyers do. Journalists do not wonder: "Is the decision logically consistent? How will it be received by the lower courts? Does it violate accepted constitutional theory?" Instead, journalists ask what stories the decision tells. Their editors ask, "What is my headline? How do I get the attention of my distractible readership?" With this knowledge of how legal decisions of public importance are consumed, O'Connor has deliberately crafted *Grutter* in a way that tells some stories and buries others. The stories she chooses to tell serve to empower minorities and assuage the egos of the majority. But as with any writer, the stories that O'Connor chooses not to tell are as important as the ones she does. To put it more esoterically, *Grutter* displays a mastery of what Sunstein dubs the constructive use of silence.[136]

What is most ingenious about Justice O'Connor's *Grutter* opinion is the way in which it uses the definitional capaciousness of the diversity rationale, or, if you prefer, the instability of its meaning, to facilitate her narrative project. Diversity allows O'Connor to take all the best arguments for affirmative action, each one logically distinct, and place each under the "diversity" heading. This everything-but-the-kitchen sink approach works because, ultimately, affirmative action's justification comes from a variety of analyses and rationales. When considered individually, the "pros" of any one rationale barely outweigh the "cons." The sum, however, of these diverse rationales makes an effective case for the program.

This kind of summation is unwieldy, though. If fully articulated in a legal opinion it would distract substantially from the

136 *See* SUNSTEIN, *supra* note 34, at 39.

opinion's central holding. With diversity as *Grutter*'s primary organizing principle, however, O'Connor was able to argue, without apparent inconsistency, that diversity has positive educational value, allows the American military to defend our interests, provides the citizenry with a representative cross-section of leaders in disparate fields, aids in the formation of good citizens, and that diversity is necessary "[b]y virtue of our Nation's struggle with racial inequality."[137]

B. Diversity as Anti-Story

Ironically, by adopting diversity, the subject of so much hand-wringing in the academy, Justice O'Connor avoided making *Grutter's* rationale the primary subject of public discussion about the decision. Why? Because diversity is old news, so to speak. O'Connor's reaffirmation of a prevailing rationale did not make for an interesting story.

In advance of the decision, there was speculation (hope in some corners) that the Court would use *Grutter* to change course and ground affirmative action in a new rationale. These alternative rationales, had the Court adopted them, would have made for excellent news. Imagine the headlines had *Grutter* endorsed affirmative action as a remedy for continuing societal discrimination: "Racists Every One: The High Court Calls Affirmative Action a Necessity in Racist Nation"; "New Analysis: Are We Racists Without Even Knowing it?"; "Affirmative Action: the Price We Pay for Continued Racism." Historical remediation would also fare poorly: "Past Sins Still Cost, High Court Says"; "Blacks to Whites: Pay Up with Affirmative Action (It's Better than Reparations)." Needless to say, discussions framed in this way would not further minority interests.

C. Narrative 1: Whites Benefit from Affirmative Action and They Can Become Diverse, Too

In its substantive ruling (affirming the use of race-based preferences), *Grutter* unavoidably reinforces the Republican narrative of white victimization. The structure of affirmative action requires that some group pay the cost, and those who pay may easily consider themselves victimized. O'Connor's opinion, however, is designed to minimize this narrative by omitting an explicit elaboration of this story and by emphasizing a distracting counter-narrative that illustrates the many ways in which diversity encompasses experiences and histories that the majority possesses.

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137 Grutter v. Bollinger, 539 U.S. 306, 338 (2003).

Like all impact litigation plaintiffs, Barbara Grutter was chosen to be the face of the crusade because she has characteristics that make her a sympathetic victim. First, Ms. Grutter is a woman. A female plaintiff is appealing both because prevailing societal stereotypes view females as commonly victimized and because women were once affirmative action's primary beneficiaries, and in some work contexts still are.

Second, Grutter did well in college, she graduated with a relatively high GPA, but did less well on the LSAT.[138] Today her GPA would place her in the top 25% of Michigan's law school's admittees, while her LSAT score would place her in the bottom 25%.[139] These numbers suggest that Grutter had a plausible chance of being admitted to the University of Michigan Law School, but they also contain a subtle subtext. Her high grades signal diligence and effort, while her low LSAT score grants her a humanizing failing.

Finally, Grutter does not fit the profile of the typical University of Michigan student. She is a mother and businesswoman, and when she applied in 1997 she was forty-three years old.[140] These characteristics are the most troublesome for the diversity rationale. In an interview conducted before the Court granted certiorari, Grutter herself described her denial of admission in a way that creates a rhetorical rift between race and diversity: "It was not a diversity issue, it was a race issue," she said.[141]

Aware of these concerns, O'Connor minimizes Barbara Grutter's sympathetic characteristics by effacing her from the opinion as much as possible. Of course, O'Connor could not leave Grutter out of the opinion entirely because judicial conventions require a factual recitation and summary of the procedural posture, and in this case, the plaintiff's personal characteristics were plainly important to the ultimate disposition. Even so, O'Connor uses the convention to radically dehumanize Grutter. Where news stories preceding the resolution of the case emphasized Grutter's unique personal characteristics, O'Connor's description of the plaintiff renders her characterless. In Justice O'Connor's narrative, Barbara Grutter, mother and businesswoman, becomes "a white Michigan resident who applied to the Law School in 1996 with a

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138 *Id.* at 316.

139 See LSAC, Official Guide to ABA-Approved Law Schools, Profile of the University of Michigan Law School, http://officialguide.lsac.org/OFFGUIDE/pdf/aba1839.pdf.

140 Anne Gearan, *Rejected White Law School Applicant Appeals Reverse Discrimination Case to Supreme Court,* The AFFIRMATIVE ACTION AND DIVERSITY PROJECT, Aug. 9, 2002, http://aad.english.ucsb.edu/docs/gearan.html; *see* Bill Mears, *Supreme Court Hears Affirmative Action Arguments*, CNN.COM, Apr. 1, 2003, http://www.cnn.com/2003/LAW/03/31/scotus.affirmative.action.advance/.

141 Gearan, *supra* note 140.

3.8 GPA and 161 LSAT score."[142] After this cursory description Grutter is further reduced. Her name never again appears in the opinion; she is afterward referred to only as "petitioner."

This kind of radical reduction, of course, is a staple of legal reasoning. Legal opinions always seek to minimize damaging facts and emphasize favorable ones. O'Connor's description of Grutter is only notable because the rest of her opinion goes to such pains to validate the importance of humanizing applicants by thorough non-empirical consideration. Plainly, O'Connor was concerned that Grutter might become the story; she would surely be interviewed after the Court rendered its decision, just as she was before oral argument. There was no need, then, for the Court to further emphasize Grutter's narrative, especially when it would conflict so obviously with the story that O'Connor was trying to tell.

That story, of diversity's inclusiveness, occupies a primary place in the opinion, directly preceding the declaration of a twenty-five year "time limit" on the program, O'Connor's other strategic concession to the sentiments of whites.[143] By emphasizing the preference that the law school confers on students who have traveled widely, who speak foreign languages, who have overcome personal adversity or family hardships, or who have pursued careers in other fields,[144] O'Connor shows how diversity includes experiences and accomplishments that happen to, or can be achieved by, all Americans. Further, by analogizing race to other experiences that whites commonly find "enriching," the benefits of minority perspectives in the academy is made less abstract to those who do not see life through a racial lens. In O'Connor's narrative, then, racial knowledge becomes a subcategory of universal, attainable life experience, rather than a separate, exclusive, and unattainable characteristic.[145]

This expansive definition of merit is implicitly contrasted with the much less desirable alternative of an admissions regime that considered only an applicant's LSAT score and GPA, or, like the undergraduate program, one that converted "soft" characteristics into numerical values. In either of the latter two scenarios, applicants are just numbers. Few Americans of any color would prefer to go before an admissions committee as a numerical summation rather than as "whole" person.

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142 *Grutter*, 539 U.S. at 316.

143 *See infra* notes 146–150 and accompanying text.

144 *Grutter*, 539 U.S. at 338.

145 This frame is in marked contrast to nearly all anti-discrimination laws which emphasize the immutability of race as a basis for granting judicial and legislative protection.

These effects are subtle, and their main purpose is simply to create a storyline that deflects attention from narratives that might emphasize affirmative action's inherent contradictions. Should the journalist or lay reader fail to appreciate these subtleties, however, O'Connor made sure to cap her ruling with a guaranteed headline generator, a few paragraphs of *dicta* that were transubstantiated by reporters into a twenty-five year time limit.[146]

D. Narrative 2: Affirmative Action Will End

Time limits are dangerous terrain for the judiciary; indeed, courts have a general aversion to numbers in any context. But Americans like time limits because they provide a sense of closure by marking a point where things will change. O'Connor is careful to structure her affirmative action "time limit" so as to generate headlines, while making it apparent to a legal audience that the limit is not formally binding.

She pulls off this sleight of hand by devoting a few paragraphs to a discussion of case law that articulates why "race-conscious admissions policies must be limited in time,"[147] creating the impression that she will follow this precedent and declare a time limit for affirmative action in higher education. In a nod to her public audience, O'Connor emphasizes that time limits are important because they "assure[] all citizens that the deviation from the norm of equal treatment . . . is a temporary matter."[148]

After all this bluster, though, she promulgates a rather toothless limit, stating only that "[w]e [the majority] expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[149] Plainly, this tepid language will not cause *Grutter* to self-destruct twenty-five years from now,[150] though it will force a future court to be less deferential to universities still granting racial preferences after the lapse of the "limit." Even so, there is nothing in the decision that precludes the Court from granting an extension for the practice if hoped-for gains fail to materialize. To most journalists, however, these legal distinctions will be lost in the race to create attention-grabbing headlines.[151]

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146 *See, e.g.*, Daniel Mark Fogel, *Expiration Date Is Set*, CHI. TRIB., July 20, 2003, § 2, at 1.

147 *Grutter*, 539 U.S. at 342.

148 *Id.* (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, at 510 (1989) (plurality opinion)).

149 *Id.* at 343.

150 Surprisingly, Justice Thomas appears to believe that the twenty-five year "time limit" represents an actual holding. *Id.* at 375–76 (Thomas, J., dissenting).

151 *E.g.*, Fogel, *supra* note 146.

In keeping with the rest of O'Connor's opinion, the time limit also serves to empower minorities by suggesting a point at which preferences will be unnecessary, willing by judicial fiat a movement towards equal treatment. Though the deadline is nonbinding, O'Connor has created a public expectation that affirmative action, in this context, will end. This expectation means that it will be politically difficult to grant such an extension, even though it is formally possible. The time limit's substantive effect, then, is to make minority underperformance much more pressing, while allowing for an extension of affirmative action in the case that improvements in poorer school districts fail to materialize.

Plainly, this opinion will not catalyze wholesale change in the status of inner-city public schools, but universities are powerful institutions that may now take more aggressive steps to improve the educational pipeline that brings students to their campuses.

In this way, O'Connor has constructed a narrative for consumption by a public audience that seeks to assuage negative sentiment among whites while changing the role of minorities from beneficiaries to patrons. In this tale, it is all students, especially whites, who benefit from the educational enhancements of affirmative action.

E. Narrative 3: Minorities Undamaged

There are reasons for underrepresented minorities to like Justice O'Connor's opinion, other than for its central holding. Most prominently, the diversity rationale "un-damages" minorities by converting race from a stigma into a category of knowledge. O'Connor also manages to elegantly collapse the distinction that the dissenters seek to enact between diversity and merit:

> With respect to the use of race itself, all underrepresented minority students admitted by the Law School have been deemed qualified. By virtue of our Nation's struggle with racial inequality, such students are both likely to have experiences of particular importance to the Law School's mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences.[152]

What is so brilliant about this particular passage is the economy with which it accomplishes three discrete tasks. It manages to place underrepresented minorities on the same level as their white counterparts, stating that all minority students have "been deemed qualified." Then, in the next breath, it subtly

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[152] *Grutter*, 539 U.S. at 337–38.

acknowledges how past and present racial discrimination both account for underrepresented minorities' racial knowledge and mandate the need for preference. Thus, effectively, O'Connor incorporates the favored rationales of liberal elites—past and present discrimination—into her opinion, but by wrapping them in diversity's comfortable, non-accusatory embrace, she dampens the sting that they would carry in their full elaboration.

Better still for the status interests of underrepresented minorities, *Grutter* focused attention on the crucial role that these groups play in the American armed services.[153] O'Connor was only able to highlight the contents of an amicus brief submitted by retired military officers because of the flexibility of her kitchen-sink diversity approach. Under a more traditional structure, this argument could not be accommodated because it is inconsistent with an emphasis on past or present discrimination. These former officers believe that having an officer corps that mirrors the composition of enlisted men and women is imperative for our national security, or, as one commentator put it, a racially integrated officer corps may be "mission critical."[154]

This is another line of argument that does double duty. It recasts underrepresented minorities in the role of patriots and thereby raises the stakes of the affirmative action debate. By linking affirmative action to national security at a time when anxiety over security was high, O'Connor knit together the interests of all Americans. Again, by reading *Grutter* as a text aimed at a public audience, we can appreciate how O'Connor is crafting a narrative that affirms and validates the status of underrepresented minorities, while methodically convincing whites that affirmative action is in their interest and even in the best interests of the country.

To her credit, O'Connor's political instincts were spot on. The adoption of the arguments put forth in the military brief garnered significant press coverage, with many media outlets speculating that that brief swung the Court's discussion.[155]

F. Narrative 4: Universities Deserve Special Deference

The other prominent story that *Grutter* tells is one that elevates the civic role of universities in order to justify the exceptional legal deference that O'Connor grants them in her opin-

153 *Id.* at 331.

154 *See* Bryan W. Leach, *Race as Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond*, 113 YALE L.J. 1093, 1094 (2004).

155 *See* LEVINSON, *supra* note 13, at 56–58.

ion.[156] This deference was particularly important for O'Connor to articulate because she wanted to avoid undertaking a detailed statistical inquiry in the text of her opinion. Such an inquiry would have told a story she did not want to tell.

Many critics believe that this deference, as well as O'Connor's refusal to address the "racial balancing" accusations lobbed in the dissent, eviscerate the meaning of strict scrutiny.[157] This group argues that O'Connor simply failed to apply the standard that she said that she was applying. In reality, O'Connor applied the standard, but did not make her analysis public, because the story of that strict-scrutiny application is not something that furthers the substantive interests of minorities.

After all, protecting that interest was her main concern. The strict-scrutiny test was designed to "smoke out" policies that hurt minorities;[158] there is no reason, then, that O'Connor should be forced into a public discussion of that inquiry if that discussion would actually hurt her main constituency in the political realm.

Diversity, then, is more than just a "fig leaf" for affirmative action. The rationale represents a self-conscious judicial choice to present affirmative action in a way that will advance and protect minority rights in a political system that systematically denies underrepresented minorities the ability to lobby for more substantive change.

CONCLUSION: THE REAL PROBLEM WITH THE DIVERSITY RATIONALE AND AFFIRMATIVE ACTION

For those who aspire to the truest form of racial equality, one that would overthrow the master narrative of white dominance, my defense of affirmative action will ring hollow. In essence, I am advocating the adoption of the diversity rationale as a way to appease a white constituency that, from a neutral standpoint, has no right to be appeased. The ultimate story of affirmative action, then, is the story of every liberal reform of a fundamentally unequal system. Derrick Bell told this story nearly twenty-five years ago:

> First, blacks are more likely to obtain relief for even acknowledged racial injustice when that relief also serves, directly or indirectly, to further ends which policymakers perceive are in the best interests of the country. Second, blacks as well as their white allies, are likely to focus with gratitude on the relief obtained, usually after a long struggle.

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156 *See Grutter*, 539 U.S. at 328.

157 *See* Lackland H. Bloom, Jr., *Grutter and Gratz: A Critical Analysis*, 41 HOUS. L. REV. 459, 468 (2004).

158 *Grutter*, 539 U.S. at 326.

> Little attention is paid to the self-interest factors without which no relief might have been gained. Moreover, the relief is viewed as proof that society is indeed just, and that eventually all racial injustices will be recognized and remedied. Third, the remedy for blacks appropriately viewed as a "good deal" by policymaking whites often provide [sic] benefits for blacks that are more symbolic than substantive; but whether substantive or not, they are often perceived by working class whites as both an unearned gift to blacks and a betrayal of poor whites.[159]

For all the work that Justice O'Connor does to mitigate some of the most troubling aspects of this narrative, no judicial opinion can magically refigure a story that has its roots deep in our country's troubled history. I doubt that this nation's original sins—the robbing of virgin territory, the enslavement of a race of people, the subjugation of people who lost battle after battle—can ever truly be overcome; these acts will continue to haunt our nation.

Still, troubling ghosts can catalyze change, and though America remains far from equal, affirmative action in higher education is making things incrementally, but significantly, better. By ensuring that underrepresented minorities are a significant presence on college and university campuses, we are not stigmatizing an entire generation, as some critics would have us believe. Doubts as to the abilities of minorities would persist with or without affirmative action; that is the nature of prejudice. But this prejudice would persist unabated if there were fewer underrepresented minorities passing through the manicured quadrangles of elite colleges and universities. Mahzarin Banaji, the Harvard professor who has shown how unconsciously racist human beings are, has suggested that the only way to overcome these biases is to develop close personal and professional relationships with members of those groups that one harbors bias against.[160] That analysis is the best evidence yet that affirmative action, for all the controversy it causes, may be working to heal this nation and stifle the hauntings of those terrible ghosts.

159 BELL, *supra* note 57, at 7.
160 *See* Kang, *supra* note 116, at 1593.

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