LAW AND THE CONSTRUCTION OF ASIAN AMERICAN IDENTITY

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This paper aims to explore the creation and inception of the pan-ethnic label, "Asian American," in modern American society. Using legal and historical frames of analysis, the construction of this moniker is explored from its roots to its current, evolving future. Immigration legislation and famous citizenship cases are among the types of evidence incorporated into this narrative. Ultimately, the term, Asian American, is tied to a common historical tradition of exclusion and ostracism that racialized Asian immigrants and their descendants outside the bounds of the black-white convention in past America.

PREFACE

What does it mean to be "Asian" in America? When asked about my own personal background, I often try to be specific as possible. I travel through the perilous journey of immigration taken by my parents, ethnic Chinese refugees from Vietnam forced to flee after the American insurrection in their homeland failed. Through this narrative, I self-identify as a second-generation Chinese-Vietnamese American, but to many friends, colleagues, and strangers, I am simply "Asian" or "Asian American." When I was younger, I failed to understand the difference between these different identifying labels and the significance of having an Asian American identity. Today, though, I have gained greater insight as to how Asian Americans fit, or do not fit, into the American mainstream, the contemporary struggles against racism helping to create our modern notions of Asian American identity.[1] Although my previous studies have revealed some of these contemporary issues affecting Asian Americans and their place in today's society, I want to learn more about the historical and legal heritage of the term, "Asian American." By exploring and understanding the underlying forces that constructed the Asian American label, we can start to better understand the identity development of Asians in America.

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[1] Angela N. Angeta, *Race, Rights, and the Asian American Experience.* (New Brunswick: Rutgers University Press, 2006), 7-9.

This paper will be guided by several research questions that will trace the construction of Asian American identity:

- How did the law shape Asian American identity?
- What types of laws changed the construction of this identity?
- How did Asian American identity form in the face of the American Black-White dichotomy?

Using these questions as a guide, I hope to lay out a logical, thorough exploration of this topic, delving into different issue areas and incorporating various points of view. To structure this paper, I have first introduced my purpose in writing this paper and my goals for investigating Asian American identity. In the next section, I briefly recount the history of Asians in America, building a basic knowledge base for further discussion on how and why Asians were treated in certain ways. Next, I look into the intersection between identity and the legal arena by examining and analyzing the impact of immigration law and citizenship rights on the creation of an Asian American identity. In these sections on law, I look to acknowledge stereotypes created for Asian Americans and their associated ethnic subgroups. Additionally, I incorporate an expansive discourse on how the Black-White color line affected, and ultimately shaped, what it means to be Asian in America.

Through this broad consideration of law and its impact on Asian Americans, I argue that the legal decisions and federal policies enacted after the first instances of Asian immigration uniquely framed Asian American identity as one outside the Black-White dichotomy. This framing creates a sense of "otherness" that persists to modern day as the idea of being Asian continues to be juxtaposed against Blackness and Whiteness.

ASIAN IMMIGRATION TO AMERICA

Asian immigration to America has a long and storied history marked with different types of motivations to migrate, exclusionary measures instituted by the government, and a contemporary influx of new individuals. With Census data collected from as early as the 1870s, Asian immigration is shown to have increased tremendously, with over 7 million emigrating from Asia in 1990.[2] However, these large numbers are not indicative of the historical struggle Asians have had in coming to America or their political and legal significance with regard to impact on immigration policy. Asians were the first group whose immigration brought about

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[2] Bill O. Hing, *Making and Remaking Asian America through Immigration Policy.* (Stanford University Press, 1993), 2-4.

great reforms in federal immigration law. They were also the first group excluded by immigration law.[3] With these facts in mind, a historical perspective on Asian immigration can help set the foundation for a discussion on Asian American identity as defined by otherness.

Asian American immigration is marked by cycles of acceptance and rejection as represented by national-level immigration policy and laws enacted throughout the course of Asian migration to the US. For most of the early history of Asian immigration, these cycles of acceptance were tied to demand for cheap labor while the cycles of rejection were connected to racial discrimination, prejudice, and the fear of economic competition.[4] Prior to the revolutionary changes to immigration law in 1965, Asian immigration was marked by waves of laborers and subsequent exclusion.

The first Asian immigrants were from China. Spurred on by poor domestic conditions (crumbling government, wartime strife, famine), they turned to immigration to improve their life outcomes. For America, the Chinese were the perfect labor opportunity in their era of expansion and burgeoning needs for cheap labor.[5] The Chinese were actively recruited for these opportunities, and they worked in mines, farms, plantations, and on the transcontinental railroad. Initial impressions of the Chinese as industrious workers were fairly positive, and Chinese immigration numbers continued to grow. By 1882, the Chinese population had reached 300,000 on the West Coast.[6] However, by this time, Sinophobic sentiment overruled any positive impressions of the Chinese. In 1870, Congress took the first steps of labeling Chinese as "forever foreigner" by denying the opportunity of naturalization to Chinese immigrants. Shortly afterward, Chinese women were effectively denied entry as a result of the passage of the Page Act in 1875. These examples of anti-Chinese sentiment were the culmination of several different factors. Tougher economic conditions and the lack of available jobs for Whites played a role, but discrimination and prejudice played an equally important part in the exclusion of Chinese. In 1882, Congress met the demands of the public by passing the Chinese Exclusion Act, the first piece of legislation that effectively excluded a group based solely on nationality that would be later revised to be even more restricting.[7]

Immigration law for other Asians during this time also included exclusionary measures. However, American relationships with their home countries changed the way in which policy was enacted. For example, the Japanese were the

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[3] *Ibid.*, 19.
[4] *Ibid.*, 16.
[5] *Ibid.*, 19-20.
[6] *Ibid.*, 21.
[7] *Ibid.*, 23-24.

next wave of Asian immigrants to the United States, spurred on by a demand of cheap laborers after the Chinese were excluded.[8] However, because of Japan's status as a rising power in the Pacific, and thus a possible rival to America, the manner of exclusion was different. Like the Chinese, the initial Japanese laborers were welcomed to America by their employers – overall attitudes toward the Japanese were positive with the Japanese described as "gentlemen of refinement and culture."[9] The early Japanese Americans mainly settled in Hawaii to work on sugar plantations, but after Hawaii's annexation in 1898, the Japanese moved to the mainland. Tension between the Japanese, who proved to be self-sustaining and financially independent farmers, and American farmers grew, and agricultural competition became an important issue.[10] Physical violence and forced segregation of Japanese students shocked the Japanese government, who was, at this time, scoring imperial victories in the Pacific. Finally, the two nations came to an agreement.

In 1907, during the height of European immigration to the United States, the two governments sharply reduced the number of Japanese immigrants and effectively excluded the Japanese through the "Gentlemen's Agreement."[12] Although the Japanese government, through its clout as a rising world power, was able to receive some concessions (e.g., the elimination of segregation in schools and the admission of Japanese wives and children), the immigration patterns of the Japanese mirror that of the Chinese. Like the Chinese, the Japanese were welcomed when economic conditions proved favorable, but were then rejected on the grounds of xenophobia even as America was in the process of welcoming millions of new immigrants from Europe.

Asian Indians, Koreans (under Japanese occupation), and Filipinos (as American nationals) followed similar patterns of immigration to American. For Asian Indians and Koreans, their migration as laborers also ended in a clamor of anti-Asian sentiment and nativist upheavals to immigration law. In 1917, Congress passed a landmark act that created an "Asiatic Barred Zone," extending the conditions of the Chinese Exclusion Act to all of Asia (except the Philippines and Guam). Combined with rising nativist sentiment toward Southern and Eastern Europeans, Congress passed the Immigration Act of 1924, establishing a national quota system based on the 1890 Census; Congress effectively eliminated or severely reduced the number of immigrants from many nations, including Asian countries. Filipino migrants, as their home nation was under the dominion of the United States, were the only Asians not affected by this law. However, the wider response

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[8] *Ibid.*, 26-27.
[9] *Ibid.*, 27.
[10] *Ibid.*, 28.
[12] *Ibid.*, 29.

to their migration patterns paralleled that of other Asians, eventually resulting in an exclusionary measure known as the Tydings-McDuffie Act. Passed in 1934, this law treated Filipino nationals like other Asian immigrants and subjected them to the previously passed immigration legislation. Even though Filipinos were brought up with Catholic faith and were schooled in American culture, their otherness outside of American cultural tolerance and their collective threat as economic competition led them to be equally excluded.[13]

From the passage of the Tydings-McDuffie Act in 1934 to the passage of the Immigration Act of 1965, Asian migration to America was tightly controlled despite changes in attitudes toward Asians. World War II era saw the redefining of Asians in the scope of citizenship (to be discussed later), but the 1965 law truly changed the landscape for immigration. As America's international relations with Asian countries changed, the dynamics of various factors, including one of increased domestic tolerance, came into play and forced a shift in immigration policy, reflecting the modern, more welcoming terms given to Asian immigrants.[14] These cultural and geopolitical factors played a large role in the inception of this law. For instance, the Cold War power struggle incurred a need for highly skilled workers in technological fields, of which many were located in Asia.[15] With the passage of the act, national quotas were abolished and immigration from the Pacific reopened. Caps were initially based on hemispheres; occupational preference, family-based migration, and investors were highly favored under this new system.[16] The passage of this specific act combined with later reforms helped to grow the Asian American population to its record levels in modern day.

With a basic recap of the facts of immigration, one can see how vacillating responses toward migration changed the way in which the American government responded toward Asian migrants. Through an "othering" of Asians put forth by exclusionary immigration measures, this identity is framed as outside the idea of what makes a "true" American. In the next section, I discuss the effects of immigration law and exclusion tactics on Asian American communities and individuals, and I trace the formation of different identities modeled after Blackness and Whiteness in order to gain acceptance in American society.

IMMIGRATION LAW: IDENTITY DEFINED BY EXCLUSION

When one thinks of the term "American" in the modern sense, images point to the great "melting pot" narrative. America is the land of immigrants,

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[13] *Ibid.*, 34-35.
[14] *Ibid.*, 17.
[15] *Ibid.*, 40-41.
[16] *Ibid.*, 42

welcomed beneath Lady Liberty's outstretched hand and into the harbor at Ellis Island. In this type of narrative, immigrants are seen as a positive contribution to society, contributing to the multicultural image of the modern American, descendants of a pluralistic mix of European White ethnics.[17] However, where do Asians fit into this narrative? Changing waves of acceptance and rejection marked the early stages of Asian immigration to the United States. However, the moments of acceptance did not signify inclusion into American society. As evidenced by exclusionary measures, Asians were never a part of the mainstream – economic demands for low-skilled and low-wage workers fueled the need for migration, but once conditions turned sour, Asians were no longer needed.[18] In this section, I seek to explain how the law, through federal immigration policy, targeted Asians, connecting these discriminatory and exclusionary practices to the formation of an Asian American identity outside of the American Black-White paradigm.

The common story behind Asian American immigration is the push-pull factor of economics. Because of economic factors (e.g., financial mobility and security), Asians came to America. In addition, upon the same economic reasoning, they were also driven out of this nation.[19] While this logic is somewhat true, it fails to capture the blatant discrimination and racial prejudice enacted upon Asian immigrants that ultimately led to their ostracization and exclusion from America. As early as the 1850s, the Chinese were labeled as "undesirable," selectively stereotyped as a "yellow peril." Political parties and unions began adopting anti-Chinese platforms and various "anti-Coolie" clubs developed in response to the growth of the Chinese laborer population. In 1852, a California state government report stated that Chinese labor was dangerous, cautioning the state of: "the concentration within our State limits, of vast numbers of the Asiatic races, and of the inhabitants of the Pacific Islands, and of many others dissimilar from ourselves in customs, language and education."[20]

The Chinese, like other immigrant workers, began to be labeled as "other" and the anti-Chinese sentiment and consequent exclusionary tactics began to stack up against their status as Americans. Anti-Chinese violence grew during the latter part of the 19th century, leading to "driving outs" of Chinese from towns and the burning of Chinatowns. In an audacious move, the anti-Chinese societies even moved to blame such violence on the immigrants themselves, marking them as individuals of lower character and substandard morals.[21] The first exclusionary

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[17] Mia Tuan, *Forever Foreigners or Honorary Whites?* (New Brunswick: Rutgers Universiy Press, 1998), 160.
[18] Angeta, *Race, Rights*, 21.
[19] Hing, *Immigration Policy*, 31.
[20] Angeta, *Race, Rights*, 21.
[21] *Ibid.*, 21-22.

measure passed in 1875, the Page Act, cut off the migration of Chinese women, labeling them as "lewd" prostitutes that would corrupt the fragile social structure of the growing West. Combined with state anti-miscegenation laws, remaining Chinese were turned into a bachelor society.[22] The Chinese Exclusion Act of 1882 and its subsequent additions choked the migration stream, forbidding the entry of laborers and then, eventually all Chinese.[23] Why was the same sentiment not expressed toward White workers? What led to the eventual and complete exclusion of Chinese from American soil?

Chinese, unlike Europeans or even Blacks, were seen as un-American and un-assimilable. In an account of Justice Stephen Johnson Field's legal decisions on Chinese exclusion cases, Park explains how the American legal system interpreted the exclusion act and widely enforced it upon Chinese immigrants—both American citizens through birth and non-citizens. In one particular decision regarding the exclusion of a Chinese-born merchant who had been away on business in South America (*Chew Heong v. United States*), Field stated: "The physical characteristics and habits of the Chinese prevented their assimilation with our people."[24]

An interpretation of his legal decision seems to suggest a casual dealing with the idea of race and the pseudoscience surrounding the topic at the time. Assimilation was largely tied to a cultural understanding and this cultural foundation of thinking formed the basis of one's perceptions of any group of individuals. For the Chinese, laborers were at first widely received as generally docile, industrious workers (i.e., beneficial to the White mainstream, as opposed to the image of the lazy Black workers).[25] This triangulation represents an attempt to match Chinese within the Black-White dichotomy. However, what ultimately occurred was a distancing of the Chinese from American society because of a failure to match either model. For instance, these laborious qualities of the Chinese were later interpreted as being frugal and not family-oriented, characteristics that separated the Chinese from the White man.[26] On the other hand, the legal sphere rejected the perception of Chinese as so-called "coolie slaves," unfairly persecuted through the stringent demands of contract labor. There would be no such retribution for Black slaves. The exclusionary acts suggest that as opposed to the emancipation and inclusion of African slaves, the overall mission of the government was to systematically avoid any dealings with the Chinese—including their legal and political status in America.[27]

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[22] Hing, *Immigration Policy*, 45.
[23] Angeta, *Race, Rights*, 25.
[24] John S. Park, *Elusive Citizenship: Immigration, Asian Americans, and the Paradox of Civil Rights* (New York University Press, 2004), 69.
[25] *Ibid.*, 74.
[26] *Ibid.*, 69-70.
[27] *Ibid.*, 74.

While they may have set the stage for Asian exclusion, the Chinese were not the only Asian immigrants targeted. Exclusionary measures were extended to Asians of all nationalities and they were uniquely tied to the notion of race and racial hierarchies that later established them as "other" in America. Nativist sentiment affected Japanese, Asian Indians, Koreans, and Filipinos. For instance, a California commissioner of labor statistics labeled Asian Indians as outsiders: the most undesirable immigrant in the state. His lack of personal cleanliness, his low morals and his blind adherence to theories and teachings, so entirely repugnant to American principles, make him unfit for association with American people."[28]

Similarly, Filipinos, colonized under the vestige of American imperialism, were categorized as "savages" and were treated as the dependent upon American values.[29] Like the Chinese, individualized acts and measures were used to exclude these groups. However, what really encapsulated this era's sentiments toward Asian immigrants were the successive Immigration Acts passed in 1917 and 1924. For the first time ever, all of these different nationalities were effectively given a single "Asian" identity and excluded from American soil. The establishment of the Asiatic "barred zone" restricted immigrants from all over Asia in a manner akin to the 1882 Chinese Exclusion Act. With the passage of the Immigration Act of 1924, quotas were set in place to directly reduce the number of Asians in the United States.[30] Asians, despite all of the intra-racial cultural diversity that these different peoples possess, were categorically lumped together in a "forever foreigner" category next to the Black-White divide in America.

Immigration was the first measure taken by the American government to place Asians in a separate racial category, creating a multi-national identity formed on the basis of racist perceptions and nationalistic fervor. Anti-Asian sentiment drove creation of these laws. Without individuals pressing forward with charges that Asians were un-assimilable or completely removed from American culture, law-making bodies would have ignored the problem. The societal pressure to remove and exclude Asians turned the mere existence of Asians on American soil into a valid social problem that had to be acted upon. The results were discriminatory and divisive. Unfair treatment from the hands of both citizens (anti-Asian violence) and the government (laws and court cases) during an era of unprecedented immigration from Europe is perhaps the most notable paradox that arises from this matter. A single belief dominated: Asians were simply too different from the conventional American and could never become one. As stated by Justice Field: "They are a different race, and, even if they could assimilate, assimilation would not be desirable. If they are permitted to come here, there will be at all times conflicts

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[28] Hing, *Immigration Policy*, 31.
[29] *Ibid.*, 34.
[30] Angeta, *Race, Rights*, 25-27.

arising out of the antagonism of the races which would only tend to disturb public order ad mar the progress of the country."[31]

Asians, in the eyes of the law, were outside what being American should mean. Being Black or White were accepted races in this identity, but Asians were constructed an identity outside of this realm. With this reasoning ingrained into the legal interpretations of different legislation and used as rationale in a variety of legal cases, Asians were effectively placed into an "other" category that would continue to be reinforced through various types of law and social norms.

CITIZENSHIP: FOREVER FOREIGNERS VS. FREE WHITES AND BLACKS

Citizenship in America has drawn from racial lines since the founding of this country. Congress' Nationality Act of 1790 stated: "Any alien, being a free White person who shall have resided within the limits and under the jurisdiction of the United States for a term of two years, may be admitted to become a citizen thereof." [32]

This law was created as an attempt to exclude Black and Native American populations from full access to American citizenship. For decades, the rights to naturalize were only given to Whites. However, in 1868, following the Civil War, the Fourteenth Amendment to the Constitution established birthright citizenship, stating that anyone born in the United Statues is subject to its jurisdiction and is an American citizen. This amendment primarily applied to former slaves, solidifying their place in American society. Additional legislation in 1870 changed naturalization law to include individuals of African descent.[33] From these acts of law, citizenship in America became defined along a Black-White paradigm, excluding individuals of other races—including Asians. Defining citizenship as being White or Black had incredible repercussions on the construction of Asian American identity when Asians began immigrating in larger numbers.

Through acts of immigration, Asians were already excluded from participation in American society. The physical act of creating a barrier made for a clear demarcation of who is an actual American. Citizenship laws and associated legal cases reinforced this line. In one exception, birthright citizenship remained intact for Asian Americans prior to World War II. In *United States v. Wong Kim Ark* (1898), citizenship by birth was affirmed through a broad interpretation of the Fourteenth Amendment. However, the application of naturalization on Asians did not mirror the success of the aforementioned court ruling. In the aftermath of the changes to the Naturalization Act in 1870, Congress attempted to apply it to Asian,

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[31] Park, *Elusive Citizenship*, 67.
[32] Angeta, *Race, Rights*, 23.
[33] *Ibid.*, *23-24.*

specifically Chinese, immigrants and upheld the exclusion of non-White/non-Black immigrants from naturalized citizenship. In the federal court case, *In re Ah Yup* (1878), this reasoning was upheld in the consideration of the naturalization of a Chinese citizen. Ah Yup's application was ultimately rejected based on the scientific reasoning that the Mongolian race was not the same as the White race. Through this ruling, naturalization effectively became racialized and barred Asians.[34]

Using this framework, Asians born in America were considered citizens, but their parents and any others who were born in another country could be denied citizenship under the current writing of the naturalization law. However, like Ah Yup, Asians of all national backgrounds attempted to fight this ruling and gain the rights of other Americans. In this struggle for citizenship rights, Asian Americans constructed new identities of themselves that aligned along the Black-White color line, specifically with White Americans. Citizenship, unlike immigration, marks the first instance in which Asians tried to change their national origin and fix themselves to American notions of race. With immigration, they were purely excluded from any discourse on their inclusion in American society. But with the topic of citizenship, Asian Americans were able to assert themselves, using the legal system to fight for rights that they felt they deserved.[35] This challenge of the legal status quo allowed Asian Americans a chance to define themselves in America, giving them autonomy over who they desired to be outside of the labels placed upon them.

Two notable citizenship cases are *Ozawa* and *Thind*. These individuals brought forth their arguments for naturalization, and the resulting legal decisions changed how America viewed Asian Americans. In *Ozawa v. United States*, the courts ruled upon a Japanese immigrant's eligibility for citizenship. This case did not challenge the conditions of the Naturalization Act of 1870; rather, *Ozawa* tried to define the Japanese people within the construct of Whiteness.[36] Because Ozawa had lived in America forever, he was effectively a White man in light of his education, upbringing, and skin color. Ozawa used a literal interpretation of the conditions, arguing that his skin was white in color, drawing a differential between the Japanese and other Asian ethnicities. Using the pseudoscience popularized during this era, Ozawa relied on a test of skin color to determine one's identity and race, trying to establish a connection between being Asian and Whiteness. However, the Supreme Court rejected this argument; skin color as a test was not a good enough measure for the Court (however, they did not throw out racial reasoning entirely) and, instead, interpreted the words "white person" as a person

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[34] *Ibid.*, 23.
[35] *Ibid.*, 25-27.
[36] *Ibid.*, 24.

of the Caucasian race. On this basis, the Court connected White and Caucasian and excluded the Japanese from adopting a White identity.[37]

In a subsequent case, *United States v. Thind*, the Supreme Court barred Asian Indians from naturalization, even with scientific evidence showing that Asian Indians were of the Caucasian race. This case clarified the definition of being White in America and further distanced Asians from this re-established notion. Instead of adopting the scientific definition of the term, Caucasian, the courts turned to a more colloquial definition, stating: "It is a matter of familiar observation and knowledge that the physical group characteristics of Hindus renders them readily distinguishable from the various persons in this country commonly recognized as white."[38]

From this broader interpretation and refining of the idea of Whiteness, Asians were effectively barred from gaining naturalization because of the dominating Black-White dichotomy that ruled American race relations. Instead, Asians were further marginalized from the mainstream American society through such measures and their identities became complicated through a lack of citizenship. These Asians living in America became stateless people. Without rights in a time when anti-Asian sentiment ran high, their identities were continually formed outside the considered definition of American through exclusion from immigration as well as citizenship.

Statelessness has a profound effect on one's identity. When an individual makes the conscious and sometimes wrenching decision to uproot their lives to another country for permanent settlement, there is some sort of break between one's allegiance to one's home nation and their identity.[39] In this era of anti-Asian sentiment, laws were created to further marginalize the stateless Asian. Alien Land Laws were created in the early 1900s to prevent land ownership of Japanese American farmers, forcing them to list property under the names of their American-born children or even their neighbors. Laws were created to strip citizenship from those women who married aliens, an attempt to disallow proliferation of an alien people. Without citizenship, rights are withheld from an individual and they are rendered prejudiced, subordinated, and "othered" in a severe minority-majority relationship.[40]

The same reasoning of statelessness holds true to an even higher degree for those born as Americans. With Asian Americans, citizenship has proven to be one

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[37] Ian H. Lopez, *White by Law: The Legal Construction of Race.* (New York University Press, 2006), 57-61.
[38] Angeta, *Race, Rights*, 24.
[39] Frank H. Wu, *Yellow: Race in America Beyond Black and White.* (New York: Basic Books, 2002), 94-95.
[40] *Ibid.*, 97-98.

legal arena in which different individuals have tried to carve a place for themselves in society. Whether it is a Chinese man born in the US, a Japanese-born and American-raised merchant, or an Asian Indian farmer, these individual instances mark a greater trend of Asian Americans attempting to assert their identity and rights as Americans.[41] In some instances, the results proved disappointing and citizenship rights were denied along the lines of race and color. These cases dealt mostly with naturalization; birthright citizenship remained intact. The upholding of birthright citizenship held true through the beginning of World War II, when scores of Japanese-Americans were taken from their homes on the west coast and forcibly interned at camps located in the interior of the Americas. After the bombing of Pearl Harbor by the Japanese, Japanese-Americans lost their rights through forced relocation as "the enemy," labeled as foreigners despite their status as birthright citizens.[42]

Executive Order 9066, signed into place by heralded wartime President Franklin Delano Roosevelt, forever changed the lives of Japanese-Americans and set forth a strong precedent of certain wartime exclusionary measures. Authorizing the forced relocation of Japanese-Americans, the order called into question the validity of citizenship of American-born citizens.[43] In response to the order, several different cases came before the Supreme Court. *Hirabayashi* and *Yasui* brought forth plaintiffs of high caliber before the court, presenting their arguments as American citizens fighting for basic rights. However, their cases failed to secure their rights and overturn the order for internment.[44] As American citizens, the two plaintiffs attempted to guard their identity through zealous arguments for some type of afforded protection to the law. However, their appearance and heritage marked them as "enemy aliens" and as foreigners; despite being initially classified as Americans, physical differences separated them from the mainstream and gave no protection against the racially-based exclusion order.[45]

In light of these cases, *Korematsu,* another exclusion order case, signals a change compared to how previous cases transpired. An ordinary citizen with no awards or distinctions, he took great measures to distance himself from the Japanese in light of the order. He moved to Arizona from his California residence to marry a White woman and used a pseudonym as well as plastic surgery to disguise his Japanese heritage. Recognizing that his citizenship had no meaning in light of the race-based exclusion, Korematsu attempted to align himself with Whiteness, becoming invisible among the mainstream masses as opposed to

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[41] Angeta, *Race, Rights*, 24.
[42] Wu, *Yellow*, 95.
[43] *Ibid.*, 132.
[44] *Ibid.*, 133.
[45] *Ibid.*, 134.

formally addressing the blatant discriminatory policies.[46] His Japanese descent meant being labeled as a disloyal and suspicious individual not fit to be an American.[47] As a result, other Asian ethnicities attempted to distance themselves from the effects of exclusion. Koreans and Chinese wore buttons displaying their ethnic heritage stating "I am Chinese. Not a Jap" in bold terms. The controversy surrounding Japanese internment and the exclusionary laws produced through a rehashing of American citizenship forced a schism between different Asian ethnic groups. This phenomenon marked instances of differential treatment based on national origin and a division of the Asian identity along these markers.[48]

Citizenship law and citizenship cases questioned the validity of the American identity claimed by Asians. On the one hand, one may argue that some Asians only fixated on obtaining citizenship as a way to secure privileges. However, citizenship also forms an essential part of one's identity. Allegiance to one's home country, acts of loyalty, and American ideals were all brought into focus with the various laws enacted against Asians.[49] The overall message through this legal arena, though, was one of continued exclusion. Despite attempts to align with Whiteness (the group with power in America), Asians were once again marked as other – foreigners that were so physically and culturally different that they posed dangers (even wartime threats) to the wider American society. In these instances, the law may simply be reflecting the popular opinion at the time of its creation. When one looks more broadly, though, the citizenship laws against the Asian individual were a direct attempt to block connections to America and to fully label them as foreigners, an "other" category outside of the Black-White divide. Citizenship also created barriers between Asian groups. While the different populations that made up Asian immigrants may have never asserted their national identity on a scale of mainstream recognition, citizenship cases forced these groups to differentiate and make a deliberate effort to carve identities out of national background. Divergent treatment became a way to secure rights through different identities. While still labeled as "other," identity became more complex through the division of ethnic groups and a tool to gain recognition.[50]

ASIAN AMERICANS TODAY: THE LEGACY OF EXCLUSION

The 1950s and beyond brought about great change for Asian Americans. Immigration law and citizenship law were both reformed, opening the channels to

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[46] *Ibid.*, 134-135.
[47] Angeta, *Race, Rights*, 62.
[48] *Ibid.*, 88.
[49] *Ibid.*, 63-64.
[50] Park, *Elusive Citizenship,* 135.

include Asian Americans.[51] This change created opportunities for Asian Americans to join the mainstream and created an identity other than "foreigner" in the eyes of the government and wider society. Asian immigration grew, and today Asians make up nearly five percent of the total American population. Asian Americans, although in varying numbers, have positions in government, business, and mass media.[52] For these contemporary Asian Americans, they have been labeled as "honorary Whites" and the "Model Minority."[53] With these examples as evidence for growing tolerance, inclusion, and changing identities, it seems safe to say that Asian Americans have carved out a niche for themselves, solidifying their place as valid and equal citizens of the United States with protected rights under the law. In modern study, though, Asian American racial identity continues to be an important topic. As previously stated, Asian Americans have been examined as racialized minorities, not unlike Blacks and Latinos. However, unlike these other groups, Asian Americans have a unique experience defined by the legacies of exclusion from the pre-World War II era.[54]

In the development of their modern identity, are Asian Americans more Black or more White? According to Gary Okihiro, Blacks and Asians share a common racialized experience that helps to define and shape their modern identities. Okihiro describes the relations between these two groups during a time of interracial tensions in the early 1990s:

> We are a kindred people, African and Asian Americans. We share a history of migration, interaction, and cultural sharing, and commerce and trade. We share a history of European colonization, de-colonization, and independence under neo-colonization and dependency. We share a history of oppression in the United States, successively serving as slaves and cheap labor, as peoples excluded and absorbed, as victims or mob rule and Jim Crow. We share a history of struggle for freedom and the democratization of America, of demands for equality and human dignity, of insistence on making real the promise that all men and women are created equal. We are a kindred people, forged in the fire of white supremacy and struggle.[55]

Okihiro draws upon the similarity of experience between Blacks and Asians as persecuted minorities by the White man. Because of this shared experience, Asians

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51 Angeta, *Race, Rights*, 84.
52 Tuan, *Forever Foreigners*, 7-9.
53 *Ibid.*, 10.
54 *Ibid.*, 8.
55 Gary Y. Okihiro, "Is Yellow Black or White? Revisited" in *Blacks and Asians in America: Crossings, Conflict, and Commonality.* (Durham, N.C.: Carolina Academic Press, 2002), 55.

and their identity can be argued as shaped in a fashion comparable to the Black experience. However, the legacies of exclusion mark a special difference between the two. Asian Americans developed identities in the era of exclusion as a result of being labeled as "other" in response to immigration and citizenship laws, attempting to align with Whiteness as a way to gain privilege. Blacks, on the other hand, experienced exclusion from mainstream society but were eventually accepted as Americans despite persistent unequal treatment.[56]

While both Blacks and Asians may have developed similar experiences in attempts to align with Whiteness as power, Asians continue to be racialized as foreigners. For instance, Okihiro cites one instance in which a headline states: "Kwan defeated by American for Olympic Gold," despite Kwan being an Asian American. For Asian Americans, according to Okihiro, there are differences that exist between their narrative and the Black American narrative. Asian Americans are still seen as foreigners, physical characteristics used as a way to differentiate insiders and outsiders to American society.[57] Despite citizenship, the logic of past exclusion cases, like *Chew Heong* or *Korematsu*, can still be felt in today's dealings with Asians. "Other" is a category that permeates Asian America, and prejudice still establishes a clear line between what can be considered American.

Despite the discussion of Whiteness, Blackness, Model Minority, and "other," Asians still exist on the fringes of the American definition. Who constitutes being an American has clearly expanded through reforms of law, but society has yet to catch up to these changes. Perhaps the legacies of exclusion are most felt here; through law, societal norms are created that extend the reach of the original case or piece of legislation. Asian American identity, therefore, can be seen as a model example for the power of law. Through the construction of Asian American identity, the law has been shown to have tremendous influence on how this identity has developed into its current form. Without the immigration and citizenship reforms that so broadly categorized Asian Americans, the profile of a contemporary Asian American would be much different today. The threads of the past extend into current times with the reaches of the law, creating a modern foundation for Asians labeled as "other."

Conclusion: A Changing Identity

The law has influenced our past conceptions of Asian American identity and continues to shape them today. However, as immigration from Asia continues to grow, this identity will continue to change. At the beginning of this paper, I

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[56] *Ibid.*, 56.
[57] *Ibid.*, 57.

discussed my own personal identity and how it differs from others' perception of myself. The modern Asian American identity, often called pan-ethnic, is arguably born out of discrimination and prejudice not unlike the exclusion era. Whether its interracial tensions or different forms of marginalization that link groups together with shared experience, this current identity stands as a strong indicator for how Asian Americans will self-identify in the future.[58] At the same time, though, this identity, unlike that of the past, seems to have formed not from the Black-White dichotomy but in an organic response to equip oneself with certain rights and liberties. Asian Americans can be delineated on the basis of national origin, unlike Blacks or Whites, but they are joined together by past injustices and a shared experience that has sparked a need to form coalition. Instead of being labeled as "other" and accepting this identity, it seems that contemporary Asian America is looking to redefine the scope of this label and create a new identity that combines history, modern issues, and patterns of migration. Blackness and Whiteness have given way to a self-perpetuated Asian identity that no longer possesses the same stigma as years past. Today, we can see the development of an identity that has been fashioned by exclusionary laws, but it continues to evolve past its legacy of otherness into a symbol of strength and a resource for community.

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[58] Angeta, *Race, Rights*, 101.

WORKS CITED

Angeta, Angela N. *Race, Rights, and the Asian American Experience.* New Brunswick: Rutgers University Press, 2006.

Hing, Bill O. *Making and Remaking Asian America through Immigration Policy.* Stanford: Stanford University Press, 1993.

Lopez, Ian H. *White by Law: The Legal Construction of Race.* New York University Press, 2006.

Okihiro, Gary Y. "Is Yellow Black or White? Revisited." In *Blacks and Asians in American: Crossings, Conflict, and Commonality.* Durham, N.C.: Carolina Academic Press, 2002.

Park, John S. *Elusive Citizenship: Immigration, Asian Americans, and the Paradox of Civil Rights*. New York University Press, 2004.

Wu, Frank H. *Yellow: Race in America Beyond Black and White.* New York: Basic Books, 2004.

MINORITY RULE?
PRIMARY ELECTION LAW AND LEGISLATOR IDEOLOGY

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In this paper I examine the effect of congressional primary laws on political polarization in the U.S. Congress. I analyze the theorized link between less restrictive ballot access laws and candidate moderation through a review of recent subject literature and through a cross-sectional quantitative analysis. I begin with an evaluation of the theoretical mechanism through which congressional primaries cause ideological polarization. After reviewing several foundational works, I explain the need for the collection and analysis of new data. I summarize my previous research from "The Impact of Primary Election Systems on Legislator Ideology in the U.S. Congress," in which I show that primary voters were more ideologically extreme than non-primary voters in 2008, but that states with semi-closed and nonpartisan primaries did not produce less ideologically extreme legislators. Finally, I conclude with a discussion of the significance of my findings and of issues relating to the theory of polarizing primary elections.

INTRODUCTION

Since the 1970s, the United States Congress has become increasingly polarized along ideological lines; since the 1960s, a substantial ideological gap has formed between the Republican and Democratic parties. Few scholars will dispute this increasing ideological divergence between partisan congressional elites. On the identity and gravity of the causes, there is more division. The role of congressional primaries, in particular, has recently engendered some controversy: some have found that primary elections facilitate the election of more ideologically extreme legislators, while others have reported "little evidence" for primaries' supposed polarizing effects.[1]

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[1] Nolan McCarty, Keith Poole, and Howard Rosenthal, *Polarized America: The Dance of Ideology and Unequal Riches* (Cambridge, MA: MIT Press, 2006); Hahrie Han and David Brady, "A Delayed Return to Historical Norms: Congressional Party Polarization After the Second World War," *British Journal of Political Science* 37, no. 3 (2007); David W. Brady, Hahrie Han and Jeremy C. Pope. "Primary Elections and Candidate Ideology: Out of Step with the Primary Electorate?" *Legislative Studies Quarterly* 32, no. 1 (2007); Barry C. Burden, "The Polarizing Effects of Congressional Primaries," in *Congressional Primaries and the Politics of Representation*, eds. Peter F. Galderisi, Marni Ezra, and Michael Lyons (Lanham: Rowman & Littlefield, 2001); Morris P. Fiorina and Matthew

From a policy standpoint, however, congressional primary-induced polarization carries little significance. Few, if any, reasonable politicians would propose abolishing the congressional primary election altogether. For all its supposed perniciousness, the primary election is infinitely preferable to voters when the alternative is candidate selection by cigar-chomping party officials in smoke-filled back rooms. Many practical-minded scholars have therefore focused on the effects of primary *design*, examining whether more "open" party primary designs with laxer voting eligibility requirements lead to more moderate candidates. Despite a relatively stable consensus regarding the proposed mechanism through which congressional primaries should induce polarization, there is significant disagreement between those who find that more "open" primaries produce significant moderation and those who do not.[2] Even those who find evidence for a link between openness and moderation disagree regarding its magnitude.

In this paper I attempt to answer the following question: do more "open" primary designs that allow independent voters (who have not registered with a party) to vote in party primaries produce less ideologically extreme elected legislators? That is, is there a significant difference in the ideological extremism of Congressmen elected via a closed primary and those elected by semi-closed and nonpartisan ones? In order to provide a conclusive response, however, I must first answer three preliminary questions: (1) Are primary voters more ideologically extreme than voters in the general electorate? (2) Are primary voters in states with closed primaries more ideologically extreme than those in states with semi-closed or nonpartisan primaries? and (3) Is a legislator's ideology responsive to the ideology of their primary constituency? If all answers are in the affirmative, I can continue to evaluate my original, overarching question, and interpret the results

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S. Levendusky, "Disconnected: The Political Class Versus the People," in *Red and Blue Nation? Vol. 1: Characteristics and Causes of America's Polarized Politics*, eds. Petro S. Nivola and David W. Brady (Washington, D.C.: Brookings Institution, 2006), 49-117; Morris P. Fiorina, Samuel J. Abrams, and Jeremy C. Pope, *Culture War?: the Myth of a Polarized America* (New York: Pearson Education, 2006); Hirano et al. "Primary Elections and Partisan Polarization in the U.S Congress," *Quarterly Journal of Political Science* 5, no. 2 (2010).

[2] Elizabeth R. Gerber and Rebecca Morton, "Primary Election Systems and Representation," *The Journal of Law, Economics, & Organization* 14, no. 2 (1998); Kristin Kanthak and Rebecca Morton, "The Effects of Electoral Rules on Congressional Primaries," in *Congressional Primaries and the Politics of Representation*, eds. Peter F. Galderisi, Marni Ezra, and Michael Lyons (Lanham: Rowman & Littlefield, 2001), 116-131; Karen M. Kaufmann, James G. Gimpel, and Adam H. Hoffman, "A Promise Fulfilled? Open Primaries and Representation," *The Journal of Politics* 65, no. 2 (2003); Eric McGhee and Daniel Krimm, *Open Primaries* (San Francisco, CA: Public Policy Institute of California, 2010); Eric McGhee et al., "A Primary Cause of Partisanship? Nomination Systems and Legislator Ideology," *Social Science Research Network* (20 Oct 2011); Nolan McCarty, "The Limits of Electoral and Legislative Reform in Addressing Polarization," *California Law Review* 99, no. 359 (2011).

accordingly. Additionally, I pose a hypothetical question: if primary type *does* affect legislator ideology, then how would electoral rule changes (institution of closed or semi-closed primaries) shift legislators' ideology, assuming *ceteris paribus*?

After a brief definition and overview of state primary rules, I begin with an evaluation of the theoretical mechanism through which congressional primaries, particularly closed primaries, cause ideological polarization. After reviewing several foundational works, I will explain the need for and propose the collection of new data.[3] I will proceed to describe my proposed hypotheses as derived from my research questions and to suggest several empirical tests. I summarize my previous research from "The Impact of Primary Election Systems on Legislator Ideology in the U.S. Congress," in which I show that primary voters were more ideologically extreme than non-primary voters in 2008, but that states with semi-closed and nonpartisan primaries did *not* produce less ideologically extreme ("polarized") legislators.[4] Finally, I conclude with a discussion of the significance of my findings and of issues relating to the theory of polarizing primary elections.

VARIATION IN STATE PRIMARY RULES

Significant variation exists among states regarding voter eligibility in either party's congressional primary. Many states hold closed primaries that bar members of the opposing party and, critically, independent and unaffiliated voters from voting in a party's primary election. Some utilize semi-closed (also known as semi-open) primaries that allow registered partisans *and* independents to vote in party primaries, but still bar members of the opposite party. Pure open elections, predictably, allow any registered voter to vote in the primary of their choice, regardless of party. Finally, two states currently utilize a nonpartisan blanket primary, in which all candidates for an office are listed on the same ballot. A runoff election between the top two vote-getters only occurs if no candidate receives a majority of votes in the first round of voting.[5]

A state-by-state analysis of these laws, including data from FairVote.org, various secretaries of state, and previous work by Eric McGhee and Kristin Kanthak and Rebecca Morton, reveals that state primary rules change relatively often.[6] Over the period of 1982-2006, McGhee documents that states have tended not to abandon or adopt open systems, but many have vacillated between closed

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[3] Brady, Han and Pope; Gerber and Morton; Kanthak and Morton; McGhee et al.; Shigeo Hirano et al, "Primary Elections and Partisan Polarization in the U.S Congress," *Quarterly Journal of Political Science* 5, no. 2 (2010): 169-91.

[4] Jonathan E. Fried, "The Impact of Primary Election Systems on Legislator Ideology in the U.S. Congress," Final research project, University of Pennsylvania, 2011.

[5] Kanthak and Morton.

[6] McGhee and Krimm; Kanthak and Morton.

and semi-closed designs. Moreover, California, Louisiana, Alaska, and Washington have all adopted a blanket primary at one point, although all but Louisiana were forced to abandon it for several years after the US Supreme Court's ruling in *California Democratic Party v. Jones* (2000). These variations provide ample opportunity for future panel analyses to isolate the effects of these primary changes.

THEORY

The case for the polarizing primary proceeds in several distinct steps and outlines how a politically active, ideologically extreme subset of voters exerts a disproportionately large influence on election outcomes relative to their size. Ultimately, this minority plays a large role in nominating candidates for general congressional elections, leaving a majority of generally moderate voters with unsatisfactory choices in general elections that skew toward the ideological fringes. Because the congressional primary (or caucus) is a critical chokepoint on the road to Capitol Hill, it allows these ideologically extreme primary voters to control the filtering of candidates into the general election.

First, far fewer citizens vote in primary elections than in general elections. In the study "Primary Elections and Candidate Ideology: Out of Step with the Primary Electorate?", David W. Brady, Hahrie Han, and Jeremy C. Pope found that, between 1956 and 1998, "general-election turnout [was], on average, approximately three times the size of primary-election turnout."[7] For the average and relatively politically apathetic voter, there are significant costs associated with attending *any* election: lost wages, transportation costs, and dull queues, to name just a few. Due to apathy, inability, or ignorance, few citizens choose to vote in most congressional primaries. Those who do, however, are a more dedicated bunch than the general electorate: unlike general election turnout, which drops significantly in off-presidential election years, primary turnout is generally stable across time.[8]

Moreover, primary voters tend to hold more extreme ideological positions (or, rather, those who have more extreme ideology tend to be more motivated to involve themselves in the political process to defend their beliefs).[9] Explains David C. King:

> Primary election voters are far more likely to be ideological purists, more likely to have contributed to a political party, more likely to have tried convincing someone how to vote, and more likely to be upper-middle class (Wolfinger and Rosenstone 1980; Neuman 1986; Rosenstone and Hansen

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[7] Brady, Han, and Pope.
[8] *Ibid.*
[9] Fiorina and Levendusky.

> 1993; McCann 1996)...as turnout in primary elections continues declining...primary elections [are continually] dominated by the preferences of party activists.[10]

This meshes well with general expectation. One should expect that those who care the most about policy outcomes are more likely to commit their time to voting in elections, and vice versa. Data from the 2008 Cooperative Congressional Elections Survey (Figure 1) confirm King's predictions. In 2008, Democrats who voted in a primary election or caucus were more liberal than those who did not; likewise, Republican primary and caucus voters were more conservative. Analysis on a 5-point ideological scale confirms the same trend. As predicted, partisan primary voters tend to be more ideologically extreme.

Faced with two ideologically distinct electorates, candidates face a strategic dilemma – which electorate should they cater to more? Empirical research from Han, Brady, and Pope demonstrates that congressional candidates tend to choose the primary electorate, an understandable choice given that a candidate must survive the primary election to even be considered by general election voters.[11]

Consequently, due to low voter turnout and a consistently strong showing of ideologically extreme voters, the congressional primary effectively over-represents a minority population of partisan voters. This gives them a "special influence" at a critical electoral juncture.[12]

In theory, closed primaries should only magnify the aforementioned effects. By blocking potentially motivated, moderate independent voters from participating, primaries that restrict voting rights to declared partisans create a more homogeneous pool of voters, skewed further to the extremes of the ideological spectrum. The median primary voter in a closed primary, therefore, should be more extreme than if the election were a semi-closed primary, all other things equal. Indeed, Elizabeth Gerber and Rebecca Morton affirm: "voter turnout in gubernatorial primaries from 1952 to 1982...is lower in closed primaries than in open primaries, even after controlling for other institutional and election specific factors that can affect turnout."[13] Kenney (1986) reports similar findings, noting that nonpartisan blanket primaries have particularly high turnout rates relative to closed primaries while confirming Jewell's results.[14]

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[10] David C. King, "Congress, Polarizaiton, and Fidelity to the Median Voter," (Manuscript, Harvard University John F. Kennedy School of Government, 2003), 13.
[11] Brady, Han, and Pope.
[12] V.O. Key, *Public Opinion and American Democracy* (New York: Knopf, 1964), 581; Brady, Han, and Pope, 91.
[13] Gerber and Morton, 312.
[14] Patrick J. Kenney, "Explaining Primary Turnout: The Senatorial Case," *Legislative Studies Quarterly* 11, no. 1 (1986): 65-73.

The data in Figure 1 provide extra support for this thesis by confirming that independent, nonpartisan voters do indeed tend to be ideological moderates, falling in the middle of Democrats and Republicans on the ideological spectrum. This indicates that disenfranchising moderates from primary elections could alienate a segment of moderate voters, thereby providing credence for the claim that closed primary electorates are more ideologically skewed. In this way, the closed congressional primary may significantly contribute to elite polarization in Congress, further augmenting the concentration of ideological extremists within the primary electorate.

OPENNESS AND MODERATION: A DEBATE

The existing literature on the connection between the openness of primaries and the moderation of elected officials, however, produces conflicting empirical results. The connection between the ideology of primary electorates and that of their districts' elected representatives is far from certain.[15]

Some have found clear, empirical support for the polarizing primary theory. Gerber and Morton find that semi-closed and nonpartisan primaries produce the most moderate legislators by regressing candidate Americans for Democratic Action (ADA) scores on primary type while controlling for district ideology using Democratic presidential vote shares.[16] Kanthak and Morton repeat this analysis and confirm its results.[17] Mandar P. Oak's research concurs via a "mathematical model of political competition," and both Michael R. Alvarez and Betsy Sinclair (2010) and Will Bullock and Joshua D. Clinton (2011) demonstrate that nonpartisan blanket primaries facilitate legislative agreement and more moderate representation.[18]

Although openness is said to cause moderation, this is generally not the case for pure open primaries. The generally accepted explanation is electoral raiding, in which strategic voters "cross over" to vote for weaker candidates in the opposing party's primary election.[19] When I include open primaries in my hypotheses, I therefore group them with closed primaries, as my theory predicts that both will be correlated with more ideologically extreme representation (albeit for different reasons).

More recent works, however, have challenged these claims and their underlying causal logic. McCarty, Poole, and Rosenthal (2006) find that winning candidates from states with closed primary elections tend to be *more* moderate than

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[15] Fried, 6.
[16] Gerber and Morton.
[17] Kanthak and Morton.
[18] Fried, 6.
[19] Gerber and Morton; Kanthak and Morton; Kenney, 8.

those from states with semi-closed primaries, not less. McCarty (2011), similarly, shows that there is no statistically significant effect of primary type on legislator ideology. Using perhaps the most comprehensive dataset yet in the literature, McGhee et al. (2011) report that openness has "little consistent effect on [state] legislator ideology" and that openness is, in fact, slightly correlated with ideological extremism rather than moderation.[20] Finally, Hirano et al. (2010) dispute even the more basic claim that direct primary elections cause polarization, showing that the introduction of direct primaries in seven US states did not cause significant ideological polarization.[21]

There now exist two clearly divided camps on the issue. The results of work from the past two years indicate that the tide is shifting toward the skeptics, but there remains more work to be done before a true consensus can be reached.

PURE OPEN PRIMARIES

Although openness is said to cause moderation, this does not seem to be the case for pure open primaries. The generally accepted explanation is electoral raiding, in which strategic voters "cross over" to vote for weaker candidates in the opposing party's primary election.[22] The mechanism, however, flies in the face of empirical work that demonstrates raiding is very rare, due to the difficulty of coordinating voting tactics *en masse.*[23] Nevertheless, I exclude open primaries from my hypotheses because of the previously observed effects, regardless of what the cause might be.

PROPOSAL: GATHERING COMPREHENSIVE PANEL DATA

A comprehensive study of how the openness of primary elections impacts mass and elite ideology must include reliable ideological indicators. For elites, DW-Nominate scores are quite sufficient, but mass-level ideology is more elusive. Some scholars use presidential vote shares as a measure of district ideology, which risks conflating the choices available to a voter with her ideal, but nevertheless absent, choice.[24] Furthermore, as King (2003) points out, relatively centrist districts often

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[20] McGhee, 17.
[21] Kenney, 7.
[22] Gerber and Morton; Kanthak and Morton.
[23] Michael R. Alvarez and Jonathan Nagler, "Party System Compactness: Measurement and Consequences," *Political Analysis* 12, no. 1 (2002): 46-62 ; John Sides, Jack Citrin, and Jonathan Cohen, "The Causes and Consequences of Crossover Voting in the 1998 California Election," in *Voting at the Political Faultline : California Experiment with the Blanket Primary* eds. Bruce E. Cain and Elizabeth R. Gerber (Berkeley, CA: University of California, 2002).
[24] Gerber and Morton; Kanthak and Morton; McGhee; McGhee et al.; Fiorina et al.

vacillate between electing ideologically extreme Democrats and Republicans due to surges of activity from committed partisan primary voters. Thus, accurate analyses must control for the ideology of district primary voters as well as that of the general electorate. Others introduce sampling bias by using primary election exit polls, which exclude less sorted nonvoters, thereby "exaggerat[ing] the level of polarization in the American public."[25] Previous works, therefore, do not always utilize accurate ideological control variables; future studies should include reliable indicators for *primary* electorate ideology as well as general district ideology.

Although self-reported ideology may not always accurately reflect political behavior, I prefer to use randomly sampled survey data to measure district ideology. With a small enough ideological scale, like the 5-point one in the Cooperative Congressional Election Survey (CCES), respondents have enough leeway to sort themselves fairly accurately into broad categories. Using survey data also allows for the incorporation of more accurate demographic control variables into analyses such as race, income, education, and political knowledge. Most importantly, it suffers from neither sampling bias nor inaccurate extrapolations of ideal voter choice and allows for the separation of primary voters from the general sample.

However, there currently exists a general dearth of comprehensive, readily available survey data that include a variable indicating whether a respondent voted in a primary or caucus. The CCES adopted this variable in 2008, but it suffers from sampling bias: for 2008, some 64 percent of respondents reported voting in a primary or caucus, which far exceeds average primary election turnout and even general presidential election turnout.[26] To my knowledge, the only other comprehensive, nationwide survey to include a primary vote variable was the 1988 American National Election Study (ANES). In order to provide accurate indicators of primary voter ideology, future surveys should include a question distinguishing primary voters from non-primary voters and work to ensure a more representative random sample.

Furthermore, future studies must work to correct inconsistencies in indicators of legislator ideology. Although most recent studies have utilized DW-Nominate scores, previous authors such as Gerber and Morton (1998) and Kanthak and Morton (2001) used ADA scores. No one measure corresponds to a particular conclusion: while the previous two papers find a significant connection between primary elections and legislator ideology, so too did Brady, Han, and Pope (2007), who used DW-Nominate scores. Nevertheless, I propose that all

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[25] Hirano et al.; Markus Prior, *Post-Broadcast Democracy: How Media Choice Increases Inequality in Political Involvement and Polarizes Elections* (New York: Cambridge University Press, 2007).
[26] Brady, Han, and Pope; Fried.

regressions be performed using both DW-Nominate *and* ADA scores to ensure consistency.

Finally, historical records of state congressional primary laws are sparse and scattered; I was unable to find a single comprehensive listing of state primary laws over time. Although much data is available, most of it exists only for single years for single states. In the literature, only McGhee (2010) reports such a list, which extends from 1982 to 2006; however, some of his findings conflict with state records.[27] Some researchers, like Brady, Han, and Pope (2007), have undertaken the arduous task of collecting and aggregating this data, but I was unable to find a researcher who made their dataset publicly available.

In order to conduct further study using panel data, I therefore propose the following: (1) the regular incorporation of a question asking respondents whether they voted in a primary election or caucus in the CCES and ANES for all future years; and (2) the collection of a comprehensive list of state congressional primary laws for all even-numbered years since World War II. This data will enable time-series regressions which measure the effect of changing state primary laws over time on legislator DW-Nominate and ADA scores as well as the ability to control for district ideology in future years. Of course, this will also generally account for more variance in the data by increasing the sample size of analyses going forward.

My proposed analysis, therefore, will use a compilation of DW-Nominate scores from Howard Rosenthal and Keith Poole's Voteview.com alongside ADA scores from Adaction.org to measure legislator ideology. To examine and control for district ideology, I will utilize all available survey data that establishes the distinction between primary voters and non-primary voters. I will also include district Democratic presidential vote shares as a separate indicator to account for any discrepancies between the two available measures. Finally, I will analyze this data in light of the aforementioned comprehensive list of state primary laws over time.

2008 Cross-Sectional Analysis

In "The Impact of Primary Election Systems of Legislator Ideology in the U.S. Congress," I undertake the first analysis of the link between openness of congressional primaries and legislator ideology that controls for voter ideology at the individual level.[28] I constructed a list of 2008 state primary laws by cross-referencing data from Fairvote.org, McGhee (2010), and various secretaries of state, and compared it to DW-Nominate data from Voteview.com. For data on mass ideology, I utilized the 2008 Cooperative Congressional Election Study. Due to the

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[27] Fried.
[28] *Ibid.*

limited nature of available survey data, my analysis is restricted to data from 2008, which corresponds to the 111th Congress. Although the explanatory power of my analysis is somewhat limited by its cross-sectional nature, the general conclusions are nevertheless valid.

My results are similar to those of Hirano et al. (2010) and McGhee et al. (2011) in that they fail to produce convincing support for the polarizing nature of closed primaries.[29] Although I do confirm that partisan primary voters tend to be more ideologically extreme and that independents are, on average, moderates, I lack "statistically significant results that show that closed primaries produce more polarized legislators than semi-closed primaries."[30] Contrary to expectations, I find that closed primaries are correlated with the election of slightly more *moderate* Republican legislators, with no statistically significant effect on Democrats. I also interpret the results of a later regression to mean that legislator ideology is strongly correlated with general district ideology, but very weakly with the ideology of primary voters.[31]

Although my inclusion of a measure of primary electorate ideology bolsters the accuracy of my results relative to other previous works, the fact remains that an analysis of data from only a single year is far from the comprehensive time-series analysis necessary to construct more solid conclusions. Moving forward with my proposal to gather and analyze comprehensive panel data will bring clarity and confirmation both to my results and to those of previous authors.

DISCUSSION

From a purely theoretical standpoint, permitting independents to vote in primary elections should, at a bare minimum, lead to more moderate congressional nominees, if not outright election winners. Moderate independents should, in theory, pull the median primary voter away from extremes, resulting in more moderate winners of primary elections. As long as candidates remain responsive to the will of the voter and satisfy their "strategic dilemma" by shifting toward the primary electorate, then semi-closed and nonpartisan primaries should be associated with more moderate primary constituencies and more moderate elected officials.[32]

Real-world observation, however, illuminates significant gaps and potentially faulty assumptions in this theory. My results indicate that legislator ideology may, in fact, be more closely correlated with the ideology of the average voter, rather than

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[29] *Ibid.*
[30] Ibid, 12.
[31] *Ibid.*
[32] As Han and Pope (2007) predict.

with that of the average primary voter, as previous research has predicted.[33] Without this critical linkage, primary laws may not have much of an effect. Still, intuitively, this makes little sense. There is a large body of research that indicates that primaries matter quite a lot when determining the choices available to the average voter, and that primary voters are significantly more ideologically extreme than the median voter (my own research included). What, then, might disrupt this apparently intuitive causal chain?

One possibility is the influence of party infrastructure. Money plays a large role in modern campaigns, and to gain access to party resources, candidates will often need to adopt the polarized party line.[34] Absent significant campaign finance reform, the resource advantage afforded to party-preferred candidates may overcome any possible effects of primary rules on legislator ideology.

Perhaps it is presumptuous to assume that independent voters will vote in primary elections simply because they can. After all, as previously mentioned, polarized partisans tend to comprise the bulk of primary voters because they are simply more politically committed. "If you let them, they will come" may be a catchy concept, but not necessarily a practical one. By their nature, moderate independents might not be motivated enough to make a real difference in primary elections. Indeed, McCarty (2011) shows that turnout is virtually identical in states with open and closed primaries.

Finally, the same logic may apply to potential congressional candidates. Even if primary electorates become more moderate, the emergence of more moderate candidates is far from guaranteed. Like primary voters, today's congressional candidates tend to be more policy-focused and ideologically inflexible than the career politicians that used to dominate the United States political landscape. Existing candidates, moreover, might not shift their behavior to better reflect the ideology of the primary electorate. The theory of the polarizing primary assumes that candidates will shift their behavior toward the middle to account for more moderate electorates, and perhaps unfairly so. Candidates are often stubborn in their beliefs, and they sometimes do not have complete or accurate information regarding the preferences of their primary constituency.

Why did earlier works find that closed primaries produced more polarized legislators, while more recent ones have not? It is difficult to say. Different methodologies may produce different results, different years may reflect different trends, and different biases may lead to different interpretations. The best way to

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[33] Fried, 28, 31.

[34] Eric Heberling, Marc Hetherington, and Bruce Larson, "The Price of Leadership: Campaign Money and the Polarization of Congressional Parties," *The Journal of Politics* 68 (2006): 992-1005; Kathleen Bawn et al, "A Theory of Political Parties," (paper presented at the Annual Meeting of the American Political Science Association, Philadelphia, Pennsylvania, 2006).

resolve this discrepancy, I think, is to use the most comprehensive datasets possible, and to account for different indicators of ideology. Indeed, my proposed analysis strives to construct one of the most comprehensive datasets yet in the literature, accounting for differences (such as between DW-Nominate and ADA scores) and misconceptions (such as the belief that proxies for district ideology are acceptable substitutes for measures of primary electorate ideology) in previous works.

Eventually, an answer may emerge. If recent works are indicative of a forthcoming scholarly consensus, however, then policymakers may need to look to avenues other than primary election reform to find ways to reduce the widening ideological divide in Congress.

A Denial of Hope:
Age as a Mitigating Factor in Juvenile Life Without Parole Sentencing

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The Supreme Court appeals of the Jackson and Miller cases rightly question the failure to assess juvenile culpability in life without parole sentences. Those 14 years of age and younger are developmentally different in a way that mitigates culpability, which should have precedence over the severity of the crime. The characteristics of adolescence shape culpability and therefore should shape criminal sentencing practices. The question Jackson and Miller present is whether or not the maturity of a juvenile affects their culpability and the LWOP sentence is indeed disproportionate, cruel, and unusual punishment. To answer this question, a brief history of LWOP will be discussed as well as the decisions of Roper and Graham. The concept of age as a mitigating factor must then be scrutinized; this means determining a juvenile's maturity, neurological development, and how these factors affect the criminal act. This leads to a discussion of proportionality and the goal of rehabilitation in juvenile justice. Ultimately, the age of juvenile offenders should be considered as a categorical mitigating factor in sentencing and therefore juvenile LWOP sentencing should be found to be disproportionate.

Introduction

Kuntrell Jackson and Evan Miller are currently serving life without parole sentences in Arkansas and Alabama, respectively. Jackson was convicted of capital murder and aggravated robbery in 1999; he was party to an attempted robbery wherein another man shot the store clerk (Associated Press). Miller was convicted of capital murder in the course of arson in 2003; he and his friend beat a man to death and set fire to his home after all three had been smoking marijuana and drinking (Liptak). These two men were both 14 years old when convicted and will have their sentences evaluated by the United States Supreme Court next year. *Evan Miller v. Alabama* and *Kuntrell Jackson v. Ray Hobbs* represent the follow up cases to the Supreme Court's ruling in *Graham v. Florida*, which found juveniles convicted of non-homicide offenses could not be sentenced to life without parole (hereinafter LWOP). Justice Kennedy wrote the *Graham* majority opinion, finding teens to be "immature, impulsive, susceptible to peer pressure and able to change for the better over time" (Liptak and Petak). The question remains, however, if this ruling's reasoning applies to the case of juvenile homicide cases such as Miller and Jackson.

73 cases of LWOP sentences for 13 and 14 year olds have been recorded in just 19 states, and a total of 2,589 people are serving LWOP from a juvenile conviction (EJI, 3). Bryan Stevenson, Miller and Jackson's lawyer and director of EJI, believes that the analysis of the *Graham* and *Sullivan* cases, "logically compels the conclusion that consigning a 14-year-old to die in prison through a life-without-parole sentence categorically violates the Eighth and Fourteenth Amendments" (Associated Press).

Despite the *Graham* decision, the current rulings in *Jackson* and *Miller* demonstrate the judiciary's refusal to consider age as a factor in sentencing. The Arkansas Court in *Jackson* concluded that sentencing was a matter of statute and the court deferred to the legislature (*Jackson v. Hobbs*, 3). The court then analyzed Jackson's culpability by pointing to the *Graham* decision: "The Court in *Graham* employed a categorical analysis ... however, the Court limited its ban to non-homicide crimes" (5). The court reasons that the LWOP sentence, being "the penultimate punishment under Arkansas law," should be considered lenient for a conviction of the worst capital offense. The Alabama Court also differentiates *Miller* from *Graham* as a homicide offender, finding that "life in prison without the possibility of parole for capital murder is not categorically disproportionate." (*Miller v. Alabama*, 24). The "twice diminished moral culpability" in *Graham* was not found for either Jackson or Miller because the courts only looked to the first area of crime severity and did not look to the second, age as a mitigating factor in culpability. Justice Danielson's dissent in *Jackson*'s case articulates this concern in that the lower court that sentenced Jackson "could not consider the defendant's age or any other mitigating circumstances—the circuit court only had jurisdiction to sentence *Jackson* to life imprisonment without the possibility of parole" because of the mandatory sentencing guidelines (*Jackson v. Hobbs*, 10). The precedent stands that courts focus on the gravity of the crime when assessing non-capital sentences, but this "precludes consideration of adolescents' diminished responsibility when they commit serious crimes" (Feld, 9). The double-edged sword of mandatory LWOP sentencing and a refusal to assess age in appeals courts has meant that any attempts to assess age as a mitigating factor have failed. This failure has resulted in the current population of inmates serving LWOP sentences for juvenile convictions.

The upcoming appeals rightly question this failure to assess culpability. Those 14 years of age and younger are developmentally different in a way that mitigates culpability, which should have precedence over the severity of the crime. The characteristics of adolescence shape culpability and therefore should shape the sentence for a criminal act. A parroting of the *Graham* decision's non-homicide LWOP ruling does not do justice to the current knowledge of adolescent development nor give justice to those sentenced as juveniles. The State has relied on a "*Graham v. Florida* controls precedence – you lose" mentality and has not made arguments against using age as a mitigating factor (Susskind). The Supreme Court should address the idea of mitigated culpability in the upcoming cases. Therefore,

the question *Jackson* and *Miller* present is whether or not the maturity of a juvenile affects their culpability and whether the LWOP sentence is indeed disproportionate, cruel, and unusual punishment. If we consider adolescence as a mitigating factor in a juvenile's culpability, this factor would apply to all individuals under 18. To answer these questions, a brief history of LWOP will be discussed as well as the decisions of *Roper v. Simmons* and *Graham v. Florida*. The concept of age as a mitigating factor must then be scrutinized, including juvenile's maturity, neurological development, and how these factors affect the criminal act. This investigation leads to a discussion of proportionality and the goal of rehabilitation in juvenile justice. Ultimately, the age of juvenile offenders should be considered as a categorical mitigating factor in sentencing and therefore juvenile LWOP sentencing should be found to be disproportionate. Additionally, the characteristics of adolescents that mitigate criminal culpability make LWOP's denial of rehabilitation a doubly disproportionate punishment for juveniles' diminished culpability.

In a discussion of juvenile LWOP and juvenile sentencing practices, issues of international standards, due process concerns, and personal stories come into the picture. Despite the validity and pressing nature of these concerns, I will focus on the issues of adolescent development and sentencing procedure because of the emphasis these issues received in the *Graham* and *Roper* decisions. The Court has given the most weight to these arguments and I also find them most relevant to the issue at hand. Determining the severity of a homicide offense will also not be discussed. Homicide is clearly a serious offense, but the failure of the previous LWOP rulings is the assessment of age as it affects culpability and not the assessment of the offense.

LWOP SENTENCING: *ROPER V. SIMMONS* AND *GRAHAM V. FLORIDA*

The 1990s saw a "perfect storm" of youth crime and gang violence that made politicians and communities across the U.S. get "tough" on juvenile offenders. A mandatory-sentencing approach to crime was one result of this deluge (Cain). Surprisingly, before the 1970s virtually no states imposed LWOP sentences on any criminals and used indeterminate sentencing practices (Feld, 53). The current use of juvenile LWOP, therefore, is neither longstanding nor part of overall trends in adult sentencing practices. Changes in the juvenile justice system in the 1990s also made it easier to try some juveniles as adults. Processes such as prosecutorial direct file and age-based mandatory adult trials meant that judges lost discretion in trying juveniles as youth or adult offenders. Despite recent arrest and victimization data that illustrate a decrease in juvenile crime rates, the legislation of the 1990s remains intact (Elrod, 402). The politics of juvenile justice from the 1990s has been difficult to dismantle: "Being hard on serious delinquents is a popular stand, and one that is hard to oppose" (237). The storm of crime and

policy at the turn of the century has left many states with mandatory LWOP sentences for some crimes and increased rates of trying juvenile offenders as adults.

The current data on juvenile LWOP stands in stark contrast to the pre-1990s when the sentence was rarely if ever applied. 2,589 inmates in the United States are serving LWOP who at the time of their conviction were juveniles and a shocking 59 percent were sentenced to LWOP for their first offense with no prior juvenile or adult record (Parker). 16 percent of the current inmates were between the ages of thirteen and fifteen when they committed their crimes, and 26 percent were sentenced under a felony murder charge where they did not pull the trigger or carry the weapon (De la Vega & Leighton, 4). Surprisingly, the majority of LWOP sentences come from only four states: Florida (273), Louisiana (317), Michigan (306), and Pennsylvania (332). In most other states where LWOP is an available sentence, it is rarely imposed (Adepoju, 7). Nonetheless, the number of juveniles serving LWOP is striking, especially in comparison to the majority of countries across the globe that bans the sentencing of juveniles altogether.

This "get tough" mentality has furthermore created a "juvenile penalty," as evidenced by trends in youths often receiving more severe treatment than adults convicted of the same crime. A study of Pennsylvania courts compared the sentencing outcomes of juveniles and young adult offenders; it found that legal variables like offense seriousness and prior record played a smaller role in juvenile sentencing outcome compared to those of young adults (Kurlycheck & Johnson). Age can be used as an aggravating factor in sentencing as much as it can be used to treat juveniles more leniently; "juries or hearing officers are convinced by prosecutors that if a youth has committed a serious offense as a juvenile, he or she will likely be even more dangerous in the future" (Elrod, 229). This logic fatally concludes that a juvenile is irredeemable from the outset of a conviction (Levick, 4). This environment in juvenile justice may not have a singular cause, but the results of sentencing practices undeniably demonstrate a harsher treatment of juveniles. A Department of Justice Study found that in the 1990s, of all homicide cases nationally, parents who killed their children were treated most leniently while teenagers who killed their parents were treated most harshly (Mones). National sentencing practices reflect a systemic imbalance in the treatments of juveniles that does not assess age as a mitigating factor in culpability and, moreover, often penalizes juveniles more harshly than their adult counterparts.

Another factor in the increase of juvenile LWOP sentences has been the increased use of direct file, or the choice to try a juvenile as an adult without a pretrial assessment. While some states have a "fitness hearing" option to assess the crime and juvenile's amenability to rehabilitation, 15 states allow prosecutors to directly file to adult court any judicial oversight. With certain criminal accusations, 29 states mandate a transfer to adult court ("Human Rights Watch," 18). One such state is California. Under California Law, certain criminal convictions are presumed

by law to result in life without parole sentence, such as kidnapping for ransom or extortion with violence and murder with special circumstances. The 1994 California Court of Appeals case *People v. Guinn* found that sentences with parole were the exception, not the rule. The court found that, "Life without parole is the presumptive punishment for 16- or 17-year old[s]...and the court's discretion is concomitantly circumscribed to that extent" (*People v. Guinn*, 1141). By removing judicial discretion from the juvenile sentencing process, the interests of the defendant are deafened. Whereas a judge is a neutral party between the victim and defendant, the prosecutor is present to advocate for the victim's rights. Some members of Congress recognized this systemic imbalance in H.R. 2289, The Juvenile Justice Accountability and Improvement Act of 2009. While the bill failed, it sought to "return discretion to judges and the parole boards to decide what is in the best interest of public safety" (ACLU). "The pernicious triangle" of prosecutorial direct file, mandatory LWOP sentencing, and felony murder rules prevents the court from assessing a juvenile as a juvenile or considering age as a factor in culpability (Dvorchak). Through direct filing and mandatory sentencing, the identity of juveniles is lost.

Recent court decisions call for a reassessment of juvenile LWOP in all cases, not just non-homicide offenses. Both *Roper* and *Graham* reassessed juvenile punishments on the basis of age as a mitigating factor. In *Roper*, the court decided on three main factors that make age a valid basis of determining diminished culpability: immaturity, vulnerability, and changeability. These three factors added up to not only diminished culpability, but also enhanced rehabilitation prospects (APA). This reasoning was the basis for striking down the juvenile death penalty. In *Graham*, the same Court extended the logic of developmental characteristics as mitigating culpability to strike down LWOP for non-homicide offenders. Not only did the Court consider age a mitigating factor, but the age of the offender also made a life sentence a final judgment on a youth's capability for rehabilitation and adulthood. The Court ruled that "a life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity. Incapacitation cannot override all other considerations" (*Graham*, 22). The *Graham* Court also "was unequivocal in its insistence that irrevocable judgments about the character of juvenile offenders are impermissible under the Constitution" as well as firm in a juvenile's reduced blameworthiness and inherently impaired judgment (Levick, 4). The Court has repeatedly accorded juveniles distinct treatment in criminal matters and attacked a "doctrinal approach" to sentencing juveniles as adults in the criminal justice system (2). These decisions have paved the way for considering age as a mitigating factor in all juvenile LWOP sentences on the basis of age and developmental characteristics.

No national consensus has developed concerning juvenile LWOP, but the crime memes of the 20th century have given way to a public that supports

rehabilitation. A 2011 national survey found the following: 78 percent want the focus of juvenile justice to be on prevention and rehabilitation, rather than incarceration and punishment, 81 percent trust judges versus prosecutors to determine trying a juvenile as an adult, and nearly two-thirds favor setting a minimum age for juveniles to be prosecuted as adults (GBA Strategies, 1). While the survey only polled 1,000 individuals nationally, it is the most recent and one of the few surveys conducted on the issue of juvenile justice. The results cannot be reliably generalized, but the results contradict the prevalence of LWOP sentencing: the focus of LWOP is incarceration and punishment, prosecutors and statues govern sentencing, and there is no minimum age for juveniles to be prosecuted as adults. Current public opinion and the atmosphere of juvenile justice make the assessment of juvenile LWOP sentences both pressing and necessary. Many victim's rights advocates and policy groups continue to support the sentence, but given the precedence of *Graham* and *Roper* combined with public opinion, LWOP must be assessed on the basis of age and culpability, whatever the outcome. Juvenile justice has lost sight of the identity of juvenile offenders and in order to reaffirm this difference, an assessment of the characteristics of adolescence is necessary.

Age as a Categorical Mitigating Factor

The consideration of age while sentencing juvenile offenders should occur during the assessment of mitigating factors. Mitigating factors play an important role in the law's analysis of blame and punishment, and they recognize the different circumstances of crimes without excusing culpability (MacArthur Foundation). The traditional model of mitigation for young offenders excuses criminal responsibility, and the contemporary model holds juveniles fully responsible for crimes; however, mitigation must be viewed as a spectrum rather than two extremes. Juvenile justice should be grounded in an assessment of mitigation because "it corresponds to the developmental reality of adolescence" (Scott & Steinberg 2008, 122). Three categories of mitigating factors affect criminal culpability: first, diminished decision-making capacity, second, extraordinary circumstances, and third, evidence that the criminal act was out of character for the actor and not a product of bad character (Scott & Steinberg 2011, 1010). Ultimately, these factors are meant to make sentencing proportional, or have the punishment fit the crime. The lower courts in *Jackson* and *Miller* did not assess age and therefore failed to complete the analysis of culpability required by law.

The Supreme Court has already identified juvenile offenders as a different class of offender in respect to culpability. The *Roper* decision identified the "Three general differences between juveniles under 18 and adults" to be "comparative immaturity and irresponsibility of juveniles ... juveniles are more vulnerable or

susceptible to negative influences and outside pressures ... and that the character of a juvenile is not as well formed as that of an adult" (15). The Supreme Court's decision lays out how the age status of juvenile offenders affects all three types of mitigating factors. Beyond the courtroom, the law recognizes that children do not have the full capacity to engage in all decisions, such as voting, marriage, contractual agreements, medical consent, drinking, and other privileges. Juvenile LWOP sentences defy both judicial and common logic. When statues are enacted for adults yet applied wholesale to kids without exception, "we have irrationally placed a system designed for someone else onto a kid, like placing helmet of a NFL player onto a kindergartener for touch football" (Dvorchak). It is because juveniles have different decision-making abilities than adults that LWOP sentences must be considered on the basis of age.

Neurological research supports the claim that the adolescent mind is developmentally different than that of an adult. Adolescence is considered a transitional period both biologically and emotionally. It is marked "by rapid and dramatic [individual] change in the realms of biology, cognition, emotion, and intrapersonal relationships" (Cicchetti, Dante and Cohen, Donald, 710). The most dramatic difference between adolescents and adults is the frontal lobe of the brain where cognitive processing occurs. These functions include planning, strategizing, and organizing thoughts and actions. More specifically, these functions occur in the dorsolateral prefrontal cortex, which is "among the latest brain regions to mature, not reading adult dimensions until a person is in his or her twenties" ("Human Rights Watch," 45). The result is a lesser ability to weigh consequences and resist outside pressures. While intellectual abilities may stop maturing around age 16, psychosocial capabilities continue to develop well into early adulthood. The lack of consequential thinking is also paired with heightened impulsivity and greater risk-taking (MacArthur Foundation). Scientific research indicates that adolescents think differently than adults, a finding grounded in both psychological and biological evidence.

Impaired decision-making capacity in adolescents arises from emotion and impulse based reasoning rather than long term, consequential thinking. The Supreme Court has cited numerous psychological studies to support that "children possess an underdeveloped sense of responsibility; they are in less control of their environment; and such characteristics are transient and will fade with age" (ACLU). The first major study of juvenile competence, performed by the MacArthur Foundation, found that a significant proportion of adolescents age 15 and younger are at the level of adults who have been deemed incompetent to stand trial because of serious mental illness. It is important to note that the argument is not that juveniles do not know the difference between right and wrong, but that their reasoning lacks consequential and risk-averse thinking. While laboratory studies have found adolescents have a capacity of risk perception close to that of adults,

these abilities are diminished in social contexts (Scott & Steinberg 2008, 131). Age does not remove culpability, but "typical adolescents are less culpable than are adults because adolescent criminal conduct is driven by transitory influences that are constitutive of this developmental stage" (Scott & Steinberg 2011, 1011). One way that this diminished decision-making capacity is observable is in the increased influence of peers on an adolescent. The MacArthur Foundation conducted a study that found "youths' desire for peer approval, or their fear of rejection, may lead them to do things they might not otherwise do." The study's juvenile reports of vulnerability to peer pressure declined over the course of adolescence into young adulthood. These characteristics are normative, or "typical of adolescence as a period and developmental in nature" (Scott & Steinberg 2008, 133). The developing nature of an adolescent's mental faculties and identity applies to this class of offenders and therefore should be considered in the assessment of culpability.

These characteristics uniquely affect decision-making capabilities during the period of adolescence, suggesting that a permanent decision about a juvenile's criminal nature is unfounded. The *Roper* decision concluded that due to the nature of adolescence, "from a moral standpoint, it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed" (*Roper*, 16). The fleeting nature of risky and illegal behavior in adolescents tends to be a marker of this transitional period and not a marker of character (Scott & Steinberg 2011, 1014). Steinberg agreed when interviewed that LWOP sentences ignore the unsettled nature of problem behavior and lack of hardened criminal patterns in adolescents, a key argument presented by the American Psychological Association in its Amicus Brief for *Graham*. The EJI also argues that this emotional instability and vulnerability to pressure mitigates culpability because of the lack of "the adult ability to resist impulses and risk-taking behavior or the adult capacity to control their emotions" (EJI, 7). The greatest divergence between youth and adult perception and risk preference occurs in mid-adolescence—the same time when youths' criminal activity increases (Feld, 37). The characteristics that diminish adolescent decision-making are manifested in this increased crime and risk-taking, but most importantly, are characteristics that define this developmental period and decrease with maturity. Any sentence that determines a juvenile not to be amenable to rehabilitation or a hardened criminal ignores the science of human development.

As both neurological research and social science have found, all adolescents demonstrate these developmental deficits. Even if the courts were to allow for individualized assessments of culpability in the case of juvenile offenders, there is a chance that age would not be adequately addressed. A categorical approach to age as a mitigating factor, however, would recognize the fact of impaired decision-making capability in the entire juvenile population. Researchers Scott and Steinberg

conclude that "despite a lack of definitive developmental research, until we have better and more conclusive data, it would be prudent to err on the side of caution, especially when life and death decisions are concerned" (Scott & Steinberg 2011, 2017). Given our current knowledge of adolescent development, the characteristics that define adolescence are reliable and follow a predictable course to maturity (MacArthur Foundation). Juvenile offenders share these characteristics that make age a necessary mitigating factor when assessing culpability. The "Immaturity Gap" of decision-making between adolescents and adults represents a "sharp cleavage" between mental maturity levels that provides a basis for reduced culpability (Feld, 32). The transient nature of these characteristics not only means that the crime is less likely to define their adulthood, but that "final, irrevocable judgment" that an LWOP sentence makes on a child ignores the fact that "it is impossible to conclude that they are incorrigible, or that even the most heinous act represents who they are" (Calvin). A categorical approach to making age a mitigating factor would refocus juvenile punishment to have rehabilitation as the central aim in the case of LWOP rather than sentencing juveniles as if their culpability was the same as that of adults.

Proportional Punishment and Rehabilitation

An acknowledgement of age as a categorical mitigating factor not only recognizes our scientific and social understanding of adolescence, but it is also necessary to balance the interests specific to juvenile justice. A juvenile's sentence must weigh many factors, such as: suffering of victim and victim's family, maintenance of public confidence in the rule of law, recognition of the state's responsibility to protect children and ensure their development, reflection on the facts of the case, the individualized circumstances of an offender, and recommendations of prosecution and defense counsel (Corriero, 54). Sentencing a juvenile as an adult means that the state's responsibility to protect children is not factored into punishment, most prominently demonstrated in LWOP sentences. Juvenile LWOP sentences "do not take into account the lessened culpability of juvenile offenders, their ineptness at navigating the criminal justice system, or their potential for rehabilitation and reintegration into society" (De la Vega & Leighton, 10). When age of the juvenile offender is not found relevant to the sentencing process, the system is blind to the impaired decision making capacities of this age group. The result of this miscalculation is an inhumane punishment, both cruel and unusual. *Graham* recognized the sentencing of a juvenile creates special proportionality concerns. Proportionality "holds that criminal punishment should be measured by two criteria: the harm a person causes and her blameworthiness in causing that harm" (Scott & Steinberg 2008, 123). The Court in *Graham* and *Roper* relied on the age status of the offender, in reference to his or her culpability, to

assess the nature of the sentence: "When a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity" (*Roper v. Simmons*, 20). *Jackson* and *Miller* question whether or not juvenile LWOP extinguishes life and the potential to attain a mature understanding of one's own humanity.

LWOP denies the possibility of rehabilitation, and it therefore should be found disproportionate for juvenile offenders. A sentence with no hope of parole denies the capacity for rehabilitation before any assessment of that capacity has occurred. LWOP sentences do not consider the characteristics of adolescents and therefore "constitute an impermissible and unconstitutional punishment for juveniles because the special characteristics juveniles inherently have for reform, as recognized in *Roper*" (Adepoju, 4). LWOP is a "denial of hope," as the Nevada Supreme Court ruled in the case of a 13-year old defendant in *Naovarath* v. *State (1989).* Life in prison means that rehabilitation is not a goal of the sentence. A condemnation for life ignores the unsettled nature of the juvenile's identity and maturity. To not apply this analysis of juvenile culpability during the sentencing process doubly punishes an offender because the dual component of immaturity and underdevelopment: the characteristics of adolescence require a dual application to culpability and to the amenability to treatment (Dvorchak). The very factors that diminish culpability improve chances of rehabilitation. A mandatory LWOP sentence or a juvenile sentenced as an adult will not address either of these factors.

The first disproportionate impact of LWOP sentences is that adolescents lack a hardened criminal character. The Court has clearly recognized that, "because a child's character is not yet fully formed, he will change and reform as he grows up" (EJI, 7). The third type of mitigating factor in criminal punishment speaks to this specific characteristic of culpability: "evidence that the criminal act was out of character for the actor and that, unlike the typical criminal act, his or her crime was not the product of bad character" (Scott & Steinberg 2011, 1010). Sentencing a juvenile to LWOP wholly ignores that a juvenile cannot have an established criminal character that would warrant life-long incarceration. A life sentence best serves the goal of incapacitating a criminal, but the odds of a juvenile offender committing another serious crime is quite low, so much so one should question the benefit of incapacitation if there is no clear sense that the juvenile would be committing crimes if not incarcerated (Fagan). To equate the culpability of a juvenile to that of an adult is ignorant of the characteristics of adolescents. The *Roper* court stressed the capacity of an adolescent to change and grow, highlight "the incongruity of imposing a final and irrevocable penalty" in a way that would extinguish the juvenile's potential to mature (Levick, 2). The ADJJ Network has sought to study the juvenile justice system, and while its studies are incomplete, the

level of variability among serious offenders meant that the likelihood of future offense couldn't be predicted (MacArthur Foundation). EJI's research has found that a remarkable number of their clients have transformed themselves in prison, most settling down in their mid-20s to become model prisoners. LWOP makes a decision "that you will never change and even if you did it wouldn't matter" (Susskind). Adolescents are not fully formed and developed; a sentence that does not recognize this fact, as does LWOP, is disproportionate to the culpability of a juvenile offender.

The characteristics that make juvenile offenders less culpable also make the offender amenable to rehabilitation. The mind of the juvenile, not fully formed, is in a position of reform. The juvenile is in mental, emotional, and biological flux. LWOP sentences wrongly ignore possibility of rehabilitation during the adolescent process of maturing. When asked about the ability of juvenile's to be successful in rehabilitative measures, Dr. Laurence Steinberg stated, "Surprisingly, this hasn't been studied. It is widely believed that the younger one is, the more amenable to treatment he or she is likely to be." While no hard evidence may support a greater capacity for rehabilitation in the adolescent period, a LWOP sentence that has no goal of rehabilitation denies the capacity for reform doubly: first when the juvenile is deemed unable to reform and second when the sentence itself denies successful reform. By denying a juvenile offender rehabilitative measures during the period of life in which those measures are most likely to succeed, LWOP constitutes cruel and unusual punishment.

In practice, LWOP sentences create barriers to the rehabilitation programs by denying juveniles opportunity of rehabilitation and failing the state's goal to consider the best interest of the child. The only way that a disparity of sentence length can be justified is "if the term of incarceration of the juvenile is for treatment, not punishment" (Elrod, 346). But on a basic level, rehabilitation will be undermined by a lack of motivate to improve with no hope of release (De la Vega & Leighton, 2). There is no incentive to behave appropriately or to improve because there is no worse sentence; parole offers "at least a distant light" (Susskind). Even if a juvenile offender is motivated, many barriers exist to effective rehabilitation. Many programs are denied to anyone sentenced to LWOP, even juveniles, based on their sentence. Prison regulations make LWOP prisoners the lowest priority for programs for many reasons: "inmates with shorter sentences have priority, security classifications not necessarily related to individual behavior make them ineligible, or they must contend with frequent system 'lock-downs' that are not the result of their individual behavior" ("Human Rights Watch," 56). Due to the severity of the LWOP sentence, the security level of juvenile LWOP prisoners tends to be set at the highest level, meaning that fewer programs are available (Human Rights Watch, Interview). Within the prison walls, the juvenile is a prisoner and the characteristics that define adolescence are not factored into

rehabilitation. The rules of the prison system mean that the chances of accessing rehabilitation are low for every juvenile sentenced to LWOP.

Proponents of LWOP focus on punishment and deterrence, but the characteristics that mitigate culpability also mitigate the success of deterrent effects. *Roper* recognized that the unique characteristics of juveniles made the deterrent effect of punishment less effective, and that those same characteristics "that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence" (*Roper v. Simmons*, 18). The goal of punishment is no less served if parole is an option. Removing LWOP as a sentencing option does not mean juveniles will go unpunished for their crimes, but rather that the sentence will serve the dual purposes of punishment and rehabilitation. Many offenders may still serve life sentences, but the opportunity for parole is "a chance for a prisoner to show strong evidence of rehabilitation" (Henning). Parole has long protected the interests of the victims' rights: effective punishment, and most importantly in the case of juveniles, rehabilitation. Proportionality should not simply be considered on the grounds of meting out punishment, but it also must "acknowledge that punishment is not the only purpose that states must pursue, especially for juveniles" (Adepoju, 9). Juvenile justice has long been recognized as separate from adult criminal courts for the purpose of "ensuring the well-being of youth offenders" (De la Vega & Leighton, 10). LWOP sentences contradict this most basic premise of juvenile justice in rehabilitation in that they deem an offender incorrigible before maturity has been reached. LWOP does not achieve the goals of punishment and mitigation more than a sentence with a parole option. What is left is a sentence that ignores the defining characteristics of adolescents in both culpability and rehabilitation.

Overall, a denial of hope best sums up the prospects of rehabilitation and prison life for juvenile offenders sentenced to LWOP. The EJI argues that handing down a LWOP sentence for "a child whose brain—much less his character or personality—is not yet developed cannot be reconciled with society's commitment to help, guide, and nurture our children" (EJI, 33). While LWOP is not the death penalty, it is equivalent in the sense that it ignores the adolescent's capacity for reform, unfixed criminal nature, and the likely denial of rehabilitation. LWOP throws away a life, and "when that life is that of a young person, the decision to throw away a life rather than create opportunities for reform and growth is a sad commentary on our society's lack of creativity and strength" (Calvin). As the Supreme Court looked to "evolving standards of decency" in the *Roper* decision, it should look to those same standards in *Jackson* and *Miller*. The public has been found to clearly favor rehabilitation of serious juvenile offenders, even when it required additional costs; the same survey found that the public was less willing to pay for more incarceration (Piquero & Steinberg, 4-6). Juvenile justice has long recognized the priority and need for rehabilitation to be the center of sentencing

practices. Judge Corriero, a long-time juvenile judge in New York City, found that, "a recognition of the characteristics of adolescence that require a teenage offender to be treated with special care, given an opportunity to change, and a chance to make a fresh start when consistent with protection of the public" (Corriero, 50). Juvenile LWOP sentences defeat the purpose of rehabilitation in defining the juvenile as an incorrigible criminal and not offering real hope of rehabilitation. The special treatment that developing adolescents should receive is far from the imposition of the LWOP sentence.

LOOKING FORWARD TO *JACKSON* AND *MILLER*

The *Graham* decision found LWOP to be "grossly disproportionate" for the age and crime of the juvenile offender. The Court emphasized the evolving standards of decency that mark the progress of a maturing society by demonstrating the cruelty of the LWOP sentence in these cases. As the Supreme Court revisits the issue juvenile LWOP in the coming year, it is most urgent that the *Graham* decision is extended to those serving LWOP sentences for homicide crimes. A categorical mitigating factor of age needs to be applied in order to recognize juveniles as a class as well as reorient sentencing to the purpose of rehabilitation. The biggest barrier to overturning juvenile LWOP was crossed in Graham: juveniles can be considered a class of offenders different than adults. The court now has to refine their thought process and fill in the greater picture of juvenile LWOP: "When they say non-homicide, what does that mean for culpability? Assuming technical liability, why are you more morally responsible for a homicide than a horrific non-homicide?" (Susskind). The Supreme Court must answer these questions and should ultimately not allow juries, prosecutors, or individual judges to advocate for or award this sentence. There is sufficient evidence that adolescents are indeed different than adult offenders. The juvenile justice system's goal of protecting both the child and society's interest has been lost. When looking at the Court's analysis of the culpability of minors in *Roper* and *Graham*, there is no reason why the court should not extend the logic of age as a mitigating factor in culpability to the LWOP sentence: "I don't see why the nature of the offense affects the basic argument that adolescents are inherently less responsible for their actions and therefore less deserving of punishment" (Steinberg). There remains no reason to further deny the effect of adolescence on culpability and on amenability to rehabilitation for any juvenile offender. The recognition of adolescents' unique position as a developing human being and capacity for rehabilitation will rebalance the interests considered in sentencing.

Despite the evidence against continuing the sentencing practice of juvenile LWOP, striking this punishment may not be easy. In Dr. Steinberg's opinion, the strategy of advancing two cases of very young juvenile offender has strength in the

court's ability to say that a 14-year-old is not an adult. This, however, will simply postpone the decision about LWOP for older adolescents (Steinberg). Mary Ellen Johnson felt that there is a chance that the court will make a broader ruling than determining LWOP for those 14 and under. She stated that, "They [the Justices] know that this issue will keep coming back to them in some form so why not get it out of the way now?" (Johnson). Fighting for the rights of criminal defendants will always be an uphill battle. Victim's rights groups and the "tough on crime" rhetoric of politics will always be obstacles to reform. Whatever obstacles exist, the sentence itself "prevents society from ever reconsidering a child's sentence and denies the widely held expert view that children are amenable to rehabilitation and redemption" (De la Vega & Leighton, 16). The LWOP sentence must be seen as a disregard for the nature of adolescent, of rehabilitation, and of punishment. The LWOP sentence denies the mitigating factor of age in the assessment of age, and it denies juveniles the opportunity for reform and rehabilitation.

The consequence of overruling the lower courts' decisions in *Miller* and *Jackson* would be a step toward justice and away from disproportionate retribution. Age must be considered as a mitigating factor in the culpability of all juvenile offenders and not just those convicted of non-homicide crimes. The defining characteristics of adolescence permeate the entire population, including the 2,589 inmates now serving juvenile LWOP sentences. The Supreme Court should recognize that juvenile justice has swung far from its goals of protecting children and promoting rehabilitation in exchange for throwing away juveniles for life with misguided fear. Criminal sentencing practices must catch up to society and science's recognition of the nature of adolescent development. Removing LWOP from sentencing practices by no means eliminates the punishment for juveniles who have committed serious crimes. Striking LWOP means rebalancing the interests of defendants and the community as equals. To continue LWOP is to deny that adolescents are different than adults, but more importantly, it is a denial of hope to this vulnerable population.

Editor's note: On June 25, 2012, the Supreme Court ruled that automatic life sentences without possibility of parole for juvenile offenders constituted "cruel and unusual punishment" and were therefore unconstitutional. Justice Kagan wrote the majority opinion for the Court's 5-4 decision.

WORKS CITED

ACLU. "ACLU Letter to House of Representatives on Juvenile Justice Accountability and Improvement Act of 2009." *American Civil Liberties Union*. ACLU, 18 Jun 2009.

Adepoju, Akin. "Juvenile Death Sentence Lives on... Even after Roper v. Simmons." *Southern New England Roundtable Symposium Law Journal*. 2.2007.

Associated Press. "Court to look at life in prison for juveniles." *SF Gate*. Associated Press, 07 Nov 2011.

Brief for the APA as Amicus Curiae, *Graham v. Florida* and *Sullivan v. Florida*, 560 U.S. (2010).

Cain, Maureen. "Interview Maureen Cain." *When Kids Get Life*. PBS, 3 Nov 2006. Web.

Calvin, Elizabeth: Senior Advocate Children's Rights Division HRW. E-mail Interview.

Cicchetti, Dante and Cohen, Donald, eds., *Developmental Psychopathology* (Oxford: John Wiley & Sons, 2006), Chapter 18, Laurence Steinberg et al., "The Study of Developmental Psychopathology in Adolescence: Integrating Affective Neuroscience with the Study of Context," 710.

Corriero, Michael A. *Judging Children as Children*. Philadelphia: Temple University Press, 2006. 46-63.

De la Vega, Connie, and Michelle Leighton. "Sentencing Our Children to Die in Prison: Global Law and Practice." *University of San Francisco Law Review*. Spring 2008.

Dvorchak, Kim: Executive Director Colorado Juvenile Defender Coalition. Phone Interview.

Elrod, Preston, and R. Scott Ryder. *Juvenile Justice: A Social, Historical, and Legal Perspective*. Third. Sudbury, Massachusetts: Jones and Bartlett Publishers, 2011. 215-239.

EJI. "Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison." *EJI*. EJI, Jan 2008.

Fagan, Jeffrey. "Interview Jeffrey Fagan." *When Kids Get Life*. PBS, 23 Jan 2007.

Feld, Barry C. "A Slower Form of Death: Implications of *Roper v. Simmons* For Juveniles Sentenced to Life Without Parole." *Notre Dame Journal of Law, Ethics & Public Policy*. XXII.1 (2008): 9-65.

GBA Strategies. "Campaign for Youth Justice Youth Justice System Survey." *GBA Strategies*. GBA Strategies, 11 Oct 2011.

Graham v. Florida, No. 08–7412. Supreme Court of the US. 17 May 2010.

Henning, Kristin. "The Case Against Juvenile Life Without Parole: Good Policy and Good Law." *FindLaw*. Reuters, 26 Oct 2009.

Human Rights Watch. "The Rest of Their Lives." *Human Rights Watch*. Human Rights Watch, 2005.

Human Rights Watch. Ross Meier, Sacramento, California. Telephone interview (published online).

Jackson v. Hobbs, No. 09-145. Supreme Court of Arkansas. 09 Feb 2011.

Johnson, Mary Ellen: Executive Director of the Pendulum Foundation. E-mail Interview. 14 Nov 2011.

Koppel, Nathan. "Judges Forced to Revisit Juveniles' Life Sentences." *The Wall Street Journal U.S. News*. The Wall Street Journal, 29 Oct 2010.

Kurlychek, M.C. & Johnson, B.D. (2004). The juvenile penalty: A comparison of juvenile and young adult sentencing outcomes in criminal court. Criminology, *42*, 485-517.

Legal Information Institute. " Life Without Possibility of Parole." *WEX, Legal Information Institute*. Cornell University School of Law.

Levick, Marsha. "Kids Really Are Different: Looking Past Graham v. Florida." *Criminal Law Reporter*. 87.14 (2010).

Liptak, Adam. "Justices Will Hear 2 Cases of Life Sentences for Youths." *The New York Times*. The New York Times, 07 Nov 2011.

Liptak, Adam, and Lisa Faye Petak. "Juvenile Killers in Jail for Life Seek a Reprieve." *The New York Times*. The New York Times, 20 Apr 2011.

MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice. "Bringing Research to Policy and Practice in Juvenile Justice." Temple University Press, 2005.

Miller v. Alabama, CR-06-0741. Alabama Court of Criminal Appeals. 25 Jun 2010.

Mones, Paul. "Interview Paul Mones." *When Kids Get Life*. PBS, 23 Jan 2007.

Parker, Alison. "Interview Alison Parker." *When Kids Get Life*. PBS, 23 Jan 2007.

People v. Guinn, 28 Cal. App. 4th 1130, 1141(1994), p. 1141

Piquero, Alex, and Laurence Steinberg. "Rehabilitation Versus Incarceration of Juvenile Offenders: Public Preferences in Four Models for Change States Executive Summary." *The MacArthur Foundation*. The MacArthur Foundation, 11 Dec 2007.

Roper v. Simmons, No. 03–633. Supreme Court of the US. 01 March 2005.

"Sentencing Juveniles". 11 Apr 2011. Chart. The New York Times.

Scott, Elizabeth and Laurence Steinberg. "Less Guilty by Reason of Adolescence." *American Psychologist*. 58.12 (2003): 1009-1018.

Scott, Elizabeth, and Laurence Steinberg. *Rethinking Juvenile Justice*. Cambridge, Mass: Harvard University Press, 2008. 118-180.

Steinberg, Laurence: Professor of Psychology at Temple University, PA. E-mail Interview. 17 Nov 2011.

""When I Die, They'll Send Me Home" Youth Sentenced to Life without Parole in California." *Human Rights Watch*. 20.1 (2008): pages. Print. Used as reference.

A META-LEGAL DEFENSE OF SAME-SEX MARRIAGES IN ETHICAL LIBERAL DEMOCRACIES

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After positing that an emphasis on personal agency in creating a life for oneself is inherent in liberal democracies, I argue that the subjugation of minority groups due to the cultural biases of the majority are fundamentally contradictory to the goals of liberalism and should be seen as threats to our very social fabric. Additionally, the restriction of same-sex marriage seriously calls into question the ability for same sex couples to participate in the social process, which, within a framework of liberalism, is absolutely necessary for the state to achieve to achieve political legitimacy.

Earlier this year, voters in North Carolina approved a constitutional amendment prohibiting the legal recognition of same-sex marriage in the state, becoming the 30th state in the Union to adopt such a ban. This amendment comes at a critical moment in the gay marriage debate, which has become something of a legal seesaw in national legal discourse with many states in the Union taking contradictory positions. Both the Maryland and Washington state legislatures, for example, passed bills earlier this year legalizing marriages between gay couples, standing in stark contrast to states such as North Carolina that have adopted constitutional bans expressly restricting such marriages. Yet, a 2011 Gallup poll shows that–for the first time–the majority of Americans believe gay couples should have the legal right to marry. The North Carolina law thus disrupts the growing trend toward the acceptance of same-sex marriage across the country.

How can these disjointed legal responses by states be understood? What is it about the question of gay marriage that yields such sharply divided opinions? Indeed, discourse surrounding gay marriage is obviously complicated by the thorny socio-historical position of gay culture and gay rights in American society, but the legal discussion is also importantly convoluted because of the various legal pathways that have been used to expand or restrict the rights of homosexuals in the United States. In some cases, state legislatures have stepped in to grant same-sex couples marriage rights. In other cases, public referendums have restricted gay marriage rights. And, on occasion, the courts and the executive branch have intervened to expand or restrict the legal rights of same-sex partners.

To mitigate the complications caused by these disjointed technologies of legal power, my analysis of this issue instead chooses to consider the topic of same-

sex marriage through the lens of democratic conceptions of justice, developing a framework which I believe does better service to the letter and spirit of our democratic governmental system. That is, while the possible *technical* pathways to same-sex marriage legalization are varied, my analysis hopes to instead provide an ethical justification for the activation of such pathways.

Indeed, the arguments defending restrictions on gay marriage are often couched in a utilitarian theoretical framework–which I will define and explore later in this essay–and as such there is an inherently *moral* component to this dilemma implicating the basic tenets of our political system. That the topic of gay marriage is currently very topical thus provides an impetus to look deeply into the moral fabric of our governmental system as it defines "justice," forcing us to acknowledge that these questions—while often discussed as matters of legal "rights"—reveal inconsistencies in our system of laws. The ensuing queries are impossibly broad. When is it fine to restrict the rights of citizens for 'the public good'? Who decides what 'the public good' is? When is it morally wrong to enforce such restrictions? Through the case of same-sex marriage, we may begin to address these larger questions.

To this end, this essay first seeks to explore the tensions between the individual and "society" in order to understand the limitations of utilitarianism in resolving the controversial treatment of same-sex marriage. Next, this essay will explore how laws are legitimized in socially just societies through analyses of deliberative democratic and social contractualist models. This, by way of social contract theory's emphasis on *consent*, will ultimately lead to an analysis of the role of autonomy in ethical liberal democracies to further understand the stake of solving the moral quandary presented by same-sex marriage. Because this analysis is centered on the topic of moral disagreements and how they should be mediated, I will not engage directly with legal theory. Instead, my method will be a juncture between political and moral theories as they may play out in modern liberal democracies (and more specifically, the United States), where the abstract concepts of 'equality' and 'freedom' form a crucial part of the political theoretical groundwork of 'justice.' This is what I call a "meta-legal" analysis, which is simply to say that I am choosing to look at the ethics underlying our system of laws rather than at technical mechanisms of the law itself. The value in pursuing this argument as a moral argument rather than a constitutional or procedural legal argument is in creating a yardstick through which legal policies can be measured.

For the purpose of this essay, it is important to consider the analysis within the framework of American democratic liberalism. My definition of 'liberalism' will be made clearer later in this paper, but for now it is sufficient to understand liberalism as a political system concerned with guaranteeing social equality and freedom for individuals.

Inadequacies of Utilitarianism and the Problem of Majoritarian Dictate

When voters approved North Carolina's same-sex marriage amendment, the electorate made a vote for what they perceived to be the public good, which is obviously a majoritarian utilitarian mechanism at play. It is important, however, to point out the inadequacies of utilitarianism in solving the dispute over same-sex marriage and similar moral disputes. Here, it is useful to turn first to John Stuart Mill, an omnipresent voice whenever utilitarianism enters the conversation.

Mill writes that safeguarding the individual's interest in society is of paramount importance in any form of government. He situates the protection of individual interests in terms of *equality*, writing, "If it is a duty to do to each according to his deserts, returning good for good as well as repressing evil by evil, it necessarily follows that we should treat all equally well" (On Liberty and Other Essays 198). This is particularly true in liberal democracies. In this passage, there is an implied connection between the concepts of morality and justice made evident by his use of the word "duty." He writes, "This is the highest abstract standard of social and distributive justice; toward which all institutions, and the efforts of all virtuous citizens, should be made in the utmost possible degree to converge" (On Liberty and Other Essays 198). According to Mill, then, it is of moral imperative to treat individuals equally, and to do so is the very purpose of institutions of justice. Justice, then, is defined as the extent to which these central tenets of liberalism are upheld. To be sure, he refers to equality both as an "obligation of justice" and as a "great moral duty." This obligation of justice is familiar to those of us in the United States, where our government is founded on such principles.

Mill's analysis of justice and equality is helpful, but utilitarianism presents a problem that is difficult to dispel. Utilitarianism takes as its goal the maximization of overall utility. In Mill's brand of utilitarianism, this is navigated with the Greatest Happiness Principle. The problem with this fixation on overall utility is that it naturally lends itself to the suppression of individuals' rights and human needs. That is, if harm done to one individual or to a group of individuals maximizes the utility for the rest of society—however 'society' may be defined—then it is morally permissible to allow such harm to occur in a utilitarian system. But this is clearly not easily ethical. This fixation on utility also assumes that there is an accurate way to measure such utility, an idealist yet erroneous assumption.

In the case of restrictions against same-sex marriage, the argument is often that allowing homosexuals to marry would fundamentally alter the way in which society conceives of the family, and that this would result in harm to children ("We don't want children to believe that homosexuality is o.k." or "A child needs a mother *and* a father."). This is clearly a utilitarian argument—from this perspective, in order to protect society from the "threat" of homosexuality, it is necessary to

restrict the rights of this group of people. Importantly, this is also a moral value judgment on what is good and what is bad. Dissenting opinions among individuals about what 'the public good' even *is* will always occur, but this becomes problematic when moral disagreements between assumed political equals are elevated to a political question of *rights*. Indeed, a major problem with Mill's utilitarianism is a presumption of what social "good" is to begin with, framed in an awkward false positivism. In this case, the case against the rights of same-sex couples to marry is based on these types of presumptions.

This cultural prejudice has led to the political institutionalization of a moral claim that deprives individuals who happen to prefer partners of the same sex of a fundamental right that heterosexual citizens are free to enjoy. That is to say, members of the gay community are at a disadvantage through no real choice of their own—unable to choose what life they are born into, or the physical realities of their physical and gendered selves, they are thrown into a society that structurally discriminates against them. This is all to say that hegemonic heterosexuality has been codified legally and such institutionalization necessarily perpetuates discrimination against homosexuals.[1]

I will eventually explain in this paper why restricting the rights of same-sex couples to marry is ethically wrong in our system of government, but here I am merely observing that legal discrimination *is* occurring. That is not to say that all discrimination is bad—we discriminate against debtors, thieves, people who litter excessively, etc., but that is not necessarily a *bad* thing. I am, however, pointing out that while in some cases the will of the majority leads to a more just society, the framework of utilitarianism proves to be inadequate to solve such a divisive issue as same-sex marriage in part because the social benefit or harm of restricting same-sex marriage cannot be measured *objectively.* Indeed, a significant number of the studies that do exist insist that children raised by same-sex couples actually do just as well as children raised by heterosexual couples.

In this way, our political process is imbued with a majoritarian reconciliation process that makes "voting" itself problematic when it is at odds with minority rights. If social conceptions of 'truth' or 'rightness' amount to a bargaining process that is settled by majoritarian dictate, and these assertions are the byproducts of cultural biases, then the entire idea of real 'truth' and 'morality' are called into question. That is, if the 'greater good' is defined in this utilitarian vain, then a majority can dictate what is acceptable and what is not acceptable to the extent that it gives the majority an enormous amount of power to legally exclude and otherize individuals with no real reason other than cultural bias. In this way, personal bias may masquerade as legal morality. This is especially troubling if it undermines the

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[1] For the record, here the word 'discriminate' should not be taken in a normative sense, but rather as an objective observation.

fabric of the social contract and 'hypothetical consent,' which will be explored more fully momentarily.

How though can societal prejudices—such as those against same-sex couples—be understood and mediated without appealing to the majority? John Rawls grapples with the problem with utilitarianism in the *Theory of Justice*, where he provides the concept of the veil of ignorance as a way of measuring what is just and what is not. Rawls situates his concept of 'justice as fairness,' which posits that justice is a relational quality between individuals. This is important because it acknowledges the tension between the majority and the minority and between the individual and the society as it relates to the question of "autonomy" and the "consent of the governed." Rawls' theory is thus extremely pertinent to our analysis here, as it critiques the use of utilitarianism in solving problems of justice and seeks to provide an alternative. An analysis of this will follow in the next section.

UTILITARIANISM AND CONTRACT THEORY

Rawls' *Theory of Justice* is contractarian, and it seeks to provide a theoretical explanation of how the social contract can exist without citizens being present in the actual moment at which a society is founded. Any discussion of social contract theory harkens readers' minds back to Hobbes' state of nature theory, but Rawls does not begin his analysis in a state of nature at all. He merely holds that through the conceptual use of the "veil of ignorance" individuals in society can ask themselves what is just and what is not. This is what he calls the "original position." To be clear, Rawls does not cast this original position as a real historical moment, but rather uses it as a conceptual mechanism through which hypothetical consent can be manufactured and/or explored. Hypothetical consent is hence a form of validating and revalidating the social contract through time. I posit, with the help of Rawls, that this hypothetical consent is crucial to the moral legitimacy of a society and of a government. Indeed, in a political system that is founded on the principle of the consent of the governed, Rawls' veil of justice is a useful tool to gauge the justice—or injustice—of specific forms of structural inequality in a comparative light.

In the case of same-sex marriage restrictions, using the veil of ignorance demonstrates definitely that by curtailing political rights of homosexuals, their position in society seems significantly less desirable than that of their heterosexual peers. This comparative lens tells us that there is an inherent unfairness in legally limiting the marriage rights of same-sex couples. If justice is really relative, as we have previously said, restricting the right for same-sex couples to marry unequally skews political power against homosexuals. Moreover, Rawls' analysis shows that utilitarianism can severely compromise the possibility for hypothetical consent, which in turn compromises the entire social contract. The underlying belief here is that an individual should not be forced to live in a society which he would not freely

enter into at the moment of foundation. The issue here is one of legitimacy—consent is how democracies derive their legitimate authority, and without it they are by definition un-democratic and illiberal.

At this point, someone may critique the argument I have so far presented by asserting that the gay community is not significantly disadvantaged in opportunities based on restrictions on same-sex marriage, and therefore a restriction of same-sex marriage rights does not really harm the gay community. In other words, the argument may be that restricting same-sex marriage rights are not a direct affront to 'justice.' This may be true if resource distribution were the only focus of justice as fairness, and indeed many luck equalitarians who have followed Rawls' writings have focused on the distribution of resources as the primary concern of justice. But in the case of same-sex marriage, and of social rights more broadly, this application of luck egalitarianism would be insufficient as a measurement of equality.

This brings us to an important question I have thus far neglected to explore—how is equality measured? The theories of justice proposed by John Rawls and Elizabeth Anderson are more appropriate than those of luck egalitarians because they focus on the eradication of social inequalities that are perpetuated in society *rather than* resource inequalities. Rawls' veil of ignorance is a means to understanding justice in many ways without strictly focusing on resource equality (although Rawls does, admittedly, discuss at times resource inequality). To be sure, gay white males tend to earn just as much or more in wages and salaries than their heterosexual counterparts and, ironically due in part to marriage and adoption restriction laws, tend to save more of that money because they don't incur the same familial expenses as their heterosexual peers. But having more access to financial resources does not necessarily lead to a fulfilling version of the 'good life.' It is hard to imagine an image of the 'good life' that does not include a family. It is also important to look beyond the immediate life of an individual and to understand the deeper moral implications of denying certain rights to certain social groups. This follows in the tradition of Jeremy Waldron's view that morality and the law are not so sufficiently distinct that one can be considered without the other. Questions of justice and morality, at least in the American legal and political system, are inherently intertwined, as the "consent of the governed" is one of the most crucial aspects of democratic government.

Deliberative Democracy and Social Contract Theory

In discussing social contract theory, it may be tempting to turn to the analyses put forth by Hobbes and Rousseau, but I believe this is insufficient given their lack of concern for the dangers of codified social biases. My conception of the social contract is different from Rousseau's analysis in a crucial way: while Rousseau says that entering the social contract is a promise that one will follow the 'general

will,' I believe this assumes that political institutions will *always* lead to ethically legitimate political decisions. This is simply not the case. Instead, I believe turning to the model of "deliberative democracy" is more fitting and can more truly live up to the principles of an ethically viable liberal democracy.

In their essay "Moral Disagreement in a Democracy," Amy Gutmann and Dennis Thompson provide an evaluation of the problem of moral disagreements in American democracy. Ultimately, Gutmann and Thompson stress that moral claims must be situated on 'assumptions about matters of fact, common estimates of risks, suppositions about feasibility, and general beliefs about human nature and social processes" (Gutmann & Thompson 88). These disagreements, they say, must be reconciled through a justification process that emphasizes deliberation among all citizens, rather than a top-heavy aggregation process (that is, majoritarian rule through voting) with asymmetrical power distributions. And in the case of gay marriage, the power imbalance between the majority and the minority are simple enough to detect.

To be sure, moral disagreements are not purely the byproducts of conflicting tensions among self-interested people, but instead disagreements that occur between different individuals who *share similar desires of achieving 'the good life,' but who may have different visions for how to achieve it.* Deliberation is here a mixture of direct democratic models and republican-democratic processes. This eliminates the possibility of arguing that something is merely "right" or "wrong" and illuminates the necessity of finding a metric for solving difficult moral disagreements that can be deduced within political frameworks shared between people in society. These shared frameworks form the parameters of the social contract.

Deliberative democracy is a powerful model for the democratic process because it considers how political and legal decisions work in relation to the underlying ideals of democracy—namely, equality and freedom—and stresses the importance of correcting the inherent power imbalances of the voting process. Deliberative democracy is useful in revealing the politically institutionalized cultural biases that may not in fact reflect the central tenets of democracy or liberalism. In the case of same-sex marriage, this takes form in legal procedures that may legally justify the restriction of same-sex marriage. That is, deliberative democracy morally delegitimizes forms of cultural bias or oppression by suggesting that pure majoritarian rule is not enough to constitute a "legitimate" law.

Admittedly, it may seem odd to discuss deliberative democracy following a section heavily focused on Rawls, who presents an idealist contract theory. My reasoning is as such: Without a moral law, the social contract is disbanded because the hypothetical "consent of the governed" is no longer achieved. In the case of gay marriage, this hypothetical consent is terminated when the minority is marginalized in the legal process due to cultural biases that disregard real deliberation and

instead rely on majoritarian and utilitarian assumptions of what is *good* and what is *bad*.

There are indeed a few tensions between proponents of deliberative democracy and social contractarianism. Proponents of deliberative democracy often charge that social contract theory does not provide an avenue through which such difficult moral questions can be addressed outside of the legal institutions already in place. Indeed, political and legal institutions, as I see it, may be already so saturated with cultural biases that it may corrupt the possibility for pure democratic consideration of the central values of democracy and liberalism.

I believe, however, that the tension between proponents of deliberative democracy and social contract theorists are not insurmountable. I instead assume that these two models can in fact enhance one another. Deliberative democracy focuses heavily on the idea of political participation and of a moral justification for government outside of procedural political institutions (i.e., to produce hypothetical consent), and social contract theory explains why it is beneficial for government to exist (i.e., to enforce the social contract). The two work in tandem.[2]

Clearly it is impossible for individuals to decide which society they are born into and it is impractical to completely relocate to another society which may fit better with the individual's political beliefs. For this reason, the process of deliberative democracy is necessary to the manufacturing of hypothetical consent. But as we have already stated, this process of deliberative democracy may be hampered by hegemonic power structures that prevent oppressed social groups from voicing their opinions in a political system. This indicates then that—for the sake of hypothetical consent and political legitimacy—a state should concern itself with assuring that all members of society are amply free to participate in the political and social process so that they are willing, hypothetically, to consent to living in such a society. The restriction of same-sex marriage thus seriously calls into question the ability for same sex couples to participate in the social process, which, within a framework of liberalism, is absolutely necessary for the state to achieve to achieve political legitimacy.

Political Liberalism and Autonomy

Not to belabor the point, but individuals' rights to liberty are central tenants of political systems such as ours. They provide a guidepost for assessing the legitimacy of the state in a recurring process of hypothetical consent. I have posited that utilitarianism and individualism are at fundamental odds because utilitarianism, conversely, looks rather to collective utility rather than individual fulfillment.

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[2] My understanding of this topic has been heavily influenced by Weithman's "Contractualist Liberalism"

Moreover, the subjugation of minority groups due to the cultural biases of the majority are fundamentally contradictory to the goals of liberalism and should be seen as threats to our very social fabric. In this section, I will explain the role of autonomy in a liberal democracy and return to the case of same-sex marriage in order to reasonably demonstrate that by limiting the legal rights of same-sex couples, the law is necessarily rejecting individuals' capacity for autonomy.

Inherent in liberal democracies is an emphasis on personal agency in creating a life for oneself. This, I propose, is the heart of liberalism. This idea of autonomy is supplemented by Raz 's statement that "autonomy is opposed to a life of coerced choices" (Freedom and Politics 371). Raz's analysis focuses on creating a life for oneself based on a variety of options. His example of the Hounded Woman who has no choices in life is an extreme example of the effects of limited autonomy. Raz says then that coercive restriction of personal choice denies individuals the right to their own independence. It is an attack against their individualism. I ask, then, what mechanism is more coercive than the legal regulation of happiness and marriage by the state?

To this end, opponents of my analysis so far may argue that denying same-sex couples the right to marry does not significantly deprive them of the ability to live an otherwise fulfilling life. They may argue that the ability for individuals with same-sex preferences to create their own life would not be seriously affected. This argument may be entirely more cogent than the utilitarian claim that was discussed above, but still misses the point.

In order to set-up a defense against this argument, it is necessary to discuss what I perceive to be the role of the state in general. This is a tall order, but can be sufficiently clarified by reconsidering the discussion above regarding deliberative democracy and social contract theory. The social contract emerges as a contract between individuals that exists for the necessary regulation of discordant interests among groups of individuals, with ample consideration to the way in which political institutions may reflect cultural biases that may not be in line with the underlying purpose of liberalism and democracy (namely, the protection of autonomy and individualism). It is true that in limiting the ability for same-sex couples to marry, the state may not be destroying *all* possibility for individuals with same-sex attraction to live a fulfilling life, but such a restriction does however represent an act against the autonomy of the individual. Moreover, it is an act against the autonomy of an individual with no clear actual social good.

The idea of "respect" is important to address, and has been used by political theorists such as Martha Nussbaum, Rawls, and Kant, to explain the political limitations of the state and the moral limitations of individuals in their interactions with each other. The idea of "respect" indicates that there is something inherent about autonomy that is necessary to value and to protect. In understanding what this underlying value might be, Michael Rosen provides a compelling analysis

of the underlying dignity of human beings. In constructing his theory on dignity, Rosen relies on Kant's assertion that it is imperative not to treat people as 'means only.' To me, this analysis indicates that to treat people as 'means only' denies them their inherent humanity. This inherent humanity, what Rosen calls 'dignity,' is the central value of the individual that we must respect. Rosen writes, "Our duty to respect the dignity of humanity is—on this I agree with Kant—fundamentally a duty towards ourselves....in failing to respect the humanity of others we actually undermine humanity in ourselves" (Rosen 138). This internal, inherent kernel of human dignity is precisely why we must respect human autonomy, and illuminates the inherent moral quality of the central tenets of political democratic liberalism. Equality and freedom are thus *moral* values because they achieve *moral* ends. An assault against the autonomy of one individual is a potential assault against the autonomy of everyone.

Criticisms of My Argument Regarding Moral Disagreement and Autonomy

A critique of my analysis may follow along these lines: *If autonomy is necessary to uphold, then it is against the rights of the individual who does not believe same-sex marriage is moral to be forced to live in a society where same-sex marriage is legal.* In other words, it is difficult to separate policy choice from a normative decision on behalf of the state, for anyone who feels that same-sex marriage should not be allowed may feel undermined by the state.

This is an interesting retort, because it brings up the topic of moral and political pluralism in liberal democracies and further complicates the role of the state in mediating these disagreements. In order to explore the implications of this argument, I will first explain the way these disagreements may be completely valid on each side yet still irresolvable. Indeed, this analysis will borrow heavily from Martha Nussbaum's "Perfectionist Liberalism and Political Liberalism." Following this, I will explain how we may better understand the state's role in mediating these disagreements by putting forth a distinction between *state/citizen* and *citizen/citizen* relationships.

Clear in my argument so far is the belief that the state must avoid imposing the cultural biases of the majority on all of society through political institutions. Conversely, this might suggest that the state has no role in directly influencing the social process to begin with, indicating that the state has no *social* role (that is, no role outside of its political obligations to uphold the underlying reasons for the social contract, namely the ideas of freedom and quality) in attempting to increase tolerance for marginalized social groups, such as homosexuals, minorities, immigrants, etc. This is to some extent true, but it is not without qualification. This will be the topic of the following pages.

Take for example a Catholic who believes that homosexuality is a sin, and therefore opposes same-sex marriage based on her religious faith. A non-Catholic is in no real way more correct to tell her that this view is wrong than the woman is to tell the non-Catholic that his view is wrong. This disagreement stems from an unavoidable difference in traditions and cultural beliefs that are put forth by (let us assume) equally reasonable people. This problem is ultimately solved, according to Nussbaum, by remembering "that respect in political liberalism is, first and foremost, respect for persons, not respect for the doctrines they hold, for the grounding of those doctrines, or for anything else about them" (Nussbaum 33). The important thing here is that "no announcement is made by the state that lives lived under one's own direction are better than lives lived in submission to some form of religious or cultural or military authority" (36). What is compelling about Nussbaum's analysis, and the reason for citing it heavily here, is that she admits the important role of social institution, such as religion, in peoples' lives and also acknowledges the tensions that arise when the values of those other institutions are not supported in the political system, which is another hugely important social institution in the lives of people. Moreover, Nussbaum holds that merely because these doctrines do not agree with each other does not mean that one is more reasonable than the other.

How then could the problem of same-sex marriage be solved in society? Indeed, appealing to respect provides a clear way of suggesting that, if same-sex couples' autonomies are to be respected, they must be allowed to marry their selected partners. Further, Nussbaum's analysis suggests that this would be permissible so long as the state does not specifically endorse same-sex marriage in any way aside from lifting the restriction on it.

But, one may argue, is not lifting the restriction a direct endorsement of same-sex marriage? The difference here can be chalked up, I believe, to the important distinction between negative and positive *restrictions* and *rights*. While allowing same-sex couples to marry seems like an endorsement, it is in fact merely the removal of the state's regulation of private matters. Implicit in my assumption is that marriage should be seen as a negative right, in which there is a freedom from the state's restriction on marriage. This assumes that the state has the power to regulate *some* things but not others and that the powers conferred to the state are wholly the byproduct of individual hypothetical consent. The people are the masters of the state, not vice versa.

I must also entertain the argument that the offense caused to those who do not believe same-sex marriage should be allowed may be potentially equal to the damage caused to same-sex couples who are not allowed to marry. Here it is again necessary to appeal to Rawls' veil of ignorance. Assuming the 'original position,' what would be preferable: living in a society where a woman can get married to the person she loves without the necessary approval of society, but also being forced to

deal with other people choosing partners that she of whom she may not approve; or living in a society where everyone must arrive a consensus regarding the person she wants to marry, with the advantage being that she will never feel undermined? I believe the first option is the most desirable.

On Social Discrimination

Before concluding, it is necessary to address the topic of social/political discrimination and how social discrimination may be diminished. Indeed, I have held throughout this paper that it is not the job of the state to intervene in the natural social process, outside of correcting for institutionalized forms of political oppression. To this end, I believe there is a difference between the moral obligation of a state to intervene and the moral obligation of individuals to intervene in social discrimination.

In other words, I argue that social discrimination is one thing, but legal discrimination is another. Further, the state cannot get involved in mediating matters of social discrimination that are not directly political. This is of course a fine line, but it is an important point to make because it upholds the idea that the state is responsible for mediating competing interests *without imposing cultural beliefs on autonomous individuals*. The state should attempt to remain an impartial mediator of competing interests, and should do so based on underlying principles of liberalism. In the case of same-sex marriage, while I believe the state has no moral right to impose the existing restrictions, I do not believe it is the state's responsibility to change prevailing attitudes toward homosexuals. In a liberal democracy the moral responsibilities of the state must be treated separately from the moral responsibilities of individuals to each other. This is necessarily a matter of scale—because states generally possess more powerful means of coercion, the importance of preventing states from becoming too involved in the private lives of citizens is imperative to the protection of our liberal democratic ideals. But of course, *the political* and *the social* inevitably engage with each other substantially, making a *real* separation of the two difficult to achieve.

Conclusion

That the state has the political power to restrict same-sex couples from marrying means neither that it is an ethically sound decision nor that it is even politically legitimate if we are to assume that political legitimacy is produced through hypothetical consent. Hypothetical consent here must be seen as an ethical process of bestowing legitimacy based on the state's ability to uphold the underlying standards of equality and liberty, which frame our political system. What is at stake is not necessarily an individuals' right to happiness per se, but something even more

troubling. That is, the corruption of the central tenets that legitimize our political system of democratic liberalism.

This view I have outlined (I believe) works in the abstract, but I am sympathetic to the argument that this does not play out as neatly in our political system. One of the reasons this is much more complicated in reality—that is, outside of a theoretical analysis—is because of the way in which different branches of government interact with each other and the public in making laws and social change. This is a topic best reserved for another paper, but hopefully what is presented here may provide an idealist theory for how government should evaluate the same-sex marriage legislation and, more broadly, legal legislation regarding the rights of other marginalized social groups.

WORKS CITED

Gallup. "For First Time, Majority of Americans Favor Legal Gay Marriage." *Gallup.Com - Daily News, Polls, Public Opinion on Politics, Economy, Wellbeing, and World*. Web. 30 June 2012.

Gutmann, Amy, and Dennis F. Thompson. *Democracy and Disagreement*. Cambridge, Mass.: Belknap Press of Harvard University Press, 1996.

Hobbes, Thomas. *Leviathan*. Cambridge [England: Cambridge University Press, 1991.

Mill, John Stuart. *On Liberty*. Peterborough, Ont.: Broadview Press, 1999.

Nussbaum, Martha. "Perfectionist Liberalism and Political Liberalism." *Philosophy and Public Affairs* 39.1 (2011): 3-45.

Rawls, John. *A Theory of Justice*. Cambridge, MA: Belknap Press of Harvard University Press, 1971.

Raz, Joseph. *The Morality of Freedom*. Oxford [Oxfordshire: Clarendon Press, 1986.

Rousseau, Jean. *The Social Contract*. New American ed. New York: E.P. Dutton and Company, Inc., 1950.

Waldron, Jeremy. "Judicial Review and the Conditions of Democracy ." *Journal of Political Philosophy* 6.4 (1998): 335-355.

Weithman, Paul. "Contractualist Liberalism and Deliberative Democracy." *Philosophy & Public Affairs* 24.4 (1995): 314-343.

PROTECTING INTIMATE ASSOCIATIONS:
THE DEVELOPMENT OF THE CONSTITUTIONAL RIGHT TO PRIVACY

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Modern constitutional jurisprudence recognizes a right to privacy, ranked fundamental among basic liberties, though no such right is explicitly stated in the Constitution. There has been much debate in scholarly circles over the right's legitimacy and construction, some flatly denying it as a judicial invention, while others rally behind it as representative of the evolutionary adaptability of the Constitution to modern concerns. In fact, a careful examination of the history and development of the constitutional right to privacy shows that it was not contrived by a revisionist Court seeking to overlay explicit liberty-oriented protections with equality-oriented schemes. Rather, the right to privacy was meticulously constructed based on precedent firmly rooted in constitutional doctrine. The right to privacy is not a general right, but has been narrowly defined, from its inception, as safeguarding strictly one's intimate associations alone; not only was it constructed narrowly, but its sweep has not been expanded beyond that point. Notwithstanding the controversy surrounding it, Griswold v. Connecticut (1965), the landmark case proclaiming the right to privacy, was by no means an anomaly, but the convergent formulation of the threads of privacy protection into a coherent doctrine. Griswold is now the baseline in privacy jurisprudence, which, despite popular perception, did not initiate an avalanche of extra- constitutional, judicially invented privacy rights. Even as the right has come to protect novel intimate associations, its scope has not deviated from its earliest bounds.

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formulation of the threads of privacy protection into a coherent doctrine. *Griswold* is now the baseline in privacy jurisprudence, which, despite popular perception, did not initiate an avalanche of extra-constitutional, judicially-invented privacy rights. Even as the right has come to protect novel intimate associations, its scope has not deviated from its earliest bounds.

It is important to address both the arguments of privacy's detractors and defenders in evaluating its evolution and legitimacy as a constitutionally-protected right. Robert Bork, a legal scholar most notable for his resounding rejection by the Senate in a failed Supreme Court nomination, denigrates the right of privacy as antithetical to his "original understanding" of the Constitution. He asserts that judicial interpretation is strictly limited to the original construction of the exact words of the Constitution.[3] Bork derides the Warren, Burger, and Rehnquist courts for imposing alien equality-centered doctrines in constitutional law, and contends the right to privacy was entirely fabricated by Justice Douglas' opinion in *Griswold.*[4] In Bork's view, a generalized right to privacy is unfounded, as the Constitution provides only specific privacy protections; he sees the development of right-to-privacy jurisprudence as indistinguishable from the *Lochner-era* abuse of 14th Amendment substantive due process.[5] The term "privacy" itself is unbounded and dependent on the whims of the Court majority, which in his eyes now uses the privacy right established in *Griswold* to dictate positions of extreme individualism and moral relativism.[6] Bork views such actions as the epitome of hypocrisy, as justices imposing their own morality by voiding democratic conclusions and inventing constitutional standards.[7] Bork cautions, "we have no idea what the right of privacy...may accomplish next" in wreaking havoc upon constitutional integrity.[8]

Constitutional scholar John Ely, advances an "interpretivist" approach similar to Bork's "original understanding" thesis, calling for judges "to confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution." [9] Holding a somewhat more nuanced view than Bork, Ely denies that the Due Process Clause contains any substantive component, but concedes that substantive values can be derived elsewhere in the Constitution.[10] He further acknowledges that certain clauses must be interpreted beyond their language and

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[3] Bork, Robert H. *The Tempting of America: the Political Seduction of the Law.* New York: Free, 1990. 144.
[4] *Ibid.*, 97-100.
[5] *Ibid.*, 98-99.
[6] *Ibid.*, 98-122.
[7] *Ibid.*, 123.
[8] *Ibid.*, 126.
[9] Ely, John Hart. *Democracy and Distrust: a Theory of Judicial Review.* Delanco, NJ: Legal Classics Library, 2004. 1-2.
[10] *Ibid.*, 16-18

legislative history, while still confining their inquiry within constitutional bounds.[11] Still, Ely reproves "non-interpretivist" approaches such as natural law, neutral principles, tradition, consensus, and predicating progress methods of adjudication as inadequate and unreliable, and inherently inconsistent with majoritarian democracy.[12] As development of the right to privacy hinged on these approaches, he deems it constitutionally unsound. Instead, Ely believes the Court should act as a representation-reinforcing referee, safeguarding fair processes rather than substantive values. In his view, the Warren Court's decision in *Griswold* was an aberrant lapse into language of fundamental values of an otherwise representation-reinforcing Court.[13]

By contrast, constitutional scholar Kenneth Karst elaborates a coherent defense of the right to privacy, deducing its existence from the broader constitutional doctrine of freedom of intimate association. According to Karst, freedom of intimate association is an organizing principle promoting values important to the development of individuality, touching all privacy cases.[14] It encompasses four essential liberty components demanding protection under the privacy umbrella: society, caring and commitment, intimacy, and self-identification. Society entails the opportunity to enjoy the company one chooses, caring and commitment entail the opportunity to love and be loved and to make and break commitments at will, intimacy entails the opportunity to form and sustain enduring associations, and self-identification entails the autonomy to shape one's personality.[15] In Karst's view, such a freedom is more than the sum of its parts representing a collective individuality with a life of its own that rejects repression of expression borne out of hostility to alternative morality. Despite its ostensible breadth, Karst notes that it is a presumptive rather than absolute freedom, refuting gibes that a right to privacy would demand individual autonomy to the extent of societal anarchy.[16]

Karst argues that intimate associational freedoms are firmly rooted in the Constitution, resting his argument on 1st and 14th Amendment protections. He finds a basis for the right of intimate associational freedoms in the 1st Amendment right of freedom of expression, which should protect sacred intimate expression accordingly. He draws a parallel with freedom of political association, arguing that intimate association deserves equally strict judicial scrutiny to justify its denial. Karst notes further that the law's hands-off approach to intra-marital communion parallels

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[11] *Ibid.*, 13.
[12] *Ibid.,* 56-70.
[13] *Ibid.*, 74-87.
[14] Karst, Kenneth L. "The Freedom of Intimate Association." *The Yale Law Journal* 89.4 (1980): 624-92.
[15] *Ibid.*, 630-636.
[16] *Ibid.*, 627-629.

its disengagement in church matters, revealing analogous substance to a fundamental 1st Amendment right.[17] He finds justification for a broad definition of intimate association in the Equal Protection Clause of the 14th Amendment, noting that the recent proliferation in acceptable forms of intimate association hastened by the movement toward racial equality and the feminist movement, "presses for extension of the freedom to other relationships." The clause's focus on protection of unconventional arrangements also urges the inclusion of intimate association under its umbrella.[18] Finally, Karst explains that the revival of 14th Amendment substantive due process jurisprudence compelled the recognition of intimate associational rights, noting that *Griswold* turned on the freedom of choice in marriage and familial affairs protected by the Due Process Clause.[19]

The right of privacy did not materialize suddenly in *Griswold*, but was initially articulated in the late nineteenth century. Michigan Judge Thomas Cooley is credited with planting the seed of privacy's judicial development in his 1888 *A Treatise on the Law of Torts* which pronounced the "right to be let alone." He spearheaded expansion of the notion of individual autonomy, claiming it was not limited to literal protection from bodily injury, but also encompassed protection from verbal assault, which causes psychological harm equal to physical harm.[20] Two years later, Justices Brandeis and Warren coauthored a paper titled "The Right to Privacy," which called for a redefinition of individual liberty in light of societal change. They reiterated Cooley's sentiments, stating that appreciation of man's spiritual nature, feelings and intellect beg protection of more than physical liberty: "the right to life has come to mean the right to enjoy life – the right to be let alone." In their view, property embraces both tangible and intangible possessions--the purpose of its protection not to guard its physicality, but to sustain the peace of mind such protection affords. They derived the right of privacy from the principle of "inviolate personality," or claim to one's individuality. With the advent of new technologies, they saw it necessary to explicitly protect such privacy, which theretofore was merely informally protected by common law. Building on Cooley's thesis, they began to articulate the concept of individual informational privacy central to the freedom of intimate association.[21] Though their essay did not result in immediate establishment of the right of privacy in law, soon after its publication, the right began to be recognized in tort law.

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[17] *Ibid.*, 657-658.
[18] *Ibid.*, 659-664.
[19] *Ibid.*, 664-665.
[20] Cooley, Thomas McIntyre. "*A Treatise on the Law of Torts, or, the Wrongs Which Arise Independent of Contract.* Chicago: 1888. 1046 pp. *American Law: Torts.*
[21] Warren, Samuel D., and Louis D. Brandeis. "The Right to Privacy." *Harvard Law Review* 4.5 (1890): 193-220.

Even prior to Cooley's *Law of Torts*, the Supreme Court had begun formulating on its own the right of privacy in *Boyd v. US (1886)*, overturning a law forcing individuals to produce papers as evidence of illegally imported goods. That decision formed the basis of the liberal construction of the 4th and 5th Amendments, emphasizing that an overly narrow reading deprives those protections of their efficacy and import. *Boyd* was crucial in establishing that the 4th Amendment protects "the sanctity of a man's home and the privacies of life" from governmental invasion. Echoing Brandeis and Warren's tranquility rationale of privacy rights, Justice Bradley asserts that it is the "invasion of [man's] indefeasible right of personal security, personal liberty, and private property" which lies at the heart of the offense. *Boyd* is significant in that it delineated the right to individual autonomy that is still at the core of the right to privacy.

Those first three landmark articulations of the right o privacy initiated a broader shift toward its recognition. Beginning in 1890, state courts, one by one, began to apply the right of privacy, and by 1960, five years before Griswold was decided, 31 states protected the right. From the late nineteenth century, privacy became an increasingly hot topic in the Court. One camp emphatically denied its constitutional basis, while their rival Court majority delivered countless privacy-related decisions further recognizing and clarifying individual aspects of privacy protection. While those decisions dealt with discrete privacy claims and posited varying constitutional rationales, none went further than the confines of intimate associational freedoms, which had been at the heart of nineteenth century defenses of privacy. As case law supporting recognition of a right of privacy amassed, the Court pronounced an increasingly cogent constitutional basis for privacy protection, culminating in its fullest articulation in *Griswold*.

In *Gilbert v. Minnesota (1920)*, the Court ruled against privacy interests in upholding a statute forbidding the teaching of pacifism to one's children. Justice Brandeis' dissent in *Gilbert* served as an important precedent in later cases. He reasserted "the privacy and freedom of the home" claimed in *Boyd*, and stressed parental rights to express convictions of religion or conscience. In doing so, Brandeis argued for a fundamental liberty protection of privacy, linking the invasion of privacy of one's home to the deprivation of 1st Amendment free speech. In *Meyer v. Nebraska (1923)*, the Court rested its decision in favor of privacy interests on 14th Amendment Due Process logic. In overturning a statute prohibiting foreign language instruction in schools, it enumerated the substantive rights protected by due process, "essential to the orderly pursuit of happiness by free men," including the freedom to engage in commerce and professions, to acquire knowledge, to marry and raise children, and to worship God as one chooses--a catalog of basic liberties identical to Karst's values of intimate association. In addition to constitutional logic, the Court also defended the "natural duty" of parents to raise children as they see fit, infusing natural law concepts into jurisprudence. The Court

again reaffirmed "the [14th Amendment] liberty of parents to direct the upbringing and education of children" in *Pierce v. Society of Sisters (1925),* overturning a statute requiring children to attend only public schools. *Pierce* validated *Meyer's* substantive due process argument, signaling its vitality as a defense of privacy rights. The Court also posited natural law reasoning similar to that enunciated in *Meyer,* claiming a parental "high duty" to "direct the destiny" of their children.

Justice Brandeis penned another landmark dissent, again overshadowing the Court's decision in lasting importance, in *Olmstead v. US (1928).* The decision construed the 4th and 5th Amendments narrowly, finding neither was violated by secret wiretaps of a privately owned building. Brandeis, however, saw those amendments as necessarily broad in scope, and recapitulated more boldly his conception of the protections underlying the right to privacy. Weaving together reasoning and phrases from *Meyer, Boyd,* and his earlier paper, he asserted that the Framers intended for those amendments to create conditions conducive to "the pursuit of happiness," taking into account man's spirit and intellect, all conferring "the right to be let alone – the most comprehensive of right and the most valued by civilized men." As such, argues Brandeis, *all* invasions of privacy breaching man's basic autonomy are violations of liberties protected by those amendments, as they are equally violations of humanity. Though this definition of privacy protection is more refined than its earlier formulations, it is no more expansive, still limited to protection of the basic liberty of man asserted from the outset.

The 14th Amendment Equal Protection and Due Process clauses were construed by Justice Douglas in *Skinner v. Oklahoma (1942)* to protect from governmental intrusion into the areas of "marriage and procreation," which comprise "one of the basic civil rights of man ... fundamental to the very existence and survival of the race." Though the privacies of the home and of family life had already been constitutionally accepted, this decision cemented the substantive due process protections of intimate associations enumerated in *Meyer* and further underscored marriage and procreation as fundamental liberties. Privacy was not expanded to include these protections, but was merely applied to protect another facet of fundamental humanity. *Prince v. Massachusetts (1944)* exemplified that plateaued trajectory of privacy protection in its limitations on those same 14th Amendment rights. In upholding a statute restricting children from selling religious literature, the Court acknowledged that while there is a "realm of family life which the state cannot enter, ... the family itself is not beyond regulation; ... neither rights of religion nor parenthood are beyond limitation." As Karst noted, rights of intimate association are not absolute, but subject to attempts to balance governmental interests with societal interests. Such Court-imposed limitation argues against any revisionist intent to enforce a morally relativistic construction on the Constitution.

Despite the scarcity of decisions citing the 1st Amendment as an analytical basis for protection of the right of privacy, such reasoning is by no means absent or obsolete. In *NAACP v. Alabama (1958),* the Court acknowledged a right to associational privacy, parallel in gravity to the 1st Amendment freedom of association. This decision was significant not only because it premised the right to privacy on 1st Amendment principles, but because it joined the 1st and 14th Amendment defenses, claiming that both the right to pursue private interests and to associate freely fall under the substantive due process umbrella. In doing so, the right to privacy in its totality was imbued with the magnitude, the sanctity, of 1st Amendment liberty protection.

Poe v. Ullman (1961) was in more than one respect a trial run for Griswold. Both cases involved the same Connecticut statute banning dissemination of contraception or medical advice pertaining to its use (although in *Poe* the suit was dismissed for want of imminent threat of prosecution). Justice Harlan's dissent in *Poe* was key to synthesizing the constitutional defenses of privacy, foundational to Justice Douglas' opinion in Griswold.

Harlan argued that the statute violated the 14th Amendment for invading "the most intimate concerns of an individual's private life." He articulated a broad definition of due process liberty, stressing its real substantive component that enforces the amendment's underlying purpose. He further claimed that such liberties cannot be limited by stated guarantees in the Constitution, but must encompass fundamental rights of personhood: "This 'liberty' is not a series of isolated points ... it is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." This bold pronouncement integrated and further legitimized the substantive due process rights first enumerated in *Meyer.* Yet *Poe* was not groundbreaking, for it merely reiterated, with renewed vigor, the original right to be let alone. At its inception, the only rationale in law was inherent human value, but by this point, constitutional jurisprudence had carved out a legitimate position for the freedom of intimate association.

Harlan also cataloged justifications for the right to privacy of the home, citing the 3rd Amendment protection against quartering of soldiers in one's home, the 4th Amendment protection against unreasonable searches and seizures, and the case law involving the 4th and 14th Amendments, protecting the home "against all unreasonable intrusions of whatever character." Drawing on Cooley's reasoning in *The Law of Torts,* Harlan claimed that although the statute involves no physical breach, it nevertheless violated the inviolate nature of life inside the home. As the seat of family life, the home encompasses is fortified by many constitutional guarantees.

As evidenced by the early writings and selected case law, the right of privacy was not fabricated by activist schemes. It was rather enumerated and refined in its

foundational cases, which reckoned with the revised notion of liberty encompassing not merely physicality, but also human personality and dignity, consequently deserving protections of intimate associations. The Court arrived at the conclusion that intimate associations were protected by the 1st, 3rd, 4th, 5th and 14th Amendments by broad application of constitutional principles, by scrutinizing analysis of their underlying imports, and by inferring how rights of basic human autonomy ought to be protected with parallel logic. Rather than extrapolating to uncharted waters, the Court harmonized the dual interpolations of the right of privacy and the liberties of man, both contained within the four corners of the Constitution.

In *Griswold v. Connecticut (1965),* the Court overturned the same Connecticut statute at issue in *Poe,* this time finding the prohibition of contraception a violation of the marital relationship and the privacy of the home. Justice Douglas' opinion established once and for all time the right of privacy in constitutional jurisprudence, presenting an exhaustive constitutional defense of intimate associational freedoms. Predicting a wide audience on account of the breadth of the right pronounced, he began by separating the 14th Amendment substantive claim of privacy protection from the *Lochner-era* abuse of due process liberty characterized by Court invalidation of the progressive economic statutes it disagreed with. He insisted, "We do not sit as a super-legislature" through the exercise of overreaching judicial power, but instead deal strictly with a statute involving "the intimate relation between husband and wife." Focusing on the marital bond, a fundamental human relation, Douglas emphasized the legitimacy of its defense as an intimate associational value, in contrast to the fictive liberties alleged in the *Lochner* decisions.

Granting due process only a cursory nod, Douglas swiftly moved to a 1st Amendment defense of privacy, claiming it guards many intimate associations not explicitly stated. In that, he reaffirmed the holdings in *Pierce* and *Meyer,* bolstering their 14th Amendment defenses to demonstrate the analogy of protected areas of thought, inquiry, and opinion to 1st Amendment freedoms of speech and press. Douglas further asserted that the 1st Amendment includes a penumbra broadly protecting one's privacy from governmental intrusion, akin to the freedom of assembly's defense of associations not strictly political, citing the NAACP decision as precedent.

Having thus established a framework of penumbral reasoning, Douglas declared that the Constitution contains "zones of privacy," found in the 1st, 3rd, 4th, 5th, and 9th Amendments, using Harlan's analysis in *Poe* as a blueprint. Notably, Douglas reiterated *Boyd's* broad construction of the 4th and 5th Amendments as shielding the "sanctity of a man's home" from governmental invasions, despite more recent case law adding other constitutional defenses to that protected area. *Boyd's* relevance and application to *Griswold* attests to the fact that the right of privacy had not been expanded in essential meaning since its initial

pronouncement. Douglas further cited precedent protecting penumbral rights of "privacy and repose," such as the freedoms of "marriage and procreation" protected in *Skinner* to further validate the intimate associational values in question.

Douglas averred that privacy in marriage predates American political heritage, and is "intimate to the degree of being sacred," promoting a traditional, esteemed, harmonious way of life. In appealing to the marital relation's natural and beneficial human properties, Douglas applied the now standard approach in privacy cases of fusing intimate associational values with broad constitutional precepts, the gravity of this decision making them lastingly one and the same.

In scrutinizing Douglas' opinion, it is evident that while he mostly synthesized precedential defenses of privacy, Douglas deviated from certain conventional arguments. Aside from a terse dismissal of improper due process usage, Douglas conspicuously omitted 14th Amendment reasoning. He ignored the due process rationale on which *Meyer, Pierce, Poe* and *Skinner* relied, and utilized those precedents by reformulating their conclusions in the language of other constitutional clauses. Perhaps Douglas worried it was too open-ended a defense or had been too tarnished in reputation to use in a landmark case sure to be widely dissected. In addition, the inclusion of the 9th Amendment as a zone of protected privacy was baffling considering its absence from privacy precedent.

Both mysteries are unraveled by the concurring opinions of Justices Goldberg and Harlan. Harlan admonished the Court for including the 14th amendment in the Bill of Rights' incorporation controversy and as a consequence excluding due process inquiry in the case at hand. In light of Harlan's opinion, it appears Douglas consciously omitted 14th Amendment arguments in order to avoid refutation of the holding solely on the basis of alleged inapplicability to the states. Goldberg's opinion detailed the history and intent of the 9th amendment, claiming that it was crafted to protect additional fundamental rights alongside those explicitly stated in the Constitution, especially those of the traditional family relation that is "as fundamental as our entire civilization." Evidently, Douglas drew on that opinion as concurrent precedent on which to base his zone of privacy argument.

Following *Griswold's* watershed declaration of the right of privacy, *Katz v. US (1967)* overturned *Olmstead's* trespass theory, rejecting the use of wiretapping as a violation of the 4th Amendment protection against unreasonable searches and seizures. Justice Stewart held that the "4th Amendment protects people, not places," aan analysis that deviated from the strictly physical definition of privacy upheld in *Olmstead.* The *Katz* decision demonstrated the fruition of privacy's recognition in law in the post-Griswold era, and more simply, the acceptance of Cooley's original premise of a privacy defined beyond physical bounds. While Stewart held that the 4th Amendment provides individuals with "reasonable expectations of privacy," he maintained that nowhere in the Constitution is a "general right to privacy," at once recognizing a fundamental right to privacy and

insisting on its narrow construction. Echoing *Prince's* earlier assertion of the right's limitations, Stewart argued that the Constitution protects certain personal privacies, not unbounded individual autonomy, and that the individual is still subject to state laws.

Soon after *Katz*, the Court extended privacy protection to the private possession of obscene materials in *Stanley v. Georgia (1969)*, relying on 1st and 14th Amendment reasoning. With *Griswold's* compelling 1st Amendment defense of privacy, its infrequent application gave way to repeated utilization thereafter. Justice Marshall asserted it that "the state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." To critics, this decision smacked of judicial imposition of morally bereft individualism, but it stil. did not deviate from the earliest "right to be let alone" and *Boyd's* "sanctity of the home" defense. The sole innovation was the union of that defense with *Griswold's* broad 1st Amendment construction, encompassing freedom of thought as a corollary to speech. Though protection was extended to an activity not traditionally safeguarded, its parallel logic kept the scope of the right unchanged. Extension of privacy rights, moreover, conforms to Brandeis and Warren's original call for the right of privacy to continually adapt to societal change.

Critics were further alarmed at the Court's decision in *Eisenstadt v. Baird (1972)*, which overturned a statute forbidding the use of contraceptives by unmarried couples, seen as an ominous judicial inflation of privacy, spring-boarding off the alleged judicially-invented right in *Griswold*. Justice Brennan asserted that the marital privacy upheld in *Griswold* turned on its intimate associational value, rather than its traditionalism, and therefore the association of unmarried couples should be equally protected. He defended privacy as "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Akin to the *Stanley* decision, the Court relied on the intimate associational values underlying the right to privacy to apply its freedom to a relationship of like fundamentality.

Since the constitutional justifications for the right of privacy were crystallized in the *Griswold* decision, the Court has used that steady footing to substantiate novel intimate associations, all while maintaining the narrow construction of privacy scope. The Court controversially proclaimed the right to an abortion as a fundamental privacy interest in *Roe v. Wade (1973)*, which overturned a Texas law banning abortion. Justice Blackmun asserted that 14th Amendment due process defends "a woman's qualified right to terminate her pregnancy. He based his argument on the direct injury, distress, and psychological harm caused by the prohibition of abortion, taking a page from Cooley's premise of "the right to be let

alone," based on a definition of privacy involving more than physical autonomy. Blackmun highlighted both the physical and intangible individual liberties at stake, paralleling the intimate associational logic of privacy precedent. He framed abortion as a limited right, stressing the state's "legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term." In following that logic, Blackmun mandated a trimester approach, granting autonomy only in the first trimester, allowing for greater regulation and even proscription of abortion in the second and third trimesters respectively.

Since *Roe*, the Court has heard a number of abortion cases, and has not only adhered to *Roe's* narrow formulation, but has authorized more and more regulations restricting the right, leaving only its bare-bones intact. In *Planned Parenthood v. Casey (1992)*, the Court again upheld a slew of state restrictions on abortion while reaffirming *Roe's* central holding, restating it as the woman's right to an abortion before fetal viability without undue state interference, the state's power to restrict abortions after viability, and the state's legitimate interest in protecting the woman's health and the potential life of the fetus. Indeed, this decision contracted abortion protection, scrapping the trimester approach in favor of the less flexible viability partition, and applying an "undue burden" test to abortion restrictions, in effect giving broad latitude to states to regulate abortions. This decision should not however, be viewed as a rejection of the right to abortion as a constituent element of the right of privacy, but rather as an acknowledgement of privacy's limitations in this area, subject to balancing and subsumption by compelling governmental interests at variance with its privacy interest.

Bearing that in mind, it is unlikely that an unqualified right to abortion would ever be incorporated into constitutional jurisprudence. For the same reason that a generalized right to privacy has not and will not be recognized beyond intimate associational contexts, as was explained in the *Katz* decision, an absolute right to abortion is inconceivable in law, for it would grant unfettered autonomy, to the detriment of governmental and societal concerns.

Besides abortion, the Court has recently explored whether bans on homosexual sodomy violate the right of privacy. In *Bowers v. Hardwick (1986)*, the Court denied that there is a fundamental liberty interest in homosexual sodomy, upholding a Georgia statute criminalizing that conduct. Justice White held that the right of privacy pertains only to family, marriage and procreation, and without traditional or historical protection, sodomy has no claim to protection. He contended that the privacy of the home does not immunize such illegal conduct. Further, he claimed that the belief that homosexual sodomy is immoral is sufficient rational basis for the statute, as "the law is constantly based on notions of morality." Justice Blackmun noted in dissent that familial rights have been given special protection specifically because they are central to an individual's life, and that the

Court here refused to recognize the fundamental interest in controlling one's intimate associations. He elaborated that sexual intimacy is a "key relationship of human existence, central to family life, community welfare, and the development of human personality," which should not be denied to homosexuals, effectively adopting Karst's conception of the fundamental value of intimate association.

The Court rectified its repudiation of privacy rights in *Lawrence v. Hardwick (2003),* which overturned Texas' "homosexual" conduct law, thereby nullifying *Bowers.* Justice Kennedy asserted that the case involved "liberty of the person both in its spatial and more transcendent dimensions," of both the physical invasion of the home and the violation of one's freedom of intimate association. He reaffirmed the substantive reach of due process liberty expressed in *Griswold, Eisenstadt,* and *Roe,* claiming that *Bowers* failed to recognize the extent of the liberty at stake, involving the most intimate human conduct of a private relationship in the privacy of the home. Kennedy admonished White's support of legislating morality, asserting that it is the Court's obligation to define liberty for all, not to mandate majoritarian morality. *Bowers* was not entirely anomalous, however, because it involved granting protection to conduct proscribed in law and tradition. Nevertheless it was wrong, argued Kennedy, because it deviated from the established right to privacy that protects intimate associations, not only the specific intimate associations already in law. As such, *Lawrence* did not expand the right of privacy beyond its original conception, but merely broadened it along the same plane to encompass an intimate association and confer on it long overdue recognition. As Blackmun asserted in *Bowers* and Kennedy reiterated in *Lawrence,* sexual intimacy is at heart of intimate association, as is the protection of unconventional arrangements, both demanding that homosexual sodomy be acknowledged as a protected privacy. Tradition has no bearing upon the right of privacy; it just so happens that most intimate associations are enshrined in tradition. That does not mean, however, that novel intimate associations deserve any less protection in law.

Having thus constitutionally incorporated homosexual intimacy as a legitimate intimate association meriting privacy protection, I predict the Court will soon acknowledge a right to homosexual unions. Parallel to the extension of privacy to unmarried couples in *Eisenstadt* based on the equivalence of the protected intimate association of marriage in *Griswold,* the recognition of the intimate associational value of homosexual intimacy begs the consequent recognition of homosexual unions. Further, outside of moral approbation, the state has no compelling interest to prohibit such unions, unlike its legitimate interest in restricting abortions. However, the Court would likely disallow use of the marriage label; while tradition may not restrict the extension of privacy protection to homosexual unions, the law steadfastly guards traditional marriage, not wholly from a moral standpoint, but more as a mainstay of civic virtue.

The strict constructionist denunciation of the right of privacy is, at its base, more a condemnation of conduct deviating from conventional moral standards than a defense of constitutional integrity. As demonstrated above, the implicit right of privacy is derived entirely from the Constitution's explicit and intended guarantees of freedom in related contexts. Perhaps because the right of privacy is never explicitly mentioned in the Constitution, the Court has construed it narrowly, strictly within the constitutionally protected bounds of intimate associational freedoms, and has demonstrated an unwillingness to expand the right beyond those defined limits, even as privacy has incorporated additional areas of protection. *Griswold* did proclaim the right to privacy, not out of thin air, but as a victorious pronouncement of privacy's constitutional canonization, each precedent a necessary step in clarifying and validating its constitutional basis. Once and for all, the right of privacy is established in law, not amorphous or unbounded, but fastidiously constructed so as to safeguard the individual's fundamental freedoms of intimate association in traditional and novel circumstances.

WORKS CITED

Bork, Robert H. *The Tempting of America: the Political Seduction of the Law.* New York: Free, 1990. 144.

Cooley, Thomas McIntyre. *A treatise on the law of torts, or, The wrongs which arise independent of contract.* 2nd ed. Chicago, 1888. 1046pp. *American Law: Torts.*

Ely, John Hart. *Democracy and Distrust: a Theory of Judicial Review.* Delanco, NJ: Legal Classics Library, 2004. 1-2.

Karst, Kenneth L. "The Freedom of Intimate Association." *The Yale Law Journal* 89.4 (1980): 624-92. *JSTOR.* 626.

Warren, Samuel D., and Louis D. Brandeis. "The Right to Privacy." *Harvard Law Review* 4.5 (1890): 193-220. *JSTOR.*

THE CONVEYANCE OF THE *MIRANDA* RIGHTS

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The Miranda rights are widely understood to be a fundamental part of the responsibility of law enforcement agencies to ensure that arrested individuals are aware of their freedoms in the legal process. However, the wording of these rights is ambiguous and can easily be misinterpreted. Therefore, law enforcement officers often have undue leverage when conducting arrests and interrogations. A basic psycholinguistic analysis of the phrasing of the Miranda rights reveals their inexactness and demonstrates simple ways to change their wording to more effectively convey individuals' freedoms. Here, the necessary components of speech act theory and Grice's maxims of conversation are outlined and used to propose new possible wordings to clarify the Miranda rights.

"You have the right to remain silent…"

These words are universally recognized by law enforcement officials and television-addicted children alike. In the American legal system, the *Miranda* Rights outline the general rights of an individual provided by the Fifth and Sixth Amendments as applied to interrogations by a police officer. These rights resulted from the Supreme Court's decision in the *Miranda v. Arizona* case, in which the judiciary stated the importance of explicitly informing a suspect of his or her rights before an interrogation takes place. Though their actual wording may vary, the *Miranda* rights generally read as follows:

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to talk to a lawyer and have him present with you while you are being questioned.
4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one. (Shuy, 1997, as cited by Solan and Tiersma, 2005, 75)

According to the theory of speech acts (Austin, 1962; Searle, 1969; as cited by Akmajian, Demers, Farmer, and Harnish 1995), utterances, called locutionary acts, have a communicative goal, called the intended illocutionary act. The illocutionary act—an utterance's intended communicative purpose—is performed in order to achieve an intended perlocutionary effect on the addressee. In essence,

together the utterance act and the illocutionary act are important for giving rise to the intended perlocutionary act, and not the opposite (Akmajian et al., 2001).

In the context of the *Miranda* rights, the intended illocutionary act of the first and third rights is to assert the suspect's freedoms to utilize those rights (i.e., to assert the existence of the rights). The goal of the second right is to warn the suspect about a negative consequence of waiving the first right; the goal of the fourth right is to offer a lawyer to protect against that negative consequence. Collectively, the illocutionary acts of the *Miranda* rights are intended to have the perlocutionary effect of protecting the suspect from self-incrimination by cautioning him or her against it. The *Miranda* warnings explicitly assert the suspect's right not to be compelled to confess to a crime and his or her right to have a lawyer present to protect that Fifth Amendment right; the Sixth Amendment grants the right to the presence of an attorney during interrogation proceedings free of charge, if the suspect is unable to pay. A lawyer is important to this protection because the interrogator's goal is to use every legal means possible to elicit a confession from the suspect; the average person is unaware of these means or how to protect himself or herself against them.

The *Miranda* rights, outlined in the Fifth and Sixth Amendments, ensure that law enforcement officials do not have undue leverage in conducting interrogations. An individual's *Miranda* rights must be waived before an interrogation can proceed. The Supreme Court, in several rulings, deemed it important that suspects be explicitly informed of their Fifth and Sixth Amendment rights, because the intended perlocutionary effect of the interrogation process is to persuade the suspect to confess.

The Supreme Court's decision in *Moran v. Burbine* further stipulated that any waiver of the Miranda rights should be done knowingly and voluntarily:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. (18 U.S.C. S 3500(e))

This stipulation is the reason that officers typically follow their reading of the Miranda rights with questions: "Do you understand each of these rights I have explained to you?" and "Having these rights in mind, do you wish to talk to us now?" (Solan and Tiersma, 2005).

If individuals do not adequately understand the rights, then they cannot knowingly waive them. The *Miranda* rights given above contain the typical wording, which is at a sixth- to eighth-grade reading level, and, therefore, they should be understandable to most American adults (Solan and Tiersma, 2005). According to Solan and Tiersma (2005), individuals with low intelligence (whether by lack of education or otherwise) or mental handicaps, juveniles, deaf people, and individuals for whom English is not their native language may not adequately understand the rights.

In the case of mentally challenged individuals, Solman and Tiersma cite a study by Fulero and Everington (1995) that investigated two groups of mentally handicapped individuals' understandings of the rights. The groups, which were not matched for IQ, differed with respect to whether they had prior experience with the criminal justice system. Grisso's (1980, as cited in Solan and Tiersma, 2005) paraphrase task was used to assess the groups' understandings of the rights. Specifically, the task required subjects to paraphrase each of the four *Miranda* warnings, and their paraphrase was scored 0, 1, or 2, with 2 representing adequate understanding. Each of the four *Miranda* rights was scored; the scores were counted cumulatively, with possible total scores ranging from 0 to 8. The findings of this study, in conjunction with Grisso's previous findings, demonstrate that mentally challenged individuals with relatively little contact with the criminal justice system tend to have inadequate understanding of the *Miranda* rights. Also, mentally challenged individuals in general tend to have insufficient understanding of the warnings, in contrast with most individuals with normal IQ. In Fulero and Everington's (1995) study, the group of mentally retarded individuals with little previous experience with the criminal justice system had an average score of 2.24, and the group of mentally retarded individuals with more experience had an average score of 4.60. In contrast, Grisso's study showed that "80.7 percent of his total adult sample scored 6 or higher" (Solan and Tiersma, 2005, 78).

Notably, of the population of mentally retarded individuals with little experience with the law tested by Fulero and Solomon, only 3.4% obtained a score demonstrating adequate understanding of the second *Miranda* warning ("Anything you say can and will be used against you in a court of law."), compared with 28.0% of mentally retarded subjects who had more extensive contact with the legal system. In contrast, 68.1% of tested individuals with normal IQs obtained scores indicating adequate understanding (Grisso, 1998, 84 and Gulero and Everington, 1995, 538 as cited in Solan and Tiersma, 2005, 79). It is clear that suspects with low intelligence or less experience with the law have a diminished understanding of the *Miranda* warnings. Therefore, whether or not a mentally deficient individual legitimately waives his or her rights is questionable. Taken together, these findings underscore the importance of mental capacity and contact with the criminal justice system as significant aspects of an individual's ability to appreciate the meaning of the *Miranda*

rights. Additionally, mentally handicapped individuals may not be capable of knowingly waiving their rights.

This conclusion can also be applied to juveniles. According to Solan and Tiersma, a study by Grisso (1998) that used his paraphrase test showed that sixteen-year-olds with lower than normal IQs scored an average of 4.30 out of the maximum of 8 whereas sixteen-year-olds with IQs over 100 scored an average 7.45. In addition, two groups of thirteen-year-olds with low IQ or normal IQ scored an average of 3.40 and 6.15, respectively. The right to counsel was understood the least by the juveniles.

Solan and Tiersma observe that mentally retarded individuals or juveniles may inadequately understand the rights because they contain lexically ambiguous words—that is, words that have more than one meaning. For example, the language of the *Miranda* statement stating that the suspect has the right to the "presence" of an attorney during the interrogation process as well as during court proceedings may not be clear to some individuals. In this case, the word "presence" is lexically ambiguous, as the locutionary act may cause the activation of the addressee's mental representations of gifts ("presents"). In addition, the suspect might not be aware that a lawyer can be appointed free of charge, since the *Miranda* warning simply states that if the suspect cannot afford one, an attorney will be appointed to represent him or her, without specifying cost (Solan and Tiersma, 2005). Other examples of words that, for juveniles and mentally handicapped individuals, are easily associated with meanings other than those intended by the *Miranda* rights include: "court," which may bring up the mental representation of a basketball or tennis court; and "right," which may bring up the mental representation of the opposite of left, or correct. The illocutionary act can take on a different representation than the speaker intends. The courts should acknowledge juveniles' inability to understand the consequences of waiving their rights when determining whether a child does so "knowingly and voluntarily."

To address the problem with juveniles and mentally retarded individuals inadequately understanding the rights, Solan and Tiersma propose using simpler wording and providing additional explanation:

1. You have the right to remain silent. You do not have to answer any questions or make any statements.
2. If you decide to speak with us, anything you say—whether or not it is recorded—can be used against you in a court of law. [We will videotape our session so that we have an exact record of what is said. The tape can be used against you in court.]
3. You have the right to have a lawyer here during questioning. All you have to do is say, "I want a lawyer." If you do not know where to find a lawyer, we will get a lawyer for you. If you cannot afford to pay, the lawyer will be provided free of charge.

4. As soon as you tell us that you want a lawyer, we will not ask you any more questions until you have talked with the lawyer. (2005, 88-89)

Such an improvement is needed to the *Miranda* warnings. It would be important to conduct a study like Grisso's and Fulero and Everington's using Solan and Tiersma's proposed wording to determine if juveniles and mentally retarded individuals now show adequate understanding. Though the heart of the problem—suspects' misunderstandings of their Fifth and Sixth Amendment rights—would not be completely resolved by changing the wording of what is read to suspects, it would be alleviated somewhat; individuals unfamiliar with the legal system would be presented with a better basic outline of the rights at their disposal.

In addition to mentally retarded individuals and those with no prior contact with the criminal justice system, deaf defendants and individuals for whom English is not their native language, or who speak a different dialect of the language in question, tend to demonstrate insufficient understanding of their rights in the interrogation process. For deaf people, it is often difficult to find a translator for sign language, and lip reading is often ineffective. Solan and Tiersma (2005) cite several examples of individuals whose comprehension of the *Miranda* warnings was compromised due to a language barrier; the court system accepts loose interpretation practices for conveying the *Miranda* warnings. Since the courts have loose standards for the level of understanding of a suspect, it is important that changes are made to the process by which the *Miranda* warnings are conveyed to suspects for whom language might inhibit understanding.

Although a suspect may adequately understand the Miranda rights, which includes recognizing their illocutionary acts, he or she may not appreciate their intended protective effect. As discussed by Leo and White (1999) and Kassin and Gudjonsson (2004), officers engage in tactics that attempt to undermine the protective effect, and, instead, achieve the effect of persuading the suspect to waive the rights. Consequently, suspects who waive their rights may not truly voluntarily do so.

The likelihood of a suspect waiving his or her rights depends on his or her prior experience with the law and the actions of the officer in conducting the interrogation. Kassin and Norwick (2004, as cited by Kassin and Gudjonsson, 2004) conducted a study in which 81% of participants who were innocent of a mock crime waived their rights compared to 36% of the participants who were guilty (Note: this study did not involve individuals who actually committed a crime.) The percentage of innocent suspects who waive their rights demonstrates that, though people may understand their rights, they may not appreciate their important protective effect. In addition they found that the innocent participants were more likely to waive their rights with a sympathetic interrogator than a hostile interrogator (92% vs. 67%, respectively, whereas the guilty participants showed the reverse effect: 33% waived

their rights with a sympathetic interrogator and 42% waived their rights with a hostile interrogator).

In addition to studying the illocutionary acts and their perlocutionary effect on defendants in determining the effectiveness of the *Miranda* rights in their normal use, it is useful to consider Grice's (1975) maxims of conversation. Grice outlined the particular characteristics that contribute to successful conversation in the Cooperative Principle, which states, "Make your conversational contribution such as is required at the stage at which it occurs by the accepted purpose or direction of the talk exchange in which you are engaged" (1975, 45). In addition, Grice specified four maxims of conversation that further specify how to achieve the Cooperative Principle: quantity, quality, relation, and manner. These maxims are implicitly and mutually assumed by participants in a conversation:

1. *Quantity*: Be informative.
    - Make your contribution as informative as is required (for the current purposes of the conversation).
    - Do not make your contribution more informative than is required.
2. *Quality*: Try to make your contribution one that is true.
    - Do not say what you believe to be false.
    - Do not say that for which you lack adequate evidence.
3. *Relevance*: Be relevant.
4. *Manner*: Be perspicuous.
    - Avoid obscurity of expression.
    - Avoid unnecessary ambiguity.
    - Be brief (avoid unnecessary prolixity).
    - Be orderly. (Grice, 1975, 45)

Although it is legal for interrogators to lie (and thereby violate Grice's Quality maxim) by saying that they consider the suspect to be a friend or even about the existence of physical evidence of the suspect's guilt, interrogators cannot legally promise any rewards or punishments of confessing. The reason for this is that interrogators do not have the authority to ensure benefits or harm, and directly lying about having this authority is deemed to be unduly coercive in interrogation proceedings. Promises of benefits or threats of harm are likely to increase the rate of both true and false confessions. Because promises and threats are very persuasive and therefore effective to the interrogator's goal of eliciting a confession, interrogators attempt to convey them indirectly, via implicature, which is a message that, if expressed overtly, would not violate one of Grice's maxims.

According to Leo and White (1999), officers attempt to undermine the protective effect of the Miranda rights by changing the utterance act so the suspect pays less attention to them as well as by asserting that they are just a formality. For

example, officers will read the *Miranda* rights in a calm, casual voice, to avoid calling attention to them. They may also try to de-emphasize the importance of the rights in one of several ways: creating the appearance of a non-adversarial relationship between the suspect and the officer, implying that reading the rights is just a formality, referring to the rights in the context of TV (to trivialize their significance), and focusing the suspect's attention on the importance of conveying information to the officer (Leo and White, 1999).

Leo and White (1999) also claim that officers attempt to persuade a suspect to waive the rights by deceiving him or her into thinking that they are not adversaries. In the following transcript the interrogator attempts to achieve this deceptive effect by lying.

Interrog 1:	I consider myself to be a friend of yours.
Suspect:	Yeah, you're a friend of mine, Bill, all right.
Interrog 1:	We've had hot fudge sundaes together, and we've exchanged Christmas letters and—we've done various things like that. (438)

This type of lying is an effective and legal strategy. It is effective because, as Grice (1975) noted, people mutually assume that they will adhere to the Cooperative Principle by obeying the maxims of conversation. Of course, the Cooperative Principle does not apply to the interrogation process, but it is beneficial to the interrogator if the suspect believes that it does apply. In the example above, the Interrogator's first utterance violates the Quality maxim, because it is unlikely that he believes he and the Suspect are friends. However, since the Suspect believes that the Interrogator *is* adhering to the Cooperative Principle, the Interrogator attempts to achieve the perlocutionary effect of deceiving the Suspect into thinking that the interrogation will be non-adversarial.

The Interrogator's second utterance is an obvious and intentional violation of the Relation maxim, since the assertion about sharing sundaes and Christmas cards with the Suspect is irrelevant to discussing the crime that the Suspect is accused of committing. According to Grice, speakers intentionally and obviously violate a maxim in order to convey an implicature, which is an implied message that goes beyond what they directly say. The addressee derives an implicature because he or she assumes that the speaker is in accordance with the Cooperative Principle despite the obvious and intentional violation of a maxim. The implicature, therefore, is a message that would not have violated the maxim if it had been said overtly. In the example above, the Interrogator's intended implicature is that it is unnecessary for the Suspect to invoke his right to remain silent or to have a lawyer present because, as a friend, the Interrogator wants to help defend him against the charges.

Another method interrogators employ in their attempts to persuade suspects to waive their rights is to make indirect promises of leniency or indirect threats of punishment, which again involves the process of conveying an implicature. Leo and White cite another example:

Suspect:	Uh huh. Wait a minute, but what you're sayin, I'm bein arrested for, for what'd you say, two—
Interrog 1:	Actually for two homicides, or one, one homicide and one beat, and one felony assault.
Suspect:	Oh no.
Interrog 2:	Yeah, unless we can find a reason or explanation for, for what happened, that's, we have no choice based on what we have.
Interrog 1:	So do you understand your rights?
Suspect:	Yeah, I understand what you're sayin.
Interrog 1:	Okay, do you want to talk to us about it?
Suspect:	Yeah, I'll talk [inaudible].

(Leo and White, 1999, 444)

The second Interrogator's assertion about finding a reason or explanation violates Grice's Quantity maxim by not being sufficiently informative. He explains neither the evidence that is the basis of the charges nor the evidence that would be the reason for dropping one or more of the charges. The implicature is that if the Suspect tells why and how he committed the crimes, the charges would be reduced. If this implied promise of benefit were directly said, then it would not have violated the Quantity maxim. However, it would have been illegal.

The goal of the interrogation process is to obtain a confession from the suspect—that is, for the suspect to incriminate him- or herself. The Fifth Amendment guarantees the right against compelled self-incrimination. Remaining silent and only responding to questions when one's lawyer advises to do so will prevent the suspect from compelled self-incrimination. Responding to the interrogator's questions without a lawyer present increases the likelihood that the suspect will confess, or incriminate him- or herself. However, as long as interrogators do not physically torture the suspect, threaten harm, or promise benefits, it is unlikely that the courts will deem that the suspect was unduly compelled to confess. Because "a person cannot intelligently waive rights that he does not understand, and people with diminished intellectual capacity do not seem to understand their rights very well," precautions should be taken to ensure that vulnerable suspects are protected in preliminary interrogation and court proceedings (Solan and Tiersma, 2005, 79). The inherent advantage a police officer has over a suspect often makes people more likely to waive their rights, depending

on their innocence and the actions of the officer. Though the *Miranda* warnings are a necessary safeguard against compelled confession, many improvements are needed to a legal system that readily prosecutes suspects but is hesitant to question its own tactics in persuading suspects to waive those rights.

WORKS CITED

Akmajian, Adrian, Richard Demers, Ann Farmer, and Robert Harnish. *Linguistics: An Introduction to Language and Communication* (4 ed.). Cambridge, MA: The MIT Press, 1995.

Austin, John. *How to Do Things with Words.* Oxford: Oxford University Press, 1962.

Fulero, Solomon M., and Caroline Everington. "Assessing Competency to Waive Miranda Rights in Defendants with Mental Retardation." Law and Human Behavior 19, no. 5 (1995).

Grice, Herbert P. Logic and conversation. In P. Cole and J. L. Morgan (Eds.), *Syntax and Semantics: Vol. 3. Speech Acts*. New York: Academic Press, 1975.

Grisso, Thomas. "Juveniles' capacities to waive Miranda rights: An empirical analysis." California Law Review 68, no. 6 (Dec. 1980).

Grisso, Thomas. *Instruments for Assessing Understanding and Appreciation of Miranda Rights*. Sarasota: Professional Resource Press, 1998.

Jencks Act. 18 U.S.C. § 3500(e), 112th Cong. (1957). *

Kassin, Saul M., and Gisli H. Gudjonsson. "The psychology of confessions: A review of the literature and issues." Psychological Science in the Public Interest 5, no. 2 (Nov. 2004).

Kassin, Saul M., and Rebecca J. Norwick. "Why suspects waive their Miranda rights: The power of innocence." Law and Human Behavior 28, no. 2 (Apr. 2004)

Leo, Richard A., and Welsh S. White. "Adapting to Miranda: Modern interrogators' strategies for dealing with obstacles posed by Miranda." Minnesota Law Review, 84 (Dec. 1999).

Searle, John R. *Speech Acts: An Essay in the Philosophy of Language.* Cambridge, UK: Cambridge University Press, 1969.

Shuy, Roger W. "Ten Unanswered Language Questions about Miranda." Forensic Linguistics 4, no. 2. (1997).

Solan, Lawrence M., and Peter M. Tiersma. *Speaking of crime: The Language of Criminal Justice*. Chicago: The University of Chicago Press, 2005.

IN DEFENSE OF JUDICIAL REVIEW

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Perceived activism by the Supreme Court—whether by liberals or conservatives—has energized political discourse for decades. Regardless of the aggrieved side in the debate, some have implicitly or directly criticized the institution of judicial review. This paper will defend the underpinnings of judicial review and argue that the institution represents an important safeguard for freedom and the rule of law. Although the power can easily be abused by judges, like most institutions in American democracy, the people and their representatives are obligated to watch their appointed judges and ensure that they do not usurp the powers more properly placed in more democratic branches. Moreover, this paper will explore some compelling alternatives that assign interpretative authority to other institutions—and discuss potential drawbacks. As the Court has increasingly been called to adjudicate the United States' most controversial issues and will soon be called to decide upon the constitutionality of President Barak Obama's recent healthcare reform, a discussion of the philosophy that allows the court to strike down duly enacted laws is essential.

In one sentence, the Founding Fathers created more controversy and political strife than could be imagined in 1789: "The judicial Power of the United States, shall be vested in one supreme Court...." What is the judicial power? Did it help move the country towards Civil War in *Dred Scott* v. *Sanford*?[1] Did it help fire off a culture war in *Roe* v. *Wade*?[2] Many agree that the courts have, at times, abused their powers, but are these abuses egregious enough to warrant changing the nature of the courts? Perhaps, except for a few hiccups, the courts have operated as the Founders envisioned. Maybe the courts were supposed to assume judicial review, and that power, like all others of government, 2 be abused if the wrong people are selected to wield it.

To keep judges in check, then, the people must be willing to exercise strict scrutiny of the bench. Few important decisions ever make the headlines, allowing judges leeway to enact policy away from the public eye. Only when this judicial activism strikes a chord such as in a *Roe* or *Lochner* does the public take notice. The courts cannot be trusted—absent the people. Conservatives and Liberals must unite, thus, not to attack the structure of the American judiciary or its legitimate

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[1] 60 U.S. 393 (1857)
[2] 410 U.S. 113 (1973)

constitutional function but to scrutinize judges to the same degree as any elected official.

A common charge levied against the courts is that they are interfering with legislation duly enacted by the people's representatives when they exercise judicial review. However, the courts, as a practical matter, must exercise judicial review. Indeed, one of the most notable advocates for judicial restraint, James Bradley Thayer, argued that the courts took the role of the sovereign to ensure that the Constitution, the national charter, was enforced and could strike down legislation in clear case of overreach by the legislature (the doctrine of clear mistake).[3] Indeed, to an arguable extent, judicial review in the United States is not significantly different from the "more democratic" British system. Although Parliament is supreme and can overturn judicial decisions, so can Congress—if it can muster the political will and votes to amend the Constitution (as it has done twenty-seven times, an average of once per decade). The American Constitution is the "supreme Law of the Land,"[4] ratified by the people, for the people. It is law setting up the government, yes; it is difficult to change, granted, but it still is law. The judiciary has traditionally interpreted and rectified conflicts between statutes; logically, the courts should referee constitutional debates and ensure laws are within the document's bounds.

In fact, since the Constitution addresses its prohibitions on the federal government to Congress, how could Congress judge itself? For instance, what if Congress were to pass a law granting a title of nobility? This law could be enacted correctly, garner overwhelming support (if the individual were popular enough), and be executed properly; it still violates the Constitution. However, neither the executive nor the legislature would repeal it. The judiciary remains the only branch that could correct this violation without facing the wrath of an electorate.[5] The example, though, need not be as clear or trivial as a title of nobility. School segregation was popular in parts of the country as even schools in the North were segregated after the Civil War, but judicial intervention galvanized federal, Congressional efforts to stop it. Anti-miscegenation laws were duly enacted yet violated the Fourteenth Amendment's Equal Protection Clause by discriminating against couples based on race.[6] The various prohibitions and rights in the Constitution that society has come to value are meant to restrain the legislature, which would more likely rule on its own acts based upon popular demand or current exigencies—rather than the Constitution.

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[3] Walter F. Murphy, James E. Felming, Sotirios A. Barber, and Stephen Macedo, *American Constitutional Interpretation*. (New York: Foundation Press, 2008), 711-2, 716.
[4] U.S. Const., art VI
[5] Alexander Hamilton, "The Federalist No. 78," *The Yale Avalon Project*, http://avalon.law.yale.edu/18th_century/fed78.asp
[6] *Loving* v. *Virginia* 388 U.S. 1 (1967)

There are few alternatives to judicial review compatible with the American tradition of government (e.g., protecting rights and ensuring legislatures do not overstep constitutional bounds). The option of non-enforcement of the law damages the integrity of the constitutional system because to do so would indicate that some duly enacted legislation is worthless. That will not do, for the unconstitutional law must not stand in violation of the document that effected its passage; it would degrade the value of all laws. Moreover, a purely democratic, "Lincolnian" resolution to a constitutional conflict is no different from that of a legislative one: a popular sentiment can easily overpower a piece of paper (The widespread disregard of traffic laws is a humorous but potent example of popular disregard of duly enacted regulation.) The only way, then, to invalidate unconstitutional, yet popular, laws is to empower a judiciary, independent and immune (barring impeachment and removal) from dismissal, to act as a constitutional arbiter.

These arguments, however, are not a rationalization of the *status quo*. Judicial review was discussed and even adopted explicitly in several state constitutions at the time of the ratification. Alexander Hamilton, in *Federalist No. 78*, argued that the Constitution is the standard by which other laws shall be weighed and that judges must intervene if the legislature violates a provision.[7] *Marbury v. Madison* confirms this reasoning.[8] The courts, in Hamilton's view (and presumably John Marshall's view, although *Marbury v. Madison* is not explicit on this issue), say what the Constitution is but do not necessarily bind the rest of the departments. Notwithstanding the rhetoric in *Cooper v. Aaron*, in which the Supreme Court declared itself the ultimate constitutional arbiter, the Court still operates with the implicit consent of the people and the other two branches in making its decisions.[9] While the branches could adopt their own constitutional interpretations with the Supreme Court as a guide (as Andrew Jackson[10] or Abraham Lincoln[11] believed), this policy would lead to governmental chaos if the interpretations differed too greatly. No constitutional controversy would ever be settled but would have to be revisited with every election. Nonetheless, the Court would be ineffectual without the enforcement mechanisms of the executive and the trust of the people.

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[7] Alexander Hamilton, "The Federalist No. 78," *The Yale Avalon Project*, http://avalon.law.yale.edu/18th_century/fed78.asp.

[8] 5 U.S. 137 (1803)

[9] 358 U.S. 1 (1958)

[10] Walter F. Murphy, James E. Felming, Sotirios A. Barber, and Stephen Macedo, *American Constitutional Interpretation*. (New York: Foundation Press, 2008), 336-7.

[11] Walter F. Murphy, James E. Felming, Sotirios A. Barber, and Stephen Macedo, *American Constitutional Interpretation*. (New York: Foundation Press, 2008), 337-41.

This fundamental weakness, then, makes the judiciary reluctant to reverse itself or contravene popular sentiments. Without the inducements of military power (the executive) or the power of the purse (the legislative),[12] the Court is far more concerned with protecting its prestige and ensuring that its decisions are well-received and enforced. In this respect, the author (perhaps Judge Robert E. Yates, who feared and opposed a strong central government) of *The Letters of Brutus*, misses the driving force of the Court.[13] The Supreme Court does not care whether the federal government's power is increased or decreased, for the Court is always final tribunal in federal judicial proceedings (and even some from states). Indeed, the Court would widen the eligibility for standing in federal court if it wanted to decide more constitutional challenges.[14] Instead, as in *Casey* v. *Planned Parenthood*, the justices expressed concern about the reputation of the court, for the frequent challenges to its abortion rulings during the 1980s threatened its prestige and authority.[15]

The sensitivity of the courts to its standing among the electorate provides the opening to the people to exert a democratic check. If the court perceives strong headwinds at its jurisprudence, it reverses itself; *stare decisis* is not a suicide pact to destroy institutional integrity. The constitution's words can be changed by amendment but the *interpretation* of those words only needs five justices. These reversals have occurred many times, and presidents have appointed justices with the explicit purpose of changing jurisprudence. For instance, Franklin Roosevelt appointed justices to reverse the substantive due process holding of *Lochner* v. *New York* so that he could pass his social, economic, and political agenda.[16] The New Deal, though, was popular; the expansive role of the federal government that the court condoned had the support of the people. In addition, the life tenure of judges did not stop Roosevelt appointees from remaining faithful to the judicial philosophy of the president that appointed them. Because Roosevelt had so vetted his appointees before naming them to the bench, they did not become freewheeling justices once confirmed. In 1965, twenty years after Roosevelt's death, Roosevelt appointees Justices William Douglas and Hugo Black avoided substantive due process holdings in *Griswold* v. *Connecticut*, which drove Douglas to form his freedoms by "penumbras" and "emanations."[17] Hence, the Court does, to a certain extent, reflect democratic trends and moods.

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[12] Alexander Hamilton, "The Federalist No. 78," *The Yale Avalon Project.*
[13] Murphy, 305-9.
[14] *Ibid.,* 1681-9.
[15] 505 U.S. 833 (1992)
[16] 198 U.S. 45
[17] 381 U.S. 479 (1965)

Thus, if judges are selected properly and followed closely by the people, judicial review and the nature of the American judiciary complement democracy. The court is a referee, reflective of the people's will yet also cognizant of the constitutional bounds, keeping democracy from destroying itself and maintaining adherence to the Constitution. A belief in the necessity of judicial review does not imply a purely cynical view of the electorate as Waldron claims but a realization that there are unfortunate times when well-intentioned, popular measures strike at the Constitution.[18]

Judges are simply required to resolve some issues, especially those concerning minority rights. These freedoms should be beyond the gavel of the legislature because the majority does not necessarily always protect the interests of minorities (institutionalized slavery is an extreme example of when a majority has an incentive to oppress a minority). Such deprivation strikes against democratic ideals, violates human dignity, and provides precedent for future abuse. Indeed, minority rights represent the breakdown of James Madison's ingenious system of self-interest checking the factions of the republic, for majorities can unite—and have united at times—to deprive minorities of political channels.[19] For that reason, debating certain, fundamental rights is ineffectual; for instance, the freedom of speech does not depend on today's sentiment but forms the bedrock for vigorous debate on more democratically-disposed issues (economic or social issues that are matters of policy and in which courts are not competent).

If courts *do* cross into a democratically disposed issue, the people must act. The founders did not intend for judges to make national policy; they desired a judiciary that could ensure that all parties have an opportunity to participate on fair terms—win or lose—and ensure democratic settlements were within the confines of the Constitution. One of the primary ways to prevent judicial activism is to examine nominees with more scrutiny and to select those with a track record of restraint and fidelity to the Constitution. This process is not perfect and partially protects the judiciary from popular sentiments because of the long turnaround time for Supreme Court justices. In this regard, the Court is much like the Senate—a lagging indicator that will eventually respond to change if the American people demand it. Another method to check the judiciary is to indicate the consistent democratic opinion that a ruling is not faithful to the people's interpretation of the Constitution. The Court in the 1930s began to warm up to New Deal regulations even before Roosevelt appointed any new justices (or threatened to "pack" the Court) as it was confronted with case after case testing New Deal legislation ("The switch in time that saved nine" is a bit of misnomer). Moreover, in the face of frequent challenges

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[18] Jeremy Waldron, *Law and Disagreement*. (New York: Oxford University Press, 2001), 282.
[19] James Madison, "The Federalist No. 10," *The Yale Avalon Project*, http://avalon.law.yale.edu/18th_century/fed10.asp.

to its jurisprudence, in *Casey* v. *Planned Parenthood*, the Court sustained many of Pennsylvania's somewhat strict abortion regulations (while partially upholding *Roe* v. *Wade*).[20] Failing these two methods, impeachment is rare, difficult, but effective in stopping an abusive judge. Up until the early 19th Century, Ohio would impeach members of its bench that struck down state legislation.[21] As a final recourse, amendments are even harder but have been utilized to correct unpopular Supreme Court decisions (the Thirteenth, Fourteenth, and Sixteenth were at least partially motivated in this manner). In the end, the constitutional system provides a democratic recourse to judicial abuse and activism.

The people ultimately control constitutional interpretation through the selection of elected officials (and influencing their appointments to the bench) as well as through the ultimate dependence of the Court on the trust and faith of the people. While judicial review is not perfect, it has helped rid American society of *de jure* segregation, protected the rights of minorities, and established boundaries for the seemingly unlimited state police power in order to protect democratic processes (the final point represents Thomas Hart Ely's thesis on judicial power). Judges, however, are people, and they must be scrutinized—both as nominees and on the bench. Democracy should view the Court with a weary and suspicious eye, but fundamentally, constitutional democracy requires an independent judiciary.

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[20] *Casey* v. *Planned Parenthood*, 505 U.S. 833 (1992)

[21] Walter F. Murphy, James E. Felming, Sotirios A. Barber, and Stephen Macedo, *American Constitutional Interpretation*. (New York: Foundation Press, 2008), 337-41. 711-2.

WORKS CITED

Ely, Thomas Hart. *Democracy and Distrust*. 1st Ed. Cambridge, Massachusetts: Harvard University Press, 1980.

Hamilton, Alexander. "The Federalist No. 78" *The Yale Avalon Project*.

Madison, James. "The Federalist No. 10"

Murphy, Walter F., Fleming, James E., Barber, Sotirios A., and Macedo, Stephen. *American Constitutional Interpretation*. 4th ed. New York: Foundation Press, 2008.

Waldron, Jeremy. *Law and Disagreement*. 1st Ed. New York: Oxford University Press, 2001.