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Editor's Note

I am pleased to announce that the Amherst College Undergraduate Law Review is releasing its third issue. I would like to thank the editorial board for all of its work throughout the past year. After a prolonged period since our last publication, the editorial board has worked hard to develop new submission procedures and a new revision rubric. I would also like to thank this issue's contributors for their insightful analyses and commentaries on issues ranging from medieval law to voting rights to terms of service agreements. We hope that you enjoy this issue. Please feel free to send any feedback or requests to aclawreview@amherst.edu.

Sincerely,

Amy Pass

Editor-in-Chief

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The Amherst College Law Review (ACLR) was born out of the desire to foster undergraduate scholarship in the liberal arts. Among our peers, the ACLR stands alone for its interdisciplinary approach to the study of law.

Given the ever-changing nature of our society, students of law encounter a host of new, troubling, and intriguing questions including, but not limited to, increasing inequality, salience of technology, and neoliberal globalization. These questions cannot be fully posed, much less answered, within the scope of conventional legal training and/or the traditional social sciences.

The mission of the ACLR is to pose these questions and to strive to answer them with the nuance, clarity, probity, and rigor provided by the liberal arts tradition. This journal brings the best scholarship of the contemporary humanities to bear on the most difficult and urgent juridical problems of our time.

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TABLE OF CONTENTS

Master Our Mastery: A Rupture into Natural Contract or a Republican of the Social Contract?

Chun-Tak Suen
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Abstract:

In *Natural Contract,* Michel Serres attempts to rupture from the social contract by making apparent what is essential yet ignored by social contract theorists, such as Thomas Hobbes and John Locke: the Earth on which the social contract was signed. Thus, he proposes a natural contract that incorporates the Earth. However, the new contract's syntax —"master our mastery"— seems worrying. The syntax suggests that the attempt to rupture from the social contract replicates the social contract. I argue that Serres is worried about the replication. Instead, he offers a unique path of liberation through *Natural Contract'*s argumentative structure. The structure attempts to help the readers experience the rupture from the social contract and move towards the natural contract through the rhizomatic metaphor of cybernetics.

Introduction:

In *Natural Contract*, Michel Serres attempts to articulate a way to rupture from the unspoken social contract on the Earth and move towards a new "natural contract." However, his theory's syntax[1]—"master our mastery"—seems to undermine his attempt to rupture from the social contract. First, I will argue that the syntax does not undermine his project; to the contrary, Serres uses the syntax to illustrate the dangers of constructing a new contract that mirrors the social contract and results in a lack of change. Second, I will argue that Serres proposes the metaphor of cybernetics to break free from the social contract and move towards the natural contract. Third, I will argue that the metaphor invites active participation by asking the readers to

[1] If syntax means the arrangement of words, then I present "master our mastery" as a succinct arrangement of words that helps the readers to both quickly comprehend Serres' roadmap to rupture from the social contract and to see the concerns surrounding that roadmap.

devise their own ways to relate to the Earth differently, rather than relying on authority figures such as the jurists and scientists.

What is Worrying about the Social Contract?

Michel Serres critiques the social contract because it is based on the logic of domination. Serres says, "Philosophers of modern natural law sometimes tract our origin to a Social Contract that we are said to have signed among ourselves, at least virtually, in order to enter into the collectivity that made us the men we are."[2] Here, the social contract seems to refer to a concept that early modern theorists devised to explain how human societies came into being. For instance, Thomas Hobbes, an early modern English political philosopher usually credited as the founding theorist for the liberal tradition, thinks self-preservation implies that we ought to renounce our right to all things in order to enter into society; John Locke, an early modern English political philosopher who had enormous impact on early American jurisprudence and social thought, thinks enjoyment of property encourages people enter into society.[3] The social contract, Serres continues, "[was] no longer rooted in anything but its own history."[4] In other words, Serres points out that the social contract seems to be so focused on explicating the origin of human society that it surprisingly takes no account of the role of the Earth on which all the contracts are signed, enacted, and adjudicated. In fact, ignorance of the Earth's part in the formation of society is so enduring that *The Declaration of the Rights of Man* is still silent on the topic of the Earth. Thus, the relationship between humans and the Earth is between, in Serres

[2] Serres, Michel. *The Natural Contract*. Ann Arbor, MI: University of Michigan Press, 2011. 34.
[3] Locke, John. *Two Treatises of Government and A Letter Concerning Toleration.* _____: Yale University Press, 2003. 115-116; Hobbes, Thomas. *On the Citizen*. Cambridge: Cambridge University Press, 2013. 34.
[4] Serres, 35.

words, the conqueror and the conquered or the parasite and the host.[5] This relationship is pathological, because, "through our mastery, we have become so much and so little masters of the Earth that it once again threatens to master us in turn."[6] Put differently, the parasite which extracts all from the host dies with the host. In response to this pathological relationship of domination, which Serres calls "pure mastery," Serres suggests we *should* "master our mastery."[7] Otherwise, human society would face total destruction.[8]

One might be concerned that "master our mastery" seems to present a syntax that duplicates the very logic of domination, meaning that even the attempt to diverge from it is still dependent upon domination. To illustrate, imagine a person trying to overthrow an oppressive regime that kills its dissidents by killing the leader of that regime. Even if this person has a noble cause and justifiable means, that person, perhaps without realizing the replicative nature of this action, reinstates the brutal regime that he attempts to destroy. Using Michel Foucault's succinct language, "if the resistance is the image of power, it would not resist."[9] As much as Serres wants to construct a new natural contract, he might inadvertently end up drafting another social contract.

Serres is, nevertheless, aware of a possible replication of the social contract. For example, when discussing the two French revolutions that aimed for yet failed to achieve true egalitarianism, Serres says, "so fiercely does our animality strive to restore hierarchy that such a quest may never end."[10] That is to say, Serres suggests that, in pursuit of a more democratic

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[5] Ibid., 37.
[6] Ibid., 33.
[7] Ibid., 34.
[8] Ibid.
[9] Foucault, Michel*, et al. Security, Territory, Population Lectures at the College De France*, *1977-78*. Palgrave Macmillan, 2014. ix.
[10] Serres, 39.

world, humans seem to replicate the very systems of domination that their progressive revolutions aims to dismantle. For Serres, the replication happens not because of malicious intent, but because of animality. Although Serres does not substantiate what he meant by animality, one can read animality in two ways. On one hand, a biological determinist argues that domination is inherently hardwired into human brains; no matter how humans try to liberate themselves, they always end up with systems of domination. On the other hand, a cultural constructivist argues that domination is socially conditioned and, thus, changeable. Both arguments assume that an inherent desire for domination is a latently insidious force that deserves caution. In this light, Serres uses the syntax "master our mastery" to caution against a mode of change that replicates the social contract.

The Old Binary Root Structure of the Social Contract and the New Rhizome for a Natural Contract:

Gilles Deleuze and Félix Guatarri present the binary root structure as an allegorical representation of the old mode of thinking. Literally, the binary root structure refers to the way that the roots grow from a tree: the roots grow from a single point, the trunk, and proceed to develop dichotomously. Metaphorically, Deleuze and Guatarri use the binary root structure to describe the argumentative structure that starts from one premise upon which the rest of the argument is built.[11] For example, Thomas Hobbes builds his argument on the idea of self-preservation, whereas Locke builds his argument on the idea of enjoyment of property. Put differently, in terms of the argumentative structure, the social contract starts from a single point

[11] Deleuze, Gilles and Félix Guattari. *A Thousand Plateaus: Capitalism and Schizophrenia.* Bloomsbury, 2017. 5.

and develops thereon.[12] The root structure is worrying for Serres for two reasons. First, building a human society upon a single premise risks total destruction. For example, he says, "There's nothing weaker than a global system that becomes a single unit. A single law corresponds to sudden death. The more plural an individual becomes, the better he lives: the same is true for societies, or for being in general."[13] Second, since the root structure follows a predictably dichotomous pattern, the reader is subject to the logic of theorists. In other words, one can engage with the social contract only if he has accepted the contract's premise. As a result, social contract theorists, such as Thomas Hobbes and John Locke, who try to liberate humanity from the oppressive conditions of the time or articulate an alternative possibility end up dominating readers' thinking and fail at their original goal. Thus, Serres is presented with a delicate problem: how can he speak in such a way that does not dominate the reader's thinking while simultaneously enabling a plurality of interpretations? The short answer is through the metaphor of cybernetics presented as a rhizomatic mode.

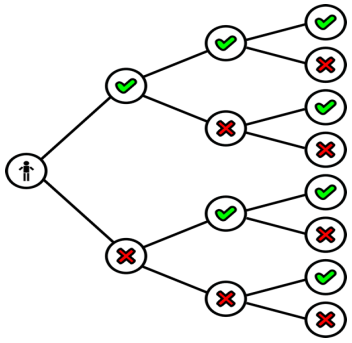

Figure 1: The Binary Root Tree Structure[14]

[12] Hobbes, 115-116.
[13] Serres, 41.
[14] Clker-Free-Vector-Images (pixabay.com). Binary Tree Data Free Photo, Needpix. https://www.needpix.com/photo/27197/binary-tree-data-structure (accessed November 11, 2019).

Rhizomes are a new allegorical representation that Deleuze and Guatarri develop in contrast to the binary root structure. Rhizomes are modified subterranean plants that grow interlinked roots and shoots from their nodes. Unlike the root structure that has a clear beginning and grows dichotomously, a rhizome can make connections with all the subterranean structures of nearby rhizomes, forming an interdependent network. Deleuze and Guatarri use rhizomes as a model that resists binary thinking, for they grow in connection with one another. Although Serres does not explicitly use rhizomes to describe cybernetics, cybernetics functions like rhizomes. Literally, cybernetics is the symbiotic art of governing ships through loops. Metaphorically, cybernetics resembles an interdependent system of relations between humans and nature. The interdependency is characteristic of Deleuze and Guatarri's rhizome. For example, they say, "[a rhizome] is composed not of units but of dimensions, or rather directions in motion. It has neither beginning nor end, but always a middle (milieu) from which it grows and which it overspills."[15] In other words, changing the knotting of a loop in one place has a global effect on the ship. Any loop is both a starting and ending point. In this light, cybernetics serves as a new allegorical representation opposed to the parasitic relationship to the Earth by creating a decentralized and interdependent loop of causal relationships between humans and the Earth.

Cybernetics' decentralized interdependency addresses Serres' chief concerns about the root structure. First, rhizomes have multiple nodes from which the remaining plant structures can grow. Unlike the root structure for which the destruction of the tree trunk leads to the destruction of all the subsidiary roots, rhizomatic plants are less susceptible to fatal damage because rhizomes can reconnect and even re-grow the stems from remaining nodes. Second, unlike the

[15] Deleuze and Guattari, 21.

root structure that follows a predictably dichotomous pattern, rhizomes grow disorderly, extending in all directions. Using Serres' ship analogy, even if several loops that govern the ships are severed due to severe weather or some other unpredictable factors, the ship can still sail safely.

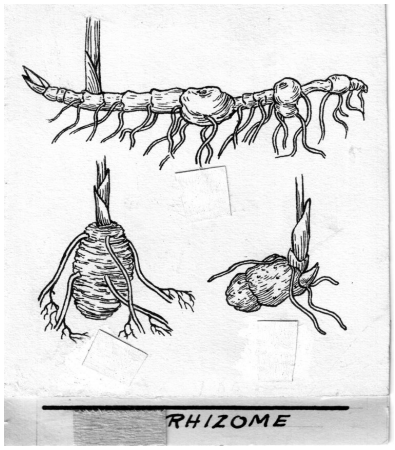

Figure 2: A Rhizome[16]

Who Shall be the Helmsmen?

If the ship is a metaphor for the Earth and the loops symbolize all human relations with the Earth, then who shall be the helmsmen performing the "symbiotic art of steering or governing by loops?"[17] One conventional reading suggests that the helmsmen are the new specialists who think and act differently from the binary-root thinkers. After all, Serres' characterization of the helmsmen as ship captains reminds readers of the knotting specialists who know the intricate interrelations of the loops on the ship by heart. Granted, Serres critiques the old specialists, who "share the power of today and have forgotten nature" and live indoors where

[16] Wikimedia Commons contributors, "File:Rhizome (PSF).png," Wikimedia Commons, the free media repository, https://commons.wikimedia.org/w/index.php?title=File:Rhizome_(PSF).png&oldid=25627015. (accessed November 11, 2019).
[17] Serres, 42.

"climate never influences any work," but he seems to reference implicitly a generation of new outdoor specialists who think differently from the binary-root thinkers.[18] He says, "If [natural] objects themselves become legal subjects, then all scales will tend toward an equilibrium."[19] Juridifying natural objects implies incorporating nature into the purview of the law and placing it under law's protection. The juridification of nature is conditioned on concerted efforts amongst different specialists, such as scientists speaking on behalf of natural objects and jurists who re-accommodate the law's purview to incorporate natural objects. In short, such a reading seems to call for a new generation of specialists, who are able to re-orient the relationship between nature and law so that the relationship between humans and nature would become more equal.

One alternative reading suggests that Serres calls upon all readers, not just the specialists, to act in a way that moves towards the natural contract. For example, Serres says, "This technique (cybernetics) was once specific to helmsmen's work but it has recently passed into other technologies just as intelligent as this command of seaworthy vessels; it has moved from this level of sophistication to the grasping of even more general systems, which the Natural Contract could neither subsist nor change globally without such cycles"[20] In other words, in today's mobile technology age, the level of sophistication, which used to differentiate the specialist and the non-specialist, seems to have become lowered. Using Serres' analogy, the helmsmen no longer need to invest themselves in the knotting and unknotting of the ropes that keep the shipping moving, but rather they should invest in commanding the appropriate technological systems to steer the ship.

[18] Serres, 43.
[19] Ibid., 37.
[20] Ibid., 43.

It has been almost thirty years since *Natural Contract* was published. The de-specialization of the use of technology seems to have empowered an increasing number of non-specialists to perform the once complicated knotting and unknotting of the loops that once required specialized training. In fact, Serres even says, "What does the helmsman with his governail have to teach those who govern?"[21] Their difference is now vanishing. Today, what everyone does gives rise to harm inflicted on the world, and this damage, through an immediate or foreseeably deferred feedback loop, becomes the givens of everyone's work."[22] Here, Serres enunciates a powerfully democratic and potentially radical call upon the readers —that every dweller on the Earth be engaged in loop-thinking instead of linear causal thinking and that everything an individual does eventually loops back to that person. Earth is the only ship we have. The ship requires not the authoritative helmsman in the antiquity but a new generation of egalitarian helmsmen thinking in loops and feedbacks who can regulate the loops locally, globally, and cooperatively.

Serres, nevertheless, does not present this powerful call by dominating readers like social contract theorists because he is aware of its replicative dangers. Instead, he helps readers to experience the new relationship with the Earth through mimicking cybernetics in his writing. One major characteristic of Serres' argumentative structure is that it resembles a rhizomatic loop. Each subsection is interdependent yet still distinct. For example, Serres divides each chapter into subsections, yet each subsection seems to be purposefully divided to disrupt a linear reading, such as "General History of Trials" and "Trials, Continued." In fact, Serres even goes out of his way to help readers experience the loops by separating a strand of argument into two. For

[21] Ibid.
[22] Ibid.

example, the subsections, "War" and "War and Violence," are highly related, but Serres interjects "Dialogue" in-between. In short, Serres attempts to break down the linear reading that underpins the root structure and experiments with writing through knots and loops. If each subheading is a loop, then Serres seems to suggest a different way to read his book: *Treat the book as if it is the ship. Experience what it is like to consider a general system as grand as that between science and law. Pull the loops together in a way that would steer the ship away from the iceberg and see how it feels*. Serres hopes that by renouncing his interpretive authority to readers, he can help empower readers to devise a plurality of modes of being, so that the Earth would no longer rely on a single law, which risks total destruction.

Conclusion

Serres presents "master our mastery" as an anxiety-provoking warning to illustrate the danger of replicating the parasitic relationship with nature that is implicit to the social contract. Instead, Serres proposes that we could think through rhizomatic loops about the symbiotic nature of man's natural contract with the Earth. Acutely aware of the danger of "master our mastery," Serres presents his egalitarian call for action through a loop-like structure that invites the readers to experience and devise a plurality of modes of living and being.

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The Constitutional Obligation of Public Schools: With regard to the Establishment Clause and the Free Exercise Clause of the First Amendment and religious celebrations.

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Abstract:

Upon the repeal of the Articles of Confederation, and the implementation of the new United States Constitution, many occupants who migrated from the old to the new world in fear of religious persecution were anxious that a new government would again be able to oppress them due to their beliefs. Many of the founders, especially in the new Democratic-Republic cohort, were among this group. This was one of the major factors behind the inclusion of an amendment that protected not only the right to practice religion, but also the prohibition against the government establishing a religion. This principle, commonly referred to as "freedom of religion," has roots in early-modern political philosophy and as far back as the first Persian Empire (c. 550BC). Today, this idea has been used by the government to prohibit public schools from adopting prayer, teaching religion, and funding non-secular activities and salaries. Depending on the interpretation of certain words within the clauses, the responsibility of government and government-sponsored institutions (i.e. public schools) varies widely. The goal of this work is to determine how these clauses should be interpreted in relation to public schools, that is, how we should understand public schools' obligation to allow religious freedom and refrain from establishing a religion of choice.

On the first day of the year, in 1802, the then-United States President Thomas Jefferson scribed a letter to the Danbury Baptists of Connecticut responding to an earlier letter from the congregation, outlining their fears of religious persecution. He, himself, cites the First Amendment:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...*[23]

[23] U.S. Constitution, amend. 1.

To alleviate the qualms of the Baptists, he claims the Amendment stipulates the "building a wall of separation between church and State."[24] Jefferson's statement would become the fuel for the fire of religious liberty that runs rampant across our modern nation.

Jefferson's "wall" is decreed by the Bill of Rights as both the Establishment Clause, and the Free Exercise Clause. Such clauses prevented the federal government from "respecting the establishment of religion," and federally persecuting on the basis of non-violent expression of religious practices. These words have defined many facets of the United States from its inception. In the case of the closing of a public school for a holiday, the decision is left primarily up to the states, as dictated by the Tenth Amendment. In most areas, public schools adopt the calendar created by a local Board of Cooperative Educational Services. As a publicly-owned and run institution, the board operates under officials that are voted in by the public, and pass legislation. The academic calendar, passed by this body, is only a local statute. So, do the rights outlined in the Constitution still apply? The answer lies in the 14th Amendment:

> *No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws…* [25]

There are two key parts here: first, states may not make any law that inhibits the privileges of citizens, one such privilege could be considered the rights outlined in the First Amendment. Second, states must provide protection under the law equally to "any person." This phrase is said

[24] "Jefferson's Letter to the Danbury Baptists The Final Letter, as Sent."
[25] U.S. Constitution, amend. 14.

to have been included for slaves, as they would fall under the umbrella of "any person"[26] Thus, this argument supports the idea that any people means all people, without exclusions. If there can exist no law that violates First Amendment protections, and it is the job of the states to protect the rights of the people, then it appears that all First Amendment rights must not only be uninhibited by the states, but also enforced by them. For example, since the academic calendar, which determines which holidays schools will be closed for, is a legislatively passed statute, it can be held subject to both clauses outlined in the First Amendment of the Constitution.

Many historical steps have been taken by the United States in order to interpret and apply the First Amendment. A large portion of these advancements have been brought about through the Supreme Court. One such instance is in the case of *Lemon v. Kurtzman*, in which it is argued that the state legislatures of Pennsylvania and Rhode Island could not pay non-secular education employees, as this would establish a preference for religious institutions.[27] The case had major legal ramifications by establishing the Lemon Test. The precedent influenced later courts to ask the following three questions: "Does the law have a secular purpose? If not, it violates the Establishment Clause. Is the primary effect either to advance religion or to inhibit religion? If so, it violates the Establishment Clause. Does the law foster an excessive government entanglement with religion? If so, it violates the Establishment Clause."[28] The case has also come to be important for how the phrase "respecting the establishment of religion" is interpreted. First, it established a firm precedent that state governments can be held accountable on the basis of implementing the right outlined in both clauses regarding religion within the Bill of Rights.

[26] "14th Amendment."
[27] Lemon v. Kurtzman, 411 U.S. 192 (1973).
[28] "Freedom of Religion and the Establishment Clause."

Second, it furthers the more liberal interpretation that governments cannot favor one religion over another and provides a means of determining if the Establishment Clause has been breached. For these reasons, *Lemon v. Kurtzman* is an important case in the history of the First Amendment, though not the only one.

The precedent for the modern, compelling interpretation of the Free-Exercise Clause arises from a 1963 case, *Sherbert v. Verner.* Justice Brennan, speaking for the majority of the court, wrote "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties."[29] This decree held that punishing a person for not abandoning their religious convictions was a violation of the Free Exercise Clause, creating grounds for holding that it is unconstitutional to withhold benefits that a citizen is entitled to because they elected to worship.[30] One such benefit, as made evident by the states' establishment of public schools and the Fourteenth Amendment, is education. This opinion was also expressed by the Warren Court earlier in Brown v. Board of Education.[31]

Since it has been stated that the school calendar is a piece of legislation, and that governments of both the federal and state governments are subject to the incorporation of the First Amendment, then the calendar language must adhere to the First Amendment as well. The question then becomes whether the calendar actually adheres to the First Amendment and if there are problems at the time of implementation. Most schools close for federal- and state-mandated holidays. Of the various federal holidays, only one holiday is explicitly religious: Christmas.[32]

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[29] Sherbert v. Verner, 374 U.S. 398 (1963).
[30] "Religious Liberty: Landmark Supreme Cases."
[31] Brown v. Board of Education, 347 U.S. 483 (1954).
[32] "United States Court of Appeals."

Does the closing of schools for a religious holiday constitute a violation of the Constitution as we interpret it through important court decisions? To answer this, one may apply the Lemon test. First, does the law have a secular purpose? If the goal of closing schools for religious holidays is to foster the practicing of religion or allow the exercise of religion, then the answer is no. (This does seem to conflict with the Free-Exercise Clause, but will be discussed later.) Second, is the primary effect of the law to advance religion? One could argue that allowing someone to not attend school for a religion would thus advance that religion. Finally, does the law foster an excessive government entanglement with religion? Regardless of the answer to the third question, the law does not pass one, and arguably two or three of the questions of the Lemon Test.

The overarching question of the Establishment Clause asks, does the law favor one religion over another? This holds true if a particular school only receives holidays off for the religions practiced by the student body. They would not have to take school off for the Festival of Tiragan, for example, if no Zoroastrians attended the school. Although, the moment one student of that faith enrolls in the school, considering the law does not say "No State shall make or enforce any law which shall abridge the privileges or immunities of most citizens of the United States," the school would seemingly have to close for all Zoroastrian holidays to not show favor or prohibit the religious practices of that student. Why not allow that student to miss school for their holidays?

The current interpretation of the Free-Exercise Clause counters the claim that students can simply miss class to worship. Students who, according to their religious obligations should be observing a holiday, are instead in school and prevented from exercising their religions freely.

They are denied certain aspects of an education, such as teacher instruction, appropriate time to complete assignments, and extracurricular affairs. Students may not be able to be a part of a sports team due to absences, or class credit could even be withheld. Since education is a right to which citizens in states who have established public schools are entitled to, no law can be made to deprive them of that privilege. The exception here is that the holiday in question would have to require the student not to go to school. This might include any holiday that requires participants not to travel, Passover for example, or any holiday that requires abstention from work. A more liberal interpretation may take this to include any holiday that encourages time spent with family or other traditions that might take precedent over being in school, like Christmas. For this reason, under a particular reading of the law, schools should be closed for the majority of the year, given the vast number of holidays. This of course, would be impractical. Therefore, it would seem, an applicable option would be to close school for all holidays celebrated by students if it were explicitly closed for holidays celebrated by one or more. If this appears to be infeasible, other options should be explored.

Looking closer at one alternative, which has already been mentioned, closing school for every religious holiday in the academic calendar would be on one end of the extreme. Though this may seem like a good solution, when taking into account the over one hundred and fifty religious celebrations, students would be at home more than they would be in school.[33] The administration would run into the issue of deciding which religions and holidays to consider "legitimate enough" to cancel school. Surely a Muslim would consider Ramadan just as equally deserving of time off from school as a Christian would consider Christmas. So why should

[33] "2018 Calendar of World Religion Times."

school be closed for one of the holidays, but remain open for the other? Since most schools are publicly-owned and operated institutions, this is an expression of a religious bias, violating the Establishment Clause. Regardless of this violation, it also inhibits Muslims from practicing freely for fear of missing class, which violates the Free Exercise Clause. Yet, it is simply impossible to run a school if the school is off for every single religious holiday.

At the other extreme, the government could have schools remain open for all holidays. This sounds severe, but would satisfy the Establishment Clause, as no religion would be favored. It is an option that has been argued by many in the past. In 1960, Harry N. Rosenfield argued that "the remedy is not nondiscrimination through joint observances, but total elimination of all religious observances from the public schools."[34] He argued that closing school for a religious holiday would have been a religious observance. Rosenfield was right in saying that the school board could not expressly close school for a religious holiday explicitly, as this would create a non-secular law. However, an issue arises in terms of the Free Exercise Clause. Students would have to be in school for religious holidays or have to miss class and be penalized, as previously discussed. Some may pose the argument that if only one type of religion were to be represented in their school, then it would be acceptable to only have off for those respective holidays. This would be rare, as religion is constantly changing, and the United States is becoming more and more diverse and less and less Christian, which is the most popular religion of the nation. The number of Christians in the United States has dropped by eleven percent in a fourteen-year

[34] Rosenfield, "Separation of Church and State in the Public Schools."

period, while other religions and no religion have both increased.[35] The increasing diversity of religion makes this issue particularly pertinent for a young and transforming nation.

Another approach is for schools to close for holidays that some larger percentage of the local population celebrate only. This is flawed because it leaves out some other holidays that minority populations celebrate, not only establishing a non-secular law, but also favoring certain religions over others. Some districts follow this unjust approach.[36]

Another argument would be to establish nondenominational and seasonal breaks from school, which are common. This plan alone would leave out those whose holidays do not fall on the given dates, thus violating the Free-Exercise Clause and the Establishment Clause. Seasonal breaks inherently favor certain religions in common practice (i.e., for most school districts, winter break centers on Christmas, and spring break centers on Easter). The bias behind who determines said breaks is bound to cause problems. This structure would prevent worship for some and favor it for others. The result of this type of plan is similar to the plan to be proposed, but the intricacies of minority protections, and unbiased and adaptable implementation set it apart.

The answer therefore must be a compromise between the two extremes and must assuage both clauses of the First Amendment in their widely accepted interpretations. First, the calendar cannot, on its outset, favor one religion over another. If it so happens to do so by chance, this would seemingly be okay under the Lemon Test as long as there are precautions that keep the Free Exercise Clause enforced. This would mean that breaks scheduled throughout the academic

[35] Jong, "Protestants Decline, More Have No Religion in a Sharply Shifting Religious Landscape (POLL)."
[36] Island Trees School Board.

year would have to be set with some standard that does not take into account religious holidays. They would either have to be random or patterned with an academic purpose in mind. It would cause less issues for many districts that have off for Christmas than it seems on the surface, as Christmas happens to fall halfway between an academic year that starts in August and ends in June. Precautions must be made for observers whose holidays do not fall on the set breaks. They cannot be required to attend. This is where a certain type of backstop can be put in place with a secular purpose. Just as in a teacher's strike, if significantly more teachers and staff are absent than there are substitutes available to replace them, the school must close.[37] Extra days should be added to the school year to account for days in which this will happen. Schools should also set a backstop policy for when excessive numbers of students miss school, just as they would if there were a flu outbreak and the majority of the student-body called out sick. Both of these have secular purposes, as it is not efficient to run a school with a very small portion of the student-body or staff present. Teachers and parents would also know well before and would have to inform the school of these dates so the school can plan accordingly. This could be done easily with one of the many forms given to parents at the beginning of the year. This would cover major holidays that do not fall on the breaks scheduled between semesters or such. Arguments against this include students collectively deciding to call out to trigger the backstop, or the trigger amount being too small or large. Considering these dates will be determined at the onset of the year by forms, the administration knows the intent of the students, so if a large number were to call out on days that were not listed, the students could be treated as if it were a normal

[37] "Strikes FAQ – League of Education Voters Foundation."

absence. There is precedent for the government to ask for religious affiliation based on a voluntary basis.[38]

For those who practice religions that are not popular enough to trigger the closing, there must be precautions set so they are allowed to practice freely, and, given the precedent set about by *Sherbert v. Verner*, not punished for missing school. This poses the problem of defining punishment. Since the court ruled benefits cannot be denied for non-violent religious practice, students cannot be deprived of the benefit of an education for worshipping on a holiday. This means they would have to come as close to the education they would have received as possible without suffering any penalty for not being there. This might vary depending on the resources available to each school. What does a student have when they are sitting in class? For one, they have the lecture. They also have the ability to ask questions. So, for those that miss class for a religious purpose, they must also receive these things. This could be in the form of class notes, video or audio recording of the instruction, or another substitute. The teacher must also make themselves available at some point for the student to ask questions. The student would also be responsible for turning in assignments that were due on the day they missed class on the day that they return, or at a predetermined date agreed upon by the student and the particular assigning teacher, not prior to their leave or prior to the next break from classes to prevent abuse. They also cannot be held responsible for missing athletic or extracurricular events, as they would not be if the school was closed. These absences could be dubbed a name separate from the term 'excused absence,' such as piety day, because they will carry different implications.

[38] U.S. Census Bureau. "Does the Census Bureau Have Data for Religion?"

Teachers as well must have their own form of absences for religious observance. This issue would best be addressed by the convening of local teachers to adequately determine what best reflects them being in the classroom. Possible solutions could include the use of substitute teachers that are trained in what they will need to cover, such that the days are not wasted. Teachers should be given the freedom to determine their own supplements and solutions because every classroom and budget is different. Sick days or vacation time may not be reduced in any way for observance, as it would be as if school were not in session for any other break. They also cannot have pay reduced, and of course, be rejected for employment because their religion has more holidays than others.

Some might argue that this model creates a "separate but equal" scenario where those who celebrate minority religions are forced out of the school to worship and receive a different type of education. This is a very real and valid concern and can only be prevented through ample and substantial enforcement of free-exercise protections. The main concerns raised by the Warren Court in deciding *Brown v. Board of Education of Topeka* involved the separation of students into separate facilities based on race. They ruled "that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal."[39] This argument was made in regard to race, but, based on their justification through the Fourteenth Amendment, can be applied to any of the federally protected classes, including religion. The major reasons that the proposed system does not contradict this decision are the following: first, the students are in the same facilities and are provided as close to the same education as possible. Second, the students segregated based on race did not elect to segregate

[39] Brown v. Board of Education, 347 U.S. 483. 1954.

themselves, they were forced by the system at the time. Third, and most importantly, there are no laws explicitly differentiating based on a protected class, as there were during the "separate but equal" era. Chief Justice Warren argued that the students "had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race."[40] The suggestions made offer no explicit preference to any religion, and no laws that distinguish based on religion; they serve to provide an education as equal as possible while still ensuring the functionality of public schools and the right to freely exercise one's beliefs. If it were found by a modern court that this system does fracture within the confines of the Warren Court's decision, then I find no applicable, functional and constitutional means of resolving the issue, and a constitutional amendment would need to be proposed. However, based on the reasons stated prior, and the ideological and practical trends of the Court, it appears that a constitutional amendment would not be necessary as the system does not create a segregated education.

An argument arises that the proposed system is similar to the existing procedures. This is correct for certain aspects of the framework in effect. The sum of this system proposes three key measures. First, school breaks would be decided without regard to religious holidays. If breaks are scheduled with the purpose of advancing any religion through allowance of practice, they would be unconstitutional. Second, the creation of a number of absences that, if reached with advanced notice, triggers the closing of the school. This allows adaptability within the system for changing religious demographics. Third, protections and accommodations for students who choose to worship on days where school is in session must be provided. These protections must be granted by law to ensure fair practice and nondiscrimination. Though these solutions will be

[40] Id.

difficult to arbitrate and implement, they are fair, just, and constitutional. As a wise man once said, "[we do these things] not because they are easy, but because they are hard,"[41] and because protecting the rights of students is worth the effort.

[41] "JFK RICE MOON SPEECH."

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To Whom Did Medieval Experts in Roman Law Accord the Power to Legislate and Why?

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Abstract:

The medieval experts of Barbarossa's Bolognan Court faced the tricky problem of codifying legislature. The new empire experienced pressure from *ius gentium*, *ius civile*, natural law and Roman law, each of which suggested something different for its people. This essay examines the reinforcement of Roman law following the Diet of Roncaglia and its emphasis on the powers of the Emperor. It navigates the lawyers' caveats regarding the Emperor's freedom to obey the law or not, the transferral or abdication of the people's power and the role of an outdated senate.

Uncertainties regarding the subtleties and origin of Roman law germinated from the 'big bang' of thinking at the Diet of Roncaglia in 1158. Emperor Barbarossa, ruler of what would soon become the Holy Roman Empire, invited four of European jurisprudence's best thinkers to his Bolognese court to formulate a rule book for his empire. After the submission of Milan in 1158, he wished to shape a theory of empire for the Lombard League under his feudal sovereignty. This became a charmed circle of very able lawyers whose opinions were often decisive in court when the Emperor and his decisive vote were absent. While these were court lawyers in our modern sense, they were also responding in an academic sense to Justinian's Digests, Code and Institutes and condensing them into a resilient theory of government. These late-Roman collections had recently been found and revived, and while making sense of apparent

contradiction within them, the lawyers were obliged to reconcile the monarch's legislative authority over the law with the tradition of the Roman Empire's customary law.[42]

Their resulting theories are based on an interpretation of these documents that was purported to hold all the answers. As Accursius, one of the earliest of Bologna's mercurial lawyers, noted in his Standard Gloss to Roman Law, "all things are to be found in the *Corpus Iuris*." This *corpus* specifically contained Justinian's *Lex Regia* which functioned as the only source of law in court, with each passage having a broad application. This was a Roman account of the origin of the entire transferral of power from the people to the Emperor, who is generally understood to be the source of law. And at this point in history, "the people of the Empire" is a byword for everyone; Caracalla extended citizenship to anyone who wanted it in 212. The medieval experts' theory about the power to legislate, which could have been very different from the practicalities of legislation, therefore naturally asserted the emperor's absolute and exclusive ability to do so. The caveat is often added to this in various ways, that he had this ability only with the consent of the 'people' who had the potential to revoke his right. The pattern of justification for legislative theories frequently relied on the process of transferral of power from people to emperor and exactly what this meant.

The strongest strain of medieval thought reflecting on Roman law was that the emperor was the only source of legislation. Most explicitly, *Code* 1.14.12.4 says that "the Emperor alone is rightly held to be the sole creator … of his Laws." The authority of these texts didn't touch the Bible but had awesome authority in society and influence on the thinking of medieval experts. Azo, one of the most senior lawyer-professors, extends this notion in his *lecura codicis*,

[42] Canning, 425.

declaring that the emperor had *all* the existing rights to create laws. He actually evidences a separate text too, *Institutes* 1.2.6, which states that the emperor has "all the imperium and power" and what pleases him has the force of law. Digest 1.4.1 replicates this sentiment almost exactly. It seems crucial that the texts focus on the girthy concept of *all* the power. This suggests that it is something that could potentially be divided, but instead the emperor possess it all, emphasizing that the right to legislate doesn't exist anywhere else. The absolutism of Digest 1.4.1 and Institutes 1.2.6, which show that the emperor's will is effectively legislation, also suggests that it would be impossible to have another source of legislation. There could never be a distribution of power if the emperor could change and manage law-making with ease, potentially making other sources instantaneously illegitimate and resulting in a very persuasive branch of Roman law to medieval lawyers.

The counterpart to this is the reverse impact of legislation on the emperor himself, which could suggest that, although no one else can legislate, his own legislative power is not inexhaustible. Accursius' Gloss comments that though the emperor can change any law, he should also subject himself to those existing laws, which Accursius implies, the emperor does intend to change. Though this doesn't tackle legislation directly, it could confuse the general theory in so far as the emperor is not above the law in the way the previous paragraph suggested. Therefore, because the emperor ought to hold himself accountable to the laws, it is not a question of how much power is freed from the laws as Jean Bodin asks in *de republica* 1.8 and Pennington urges us to reflect on.[43] There seem to be separate paradigms where in one, an emperor changes a law he doesn't like while in the other he tolerates and abides by it. C.1.14.4

[43] Pennington, 45.

and C.6.23.3 comply with this, suggesting that the emperor is not also *above* other existing laws simply because he has the ability to legislate and change them. Placentinus, founder of Montpellier University in 1160, condenses this mode of thought into the sound bite that laws ought to be obeyed by subjects out of necessity and by princes through their will, even though he doesn't reconcile the confusing contradiction between the Emperor's position above the law and his ability to change it.[44] Perhaps the way the experts understood this to not necessarily contradict the emperor's exhaustive power to legislate. Rather, it simply says then, when not modifying legislation, the emperor should abide by any laws that already exist.

The second caveat to the emperor's absolute power over legislation is that it is, at least in some way, built on other sources of power. It is not exactly God-given and it is not argued to be inherent. Instead C.1.17.1.7 explains that the *Lex Regia* enacted a transfer of power from the people to the emperor. The emperor's power came from the people and therefore has an inextricable tie to them. In the most extreme iteration, this fact has led some scholars reflecting on Digest 1.3.9, which says that "there is no doubt that the Senate can make law," to conclude that the emperor's power overlapped with a legislative authority that still directly resided with the people. Accursius reflects on this in a slightly roundabout way when he says "the people can make law" but only the Emperor can do so on his "own." This is to say that the people can *all but* make the law in that they can enact the process all the way up to the point of legislation. Practically, this reinforces that ultimately only the emperor can legislate but it also draws a new definition on what exactly legislation is. Perhaps the important bit of the legislation is therefore

[44] Canning, 431.

done by the people and it is incidental and practical that they have elected a single figure of authority to pen and bring the law into practice.

Iacobus Butrigarius, a less decorated jurist of the fourteenth century, elaborates on the existence of some sort of legislative power remaining with the people. He explains that what this really means is that through the same official channel by which the emperor received power from the people, the people could also retract it with a new law, suggesting that they have a legislative power at least for this purpose. Azo had reinforced this perspective, suggesting that "what is once transferred may be taken back." Therefore the Senate's ability to make a law could actually be restricted to retracting their previous creation of the most important law rather than a broader mandate to legislate. This would mean that the emperor's power is not absolute but rather that he has absolute power in practice as far as the people are happy with him keeping it.

However, rather than saying that the people can literally still legislate, many more medieval experts suggested that the people had an indirect and usually passive impact on legislation. This could mean that because the people appear to have retained nothing of their previous power, the emperor does not have greater or absolute power over the people but greater power than each individual person, which is what Azo seems to suggest in relation to C.8.52. Azo points to C.8.53, saying that a custom which preceded a contrary law in its enactment was invalid but a custom arising after a law could actually abrogate the law. Theoretically then, because the broader corporation of people has its own customary law, the princeps could actually be lesser than the corporation. Perhaps Azo has sensibly concluded that if people have existing Roman laws but naturally produce a different custom, it is definitively superior and this is not something that the emperor could overrule. Although Irnerius, the dogmatic but pioneering

medieval lawyer, defined custom as old, he admits that it is not definitively agreeing with or contrary to reason or law and so seems to exist in a separate paradigm of creation and impact. He might also, as Placentinus says more bluntly, be confusing the use of the Greek '*nomos*' in some laws, which referred to both custom and law, with the Roman '*lex,*' which had a judicial tone. Since the customs of the Holy Roman Empire came about after the writing of Justinian's Laws and were set up by the people, the people could therein be perceived as having more power to legislate than the emperor in this context.

Bulgarus, perhaps the most celebrated jurist, had a solution to the clear contradiction between the prevailing notion of the emperor's legislative power, the custom of a particular locality and a general custom of the entire Roman people. In theory, this division could be modified to suit any apparent contradiction in the *corpus* and this is less an interpretation of Roman law than an adventurous attempt to make it practical. Perhaps if he compared custom with law in terms of the entire empire, Bulgarus would fall more towards the iteration of Digest 1.3.32 which explained that because the people allowed transfer of power to the emperor, their power lay in this transfer and any attempt to impose custom over Roman law would matter very little. Irnerius qualifies this Digest in what seems to be the most logical conclusion of how it is broadly compatible. He says that this could have applied when people had the power of distributing the power of the law but actually this would no longer have any effect under a system created by the emperor. Like Bulgarus, this is a logical attempt to understand and make Roman law compatible with the contemporary climate, which could be stretched to co-opt other inconsistencies into medieval theory.

Perhaps the strongest argument concerning exactly where the people fit into the equation of legislative power is a linguistic one. This is repeated frequently by various experts. Odofredus, for example, explains that he understood 'transferred' as 'granted,' not as abdication of legislative power. This is likely to originate from his experience of a more dissipated sense of imperial power during his time in France where the likes of the Angevin Kings operated *de facto* governorship. He oddly points to C.1.14.1 to indicate that this piece of law does not reflect how he understood Roman law, which is not necessarily a sound way to explain away something that does not fit his theory. Odofredus also cites D.1.21.1 when he compares the transfer to a delegating judge who does not give up his jurisdiction when he allows other people the power to wield the law. This is a definition of transfer that he derives from D.1.11.1. However, judges essentially outsource their jurisdiction temporarily to people. This analogy does not necessarily work because, while the people could be seen to be doing this to the emperor, this would mean that the emperor then exerts the power back on the people, which make little sense in the judicial analogue. Azo makes perhaps a better attempt of justifying this theory of Roman law, arguing that when someone transfers something they also retain it, which is what seems to have happened at D.1.21.1. This idea is particularly applicable to something as metaphysical as the law.

In conclusion, none of the medieval experts attempted to interpret the *corpus* in a way that does not give primary legislative power to the emperor. However, in addition to this they all add various personal interpretations, generally tailored to specific lines in the *corpus,* which attempt to justify ways that Roman law distributed legislative power in a broader sense, some explaining caveats to the emperor's power, others explaining ways it might be overruled. They were trying to generate a prototype of imperial legislation which not only functioned over the

course of the twelfth century but would provide a scholarly template in the future. Presenting ancient law as apolitical, objective and God-given has long been jurists' mode of seizing political advantage for the status quo. This speaks to the time-enduring attempts to validate legal systems by citing the Old Testament. Lawyers have always said that "ours is the Kingdom to which Christ referred," so introducing an entirely new catalogue of justifications for all sorts of legislation. These lawyers provide a very firm basis for constructing an imperial empire in medieval Europe and some explore further the meaning of local law, what constitutes a *universitas* (corporation) of people and whether the simple custom of regional people is in fact closer to constituting a "law" than the opinions of a distant emperor. Significant to the creation of imperial law though this is, it is also possible that the results of the Diet were highly falsified. It seems highly unlikely that on the eve of the defeat of his homeland, the Archbishop of Milan would profess his province to the Roman Empire using language which echoed the words of unborn lawyers so accurately.

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Click "Yes" to Consent: A Feminist Analysis of Consenting to Corporate Surveillance in Terms of Service Agreements

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Abstract:

Terms of service (TOS for Internet-based products and services are notoriously long and convoluted. Few Internet-users read them before clicking "I accept," a phenomenon which has allowed technology firms to get away with a broad away of otherwise illegal surveillance practices. Such practices rest on the claim that users "consented" to the surveillance. This paper draws upon a model of consent provided by Lois Pineau and explores how a more robust notion of communicative consent could better elucidate how the consent exception of the Wiretap Act should be interpreted and deployed in relation to Internet companies' terms of service agreements. This paper argues that Pineau provides us with a framework that elucidates how the consent exception should be interpreted in light of 1) coercion, 2) ongoing communicative consent, and 3) shifting the burden of proof onto companies. With each consideration, modest proposals as to how Pineau's framework could better U.S. privacy law are offered. The paper concludes by engaging with anticipated objections and providing a general argument as to why one should care more about consent *vis-à-vis* data privacy.[45]

In 2017, two communications professors ran a study in which 543 college students were asked to sign up for NameDrop, a fictional new social media network. The students were faced with text on a screen that many of us are familiar with: "By clicking Join, you agree to abide by our terms of service." All 543 students agreed to the terms. What none of the students realized, however, was that they had agreed to give NameDrop their first-born child under section 2.3.1 of the terms of service.[46]

[45] *Content Warning: Mentions of Sexual Violence.*
[46] David Berreby, "Click to Agree With What? No One Reads Terms of Service, Studies Confirm."

Almost no Internet user reads the terms of service (TOS) for Internet-based products and services. A 2017 Deloitte survey of 2,000 consumers found that 91 percent of U.S. Internet users agree to TOS agreements without reading them. For younger individuals in the 18-34 age-range, the rate rises to an astonishing 97 percent.[47] By compelling would-be users to assent to TOS agreements, technology firms have gotten away with a broad array of otherwise illegal surveillance practices with the claim that their users "consented" to the surveillance. This paper draws upon a model of consent provided by Lois Pineau in "Date Rape: A Feminist Analysis," and explores how a more robust notion of communicative consent could better elucidate how the consent exception of the Wiretap Act should be interpreted and deployed in relation to Internet companies' terms of service agreements. First, the paper surveys issues in data privacy, with a particular focus on how the Wiretap Act's consent exception has been inconsistently applied across different class-action lawsuits against Internet-based communication companies (ICCs). I then turn to Pineau's proposed model for date rape law and explicate how it applies to TOS agreements and privacy law. This paper argues that Pineau provides us with a framework that elucidates how the consent exception should be interpreted in light of 1) coercion, 2) ongoing communicative consent, and 3) shifting the burden of proof onto companies. With each consideration, modest proposals as to how Pineau's framework could better U.S. privacy law are offered. The paper concludes by engaging with anticipated objections and providing a general argument as to why one should care more about consent *vis-à-vis* data privacy.

In the United States, there is no explicit right to privacy in the Constitution. In practice, however, the Supreme Court has generally found that there is an implicit constitutional right to

[47] Caroline Cakebread, "You're Not Alone, No One Reads Terms of Service Agreements."

privacy, mostly in light of the Fourth and Fifth Amendments. In 1967, for instance, the Supreme Court was faced with a case in which they had to decide whether or not a recording of Charles Katz's telephone conversation in a public telephone booth, produced by the FBI by means of electronic wiretapping, was admissible in court. In *Katz v. United States*, the Supreme Court held that Katz had a right to privacy in regard to his private telephone conversation, even if it occurred in a public telephone booth, and that the FBI's electronic recording of said conversation constituted an illegal search.[48]

In addition to the Supreme Court's inclination towards securing privacy, Congress has enacted a number of privacy protection laws across various sectors since the late 1960s.[49] In 1968, building off of *Katz*, Congress passed Title III of The Omnibus Crime Control and Safe Streets Act (also known as, and henceforth, the Wiretap Act), which prohibited unauthorized or non-consensual government and private interception of "wire, oral, or electronic communications."[50] In 1986, Congress amended the Wiretap Act by passing the Electronic Communications Privacy Act (ECPA), which added new provisions to protect electronic communications and digitally stored information such as email and voicemail.[51] Generally speaking, under current law, it is illegal for anyone to surveil, track, or extract information from individual citizens' electronic communication unless certain conditions are met, such as prevailing national security interests sanctioning government agencies to surveil select individuals.

[48] Katz v. United States, 389 U.S. 347 (1967); Allen, *Unpopular Privacy*, 169.
[49] Allen, *Unpopular Privacy*, 156-157.
[50] Bureau of Justice Assistance of the Office of Justice Programs of the U.S. Department of Justice, "Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Wiretap Act)."
[51] Allen, *Unpopular Privacy,* 157.

There are exceptions to the Wiretap Act. One of these exceptions is the consent exception, which can be found in 18 U.S. Code § 2511 (2)(d). The law states

> *It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State*.[52]

In other words, Internet-based private corporations, a "person not acting under color of law," *can* intercept their customers' electronic communications so long as the individual in question "has given prior consent" and the corporation is not using any of the information to commit any sort of "criminal or tortious" crime.

The consent exception, as demonstrated by Amanda C. Perry, has been inconsistently applied across different class-action lawsuits against the country's leading ICCs. Contrast *In re Yahoo! Inc.* with *Campbell v. Facebook*, two factually similar cases that had drastically different outcomes (decided by two United States District Court judges belonging to the same bench no less).[53] In *In re Yahoo!*, plaintiffs objected to Yahoo! scanning and analyzing their personal emails for marketing and algorithmic purposes.[54] The judge presiding over the case, however,

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[52] 18 U.S. Code § 2511 (2)(d) (2018).

[53] Lucy H. Koh, who presided over *In re Yahoo Mail Litigation*, is a district judge. Phyllis J. Hamilton, who ruled against Facebook in *Campbell v. Facebook*, is the Chief District Judge. Both judges belong to the United States District Court for the Northern District of California. See "Judges."

[54] As a Yahoo Mail user myself, I was stunned to find out what Yahoo can do with my information. The Yahoo Global Communications Additional Terms of Service for Yahoo Mail and Yahoo Messenger states: "We also may use the information we have about you for the following purposes:

- Analyze your content and other information (including emails, instant messages, post, photos, attachments, and other communications)…

found that "users of the email service had explicitly consented, under the Wiretap Act," to the company's surveillance activities by agreeing to its TOS agreement.[55] Having found violations of the Wiretap Act, the court granted Yahoo!'s motion to dismiss the case.[56]

In contrast, the court in *Campbell v. Facebook* asserted that Facebook's surveillance techniques violated not only the Wiretap Act, but also California's Invasion of Privacy Act, and § 17200 of California's Business and Professions Code. Plaintiffs in *Campbell* argued they had not agreed to Facebook's practice of scanning interpersonal messages for links to webpages and counting those links as a "like"; whereas Facebook maintained that consumers should have reasonably expected such surveillance to occur, given that the tech giant's TOS mentions how they, generally, collect "like" information and survey private messages. In the end, Judge Phyllis

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- Match and serve targeted advertising (across devices and both on and off of our Services) and provide targeted advertising based on your device activity, inferred interests and location information…
- Associate your activity across our Services and your different devices as well as associate any accounts you may use across Oath Services together…
- Create analytics and reports for external parties, including partners, publishers, advertisers, apps, third-parties and the public regarding the use of and trends within our Services and ads, including showing trends to partners regarding general preferences, the effectiveness of ads and information on user experiences. These analytics and reports may include aggregate or pseudonymized information…

Oath shares information within its affiliated brands and companies and with Verizon. We also share information we have about you for the purposes described in this Privacy Policy, including to provide [*sic*.] Services that you have requested (including when you connect with third-party apps and widgets). We do not sell, license or share information that individually identifies our customers with companies, organizations or individuals outside of Oath unless one of the following circumstances applies:

- **With Your Consent.** We will share information with companies, organizations or individuals outside of Oath when we have your consent.

We may update this Privacy Policy from time to time, so you should check it periodically."
See "How We Use This Information."

[55] Perry, "Click Yes to Accept Surveillance," 37.

[56] "The Court concludes that the [Yahoo Global Communications Additional Terms of Service for Yahoo Mail and Yahoo Messenger] (ATOS) establishes *explicit consent* by Yahoo Mail users to Yahoo's conduct… The Court further finds that the ATOS also *established* Yahoo Mail users' *consent* to Yahoo's practice of scanning and analyzing emails for the purposes of creating user profiles for both parties to the email communication and sharing content from the emails with third parties." See "*In re Yahoo Mail Litigation*: Order Granting in Part and Denying in Part Defendant's Motion to Dismiss"; Ibid., 33.

Hamilton decided that because Facebook did not notify its users that the company would engage in the specific conduct objected to by plaintiffs, Facebook did not have user consent.[57]

In re Yahoo! held that Yahoo! Mail users assented to screening of personal emails for the sake of data collection by agreeing to their TOS, which broadly describes how Yahoo! might use your information but makes no mention of the particular types of algorithms used. *Campbell* ruled that even though Facebook's TOS stipulated how users would be subjected to data collection, the social media network still failed to meet the standards of the consent exception because they did not specify that Facebook Messenger users would have their messages scanned by a web crawler algorithm for the purposes of targeted advertising.[58] Two factually similar cases – substantially different results.

Presented with the courts' inconsistent applications of the consent standard, one might start to wonder whether or not there are any meaningful guidelines as to what does or does not constitute "consent" in privacy law. The Wiretap Act, for one, provides no such direction.[59] Congress, as recently as December 2018 when Google C.E.O. Sundar Pichai testified on Capitol Hill, has consistently shown its inability to understand and legislate complex technological issues such as data privacy.[60] From what sources, then, could the courts draw upon in order to establish applicable principles for what constitutes "consent"?

Writing on date rape law about three decades ago, the feminist philosopher Lois Pineau provides one such framework. Pineau, in the late 1980s, recognized that there was "nothing to protect women from ... unscrupulous victimization. A woman on a casual date with a virtual

[57] Perry, "Click Yes to Accept Surveillance," 33-34, 39-40.
[58] Ibid., 40.
[59] 18 U.S. Code § 2511 (2)(d) (2018).
[60] Wakabayashi and Kang, "Sundar Pichai, Google's C.E.O., Testifies on Capitol Hill"; Ortutay, Liedtke, and Gordon, " Google Grilled in Congress: What's Ahead For Tech Companies."

stranger has almost no chance of bringing a complaint of sexual assault before the courts."[61] Pineau called particular attention to prevalent myths about rape and human sexuality, such as why sexually provocative women "ask for it" and how male aggression and female reluctance are assumed to be normal parts of seduction.[62] Pineau further contends that adherence to such myths explain, in part, why courts would assume "consent is implied unless some emphatic episodic sign of resistance occurred."[63] Most of the myths that Pineau highlighted almost three decades ago remain relevant today.

In "Date Rape: A Feminist Analysis," Pineau argues for a paradigm shift in how courts establish what qualifies as "consent" in cases of date rape. Instead of searching for evidence that a woman acquiesced or "went along with" a sexual encounter and equating submission with consent,[64] Pineau insists that courts should shift their focus to what is or is not reasonable from a woman's point of view:

> *Since what we want to know is when a woman has consented, and since standards for consent are based on the presumed choices of reasonable agents, it is what is reasonable from a woman's point of view that must provide the principal delineation of a criterion of consent that is capable of representing a woman's willing behavior.*[65]

The article then goes on to explicate how judges might center women's subjectivities in the courtroom, shifting the burden of responsibility for proving that consent occurred onto male defendants and off the shoulders of female plaintiffs.

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[61] Pineau, "Date Rape: A Feminist Analysis," 220.
[62] Ibid., 224-233.
[63] Ibid., 220.
[64] Ibid., 224.
[65] Ibid., 221.

Judges and privacy lawyers have a lot to learn from Pineau. First and foremost, Pineau provides us with a general conception of consent that can be used as a barometer for what actions fulfill the consent exception under the Wiretap Act. Following Pineau, we might reason, since what we want to know is when an Internet user has consented, and since standards for consent are based on the presumed choices of reasonable agents, it is what is reasonable from the user's point of view that must provide the principal delineation of a criterion of consent that is capable of representing a user's willing behavior. This dialectical transition has important ramifications. Transplanting Pineau's model for laws against sexual assault into privacy law can elucidate three criteria that should be considered by the legal and legislative communities in constructing more robust guidelines for the Wiretap Act's consent exception: 1) coercion, 2) ongoing communicative consent, and 3) shifting the burden of proof onto companies.

First, coercive tactics do not lead to consent. Pineau draws upon a useful analogy to contract law in order to demonstrate how contractual notions of just deserts are predicated on the informed consent of all parties: "In law, contracts are not legitimate just because a promise has been made. In particular, the use of pressure tactics to extract agreement is frowned upon. Normally, an agreement is upheld only if the contractors were clear on what they were getting into, and had sufficient time to reflect on the wisdom of their doing so."[66] Here, Pineau usefully calls attention to the guarantee of informed consent and absence of pressure tactics in contract law, asking us why other "contracts" should not promise the same baseline.

Pineau's argument can further be extended to contractual obligations for non-contractors. Unless express consent was given by the third party, making agreements on behalf of others

[66] Ibid., 230.

would not hold the force of a legally legitimate contract. Such compacts, in fact, are unlikely to withstand moral judgment in our day-to-day lives. Consider, for example, the sibling who promises a parent that their sister would do all of the dishes without the sister's knowledge. What is interesting, then, is the fact that Internet communication companies' surveillance practices have had far-reaching impacts on non-contractors. To wit, Apple, Yahoo!, and Google have all been found to collect information on non-users who have not agreed to their terms of service.[67]

Deeming pressure tactics and derived consent for third parties to be illegitimate means of establishing user consent can have salubrious effects for Internet-based privacy. For one, it would force tech giants to be more forthcoming about their surveillance practices. If non-coerced informed consent were the general standard for assenting to surveillance, companies would have the responsibility to *properly inform* users what information is being collected, and how that information is being used. Overly complex technical jargon in circuitously long terms of service, for instance, might be substituted for community-centered press releases and learning opportunities (e.g. a more readily-accessible "Click here to learn more about Facebook's privacy policy" that leads you to an easy-to-understand FAQ section).

This is not to suggest that deciding what precisely constitutes coercion on the part of ICCs would be a simple endeavor. Would, for instance, having a huge green button that says, "Yes, I agree to the terms and condition" on top of a barely noticeable link that says "No thanks" be considered coercive?[68] There are, indeed, tricky ethical, sociopolitical, and legal normative questions involved in determining what coercion looks like. Nonetheless, shifting the

[67] Perry, "Click Yes to Accept Surveillance," 53.
[68] Such was the case in *Perkins v. LinkedIn;* Ibid., 41-42.

conversation to what constitutes *informed* consent in TOS agreements can go a long way in bringing about better privacy legislation and regulation.

One might object that because companies are private entities providing a free service, users should have to "play by their rules" and agree to whatever they say. The Facebook world, for instance, only exists because of the company, and so what happens in said realm remains their prerogative. But this does not mean that anything goes.[69] Currently, numerous companies, such as Facebook and Yahoo!, do not allow would-be users to utilize their services without agreeing to TOS agreements, but it is possible to imagine other possibilities. For instance, Internet-based communication companies can provide "opt-out" options of sorts in which differing services are provided based on what level of surveillance practices potential users are comfortable consenting to.

This leads to the second idea provided by Pineau that further illuminates how the consent exception should protect user privacy: Privacy agreements are not a slide. Pineau writes

> *If the 'she asked for it' contractual view of sexual interchange has any validity, it is because there is a point at which there is no stopping a sexual encounter … If a sexual encounter is like a slide on which I cannot stop halfway down, it will be relevant whether I enter the slide of my own free will, or am pushed.*[70]

Pineau goes on to argue that sex, of course, is not like a slide. Consenting to one sexual act does not entail one has consented to any and all sexual acts. Sex, according to Pineau, requires a "communicative sexuality" in which we take and promote the ends of others as our own. In other words, one must, "in a non-manipulative and non-paternalistic manner," be open to having

[69] Perry, "Click Yes to Accept Surveillance," 51-52.
[70] Pineau, "Date Rape: A Feminist Analysis," 231.

honest and open communication with one's sexual partner(s) and always ensure that there is ongoing consent and mutual enjoyment.[71]

Privacy agreements, likewise, are not slides. Namely, even if a user agrees to one type of surveillance, this does not mean that Internet communication providers now have universal license to collect whatever information they so choose, and use said data however they want. Similar to sex, any agreement between ICCs and an internet user should herald the value of reciprocity. Both sides should be forthcoming with what they want and treat one another with respect. There must be clear communication at all times, and one side should never assume the other has agreed to something to which they have not expressed informed consent.

Thinking about privacy and surveillance in this way would significantly change how judges decide cases like *In re Yahoo!* and *In re Google*. In *In re Yahoo!*, Yahoo! essentially gained blanket permission to do whatever it wanted with data they collected from not only Yahoo! Mail users, but also anyone who had corresponded with someone using a Yahoo! email account. Perry writes that the ruling "empowers an electronic communication provider to collect an unlimited amount of personal data from individual users, for an unlimited amount of time, for any number of unrestricted purposes."[72] This verdict would not slide, if one accepts that privacy agreements are not a slide. Even if Yahoo! met the informed consent standard in their collection of information from users and non-users, and that is a big if, that alone should not grant them unbounded data collection power. Instead, Yahoo! should be clear about what specific data they collect, for how long, and for what purposes, and ensure that their users permit every instance of privacy-breaching behavior.

[71] Ibid., 234-235.
[72] Perry, "Click Yes to Accept Surveillance," 55.

In re Google established that consent under the Wiretap Act could be implicit. *In re Google* decided that "banner advertisements, hyperlinks, and resources that existed in the U.S. media, such as newspaper articles and editorials," can all be considered a privacy disclosure seeking user consent. The court in *In re Google* further decided that mere exposure to these disclosures "might be sufficient to establish implicit consent, provided there was no record of plaintiffs objecting to the relevant source."[73] However, if one accepts that privacy agreements are not like slides, then any threshold of clear communication between company and user would not accept implied consent as true consent. Accepting mere exposure to disclosure as an equivalence for implicit consent would be akin to saying that a tourist who has read an article about the United States' long legacy of racial injustice has tacitly consented to its racial hierarchies in traveling to the country.

Pineau's logic directly rules out ICCs spontaneously changing their TOS without informing their customers. Currently, numerous companies' TOS include clauses stating that they can change their terms at any time. Yahoo!, for instance, says "We may update this Privacy Policy from time to time, so you should check it periodically."[74] Shifting the onus onto consumers, Yahoo! here fails to meet the standard of healthy, respectful conversation.

Finally, according to Pineau's model, if and when a case is brought against Internet communication companies for violations of the Wiretap Act, the burden of proof for meeting the requirements of the consent exception must lay squarely on the company. In her article, Pineau asks for a paradigm shift in date rape and sexual assault law. She demands that the standard of reasonable consent be determined from a woman's point of view. What logically follows, then, is

[73] Ibid., 39.
[74] "How We Use This Information."

that any case of sexual assault brought before the courts must center women's subjectivities and shift the burden of proof onto defendants. To be specific, this means that instead of interrogating women as to how they resisted male aggression and made some "emphatic episodic sign of resistance," courts should question male defendants as to why what occurred would be reasonable to consent to from the woman's point of view.[75] Pineau explains

> *Where the kind of sex involved is not the sort of sex we would expect a woman to like, the burden of proof should not be on the woman to show that she did not consent, but on the defendant to show that contrary to every reasonable expectation she did consent.*[76]

Pineau goes on to offer a litany of questions prosecutors may levy in their cross-examination of defendants accused of sexual assault, demonstrating how such a shift in thinking would draw attention to the centrality of reciprocal communication in healthy sex.[77]

Similarly, privacy law should also shift the burden of proof onto defendants – the ICCs – and off the shoulders of plaintiffs – Internet users. When ICCs are accused of violating the Wiretap Act, the public should, first and foremost, believe plaintiffs and their stories.[78] Then, in the courtroom, prosecutors should ask company representatives whether or not they intended for their terms to be an intelligible basis for users' informed consent. If they answer in the negative, then the company in question would have to account for why they did not seek explicit consent from users and would, thus, likely be found guilty of violating the Wiretap Act.

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[75] Pineau, "Date Rape: A Feminist Analysis," 220.
[76] Ibid., 233.
[77] Ibid., 240-241.
[78] This was not the case in *Perkins v. LinkedIn* in which a judge openly dismissed thousands of explicit complaints made by LinkedIn users; Perry, 45.

But suppose they answer in the affirmative. Then the cross-examiner could use the reciprocal communication model to discover how much respect the company had for user autonomy. Did they ask users what type of surveillance they are comfortable with? How was information communicated to users? Was it coercive? Did they make any effort to see if would-be users would prefer other options? Did the user directly ask to have their information collected? Did companies ask their users how they would like to be surveilled? With the state of most companies' TOS agreements today, it is unlikely that any ICC would provide satisfactory answers to these questions.

This new criterion of burdening companies with the responsibility to prove why it would be reasonable from a user's point of view to agree to their TOS would help the legal community better focus on mutual communication and user agency. For one, it requires ICCs to tell a fairly long, yet consistent, story about how they continuously sought non-coerced, non-manipulated consent from their users. Second, in making constant communication key to a healthy privacy agreement, it becomes easier to delineate surveillance practices to which users consented from those that ICCs are conducting illegally without user consent. For even if a user assents to Facebook scanning their Facebook Messenger messages, for example, the line of questioning above is still available to prosecutors to cross-examine why Facebook would then go on to assume X or Y conduct. Third, the new criterion makes it possible for users to take ICCs to court for a host of espionage-like conduct, providing average Internet consumers with an effective recourse to a wider array of breaches of their data privacy.[79]

[79] This paragraph is a modified version of Pineau's arguments. See Pineau, "Date Rape: A Feminist Analysis," 241-242.

I anticipate at least two objections to the claims I have made thus far. The first of which is a generally libertarian argument, worrying that these privacy policy changes would constrain liberty in two ways. For one, the libertarian might be concerned that increased state regulation of the consent exception would seriously limit the choices available to consumers. Why should the state be allowed to define what data a user can or cannot consent to giving away? The second qualm a libertarian might have is that shifting the burden of proof of consent onto corporations would be an undue restriction on the free market. Google is a private entity providing a free service to its customers, and therefore rightfully owns all of the data associated with Gmail, Youtube, Android, etc. The government should not be able to regulate private intellectual property as such. Moreover, if the legal community fully adopts the proposals made in this paper, Google would face tremendous litigation costs. This would divert essential Google resources that could be used for important new digital innovation.

One could reply to the libertarian in a number of ways. For one, both objections are predicated upon overly simplistic formulations of private property. In reality, one's "personal" data more often than not implicates others. Specific information can be collected on friends and family that you have communicated with through email. Marketing algorithms only function if the company has collected enough individual consumer profiles to aggregate into "Big Data." And, as numerous scholars have shown, data collection about your consumption behavior could even be used to determine someone else's health insurance rates.[80] Given how one's digital data generally compromises other people's privacy, and in light of the aforementioned reasoning as to why one cannot consent for others, it would be wrong to assume that one can give away their

[80] Karsten and Jin, "How Should the US Legislate Data Privacy"; Karsten, "The State of Health Care Data Privacy."

information haphazardly with no consequences to others. The libertarian argument also assumes that the digital information collected by ICCs "belongs" to the company – but just because a university, for instance, has collected personal information on students, faculty, and staff, in regard to where they live, their marital status, their family income etc., that does not entitle said university to do whatever they want with said information, even if everyone consented to them having it on record.

Another way in which one could respond to the libertarian is through a language of rights. The European Union for instance, has held that all individuals have a "right to be forgotten" in digital space.[81] As previously stated, U.S. courts and Congress have both held that U.S. citizens have an implicit constitutional right to privacy, broadly speaking. This argument, of course, would bring one into difficult ethical terrain in balancing competing rights and interests. Regardless, by playing the libertarian's game in addressing the issue through a discourse of rights protection, one would force the objector to nuance their critiques through recognition that there are inalienable rights that we must protect in the digital world. Answering the objection that privacy protection would stifle technical innovation, one might ask, is the new Google VR-gaming headset really worth violating our fundamental rights to privacy and data security?

Finally and relatedly, one could use a libertarian argument on the libertarians. Companies that provide online communication services effectively function as oligopolies. As Perry points out, "current antitrust regulations do not prevent leading electronic communication providers from increasing their market power exponentially through big data acquisition."[82] A libertarian

[81] Doubek, "Google Has Received 650,000 'Right to be Forgotten' Requests Since 2014"; Bowcott, "'Right to be Forgotten' Could Threaten Global Free Speech, Say NGOS"; Moore, "The Right to be Forgotten is the Right to Have an Imperfect Past."
[82] Perry, "Click Yes to Accept Surveillance," 52.

genuinely worried about choice, therefore, should probably focus more on how Big Tech companies engage in practices, such as predatory pricing and hostile acquisitions, that push out genuine competition. Preventing ICCs from collecting unlimited data for unlimited amounts of time, and thus limiting ICC's market power in data-driven markets, is one way to encourage more competition, consumer choice and innovation.[83]

Another objection one could raise is simple: people do not care. As Anita Allen maintains, "Privacy is not always popular." Say I want to play Pokémon Go – why should the state or anyone else tell me what I should or should not care about in regard to my privacy? Why should I not be allowed to skip over fully reading the TOS so I can play Pokémon Go as soon as possible? If no one else is reading TOSs, and my friends and family are effectively giving away information related to me anyways, what does it matter if I give away my information as well? Plainly put, reading and understanding complex legal jargon is a drag – just let me play Pokémon Go.

This objection, though deceivingly simplistic, holds a lot of weight. Why should the state, be it through legislation or the courts, regulate what one should or should not care about? This is a question left for the political philosophers. Nevertheless, it seems reasonable to maintain that an issue does not become intrinsically meaningless just because people do not care about it. For instance, even though most Americans choose not to vote, the abundance of reasons for why one ought to care about voting still stands. As Allen and the many philosophers that she cites in *Unpopular Privacy* note, the experience of privacy is fundamentally linked with "dignity,

[83] Another option would be to define the Internet as a public good and put electronic communication under the same scrutiny and privacy protection we provide to physical mail; Perry, "Click Yes to Accept Surveillance," 50-51. This, however, would likely be unpopular among libertarians.

autonomy, civility... intimacy... repose, self-expression, creativity, and reflection."[84] To respect someone's privacy, be it digital or not, is to respect someone as a person. The Wiretap Act's consent exception is fundamentally about treating rational agents with respect and dignity, and ensuring that informed consent to otherwise illegal practices are obtained by Internet communication service companies before they engage in problematic behavior. Even if people do not care, privacy still matters.

This paper has argued that Pineau's 1989 communicative sexuality model for laws against sexual assault can be fruitfully utilized in privacy law by centering user rationality and upholding the principal values of reciprocal communication and shared meaning-making. Transplanting such a model, even analytically, tells us much about the problematic assumptions underlying ongoing surveillance practices and contemporary privacy law. Digital privacy may not be the most attractive political issue, but its ramifications *vis-à-vis* Internet-user's rights and autonomy cannot be understated.)

[84] Allen, *Unpopular* Privacy, 171.

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Children's Individuality and Parents' Expressive Interests: The United Nation Convention on the Rights of the Child and the Philosophy of John Stuart Mill

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Abstract:

This paper examines U.S. opposition to the United Nation Convention on the Rights of the Child as an example of the fundamental and pervasive tension between children's individuality and parents' expressive interests. In other words, how do families balance the individual liberties of different members, and how should society be structured in order to encourage this balance? Where should the law afford personal liberties, and to what extent? These questions are essential to the flourishing of democratic societies, which rely on the thoughtful political participation of citizens. Religion, and the politicization of religious beliefs, creates particularly difficult questions about the balance between parental and child interests, especially those concerning autonomy and fulfillment of personal conceptions of the good. This paper explores the possible ways to reconcile a religious upbringing with values of autonomy and individualization, including education. However, the plurality of educational styles makes education an incomplete and unsatisfactory solution to this problem; as such, a cultural shift to viewing children as *individuals and moral agents* is necessary, as well as a societal commitment to assuming a certain level of responsibility in children's upbringings.

Introduction:

The ideal of the American democratic society rests on the creation and protection of a pluralistic culture and a free market of ideas; these values are enshrined in the First Amendment of the Bill of Rights and permeate the legal and social culture across the nation. However, the issue of exactly *how* individuals best develop their own sense of personal liberty is largely overlooked, if not ignored, in both public and philosophical discourse. Certainly, childhood and upbringing play a major role in preparing citizens able to think for themselves both in life and in

the voting box, yet much of the philosophy of individual liberty largely omits the concept of children[85] and childhood in discussions of social rights. Nowhere in the American Constitution, nor Bill of Rights, are any mentions of *children's* rights, nor how to protect the interests unique to childhood. Indeed, the U.S. itself has a troubled history with the protection of these ideals. In 1989, the United Nations introduced a treaty titled the Convention on the Rights of the Child,[86] and it quickly became "one of the most rapidly and widely adopted human-rights pacts" in history.[87] Despite its popularity, however, two countries have yet to ratify it: Somalia—which has no functioning government—and the United States. Much of the United States' opposition to the CRC lies, perhaps counterintuitively, in the fears that a document championing the rights of children would infringe upon the liberties of parents and of the collective family.

This paper will focus on religion as a single issue through which to examine U.S. opposition to the concept of children's rights as well as conflicts of interest within the family. In order to understand this issue more deeply, I will also analyze a similar discrepancy between ideals in John Stuart Mill's influential essay *On Liberty*, since much of the American language of individuality echoes Mill's own writing and ideas. Through this analysis, I will identify an essential tension in the discourse of individuality present in U.S. legal and social culture as well as the CRC: children's individuality versus parental expressive interests.[88] Finally, I will explore the different aspects of this conflict and posit various ways to mitigate between these two values,

[85] In this paper, the word "child" will be used to refer to anyone under the age of 18, as this is the age at which individuals leave the legal control of their parents or guardians. While some of the arguments may be more applicable to younger children in a different stage of development, I will not be examining developmental psychology to determine the exact age at which the process of individualization begins; my arguments will primarily be philosophical in nature.

[86] Hereafter referred to as the "CRC."

[87] S.C. "Why Won't America Ratify the UN Convention on Children's Rights?"

[88] Throughout this paper, I will use the term "expressive interests" (used by Eamonn Callan in *Creating Citizens*) as a way to describe parental interests in the upbringing of their children

examining the ideas of writers and philosophers who try to balance the interests of parents and the collective family with those of children. The question of the status of the child is pivotal in addressing this conundrum; by way of conclusion, I will suggest that we must take children's interests more seriously while still respecting parents' interests in raising their children in a particular conception of the good. The CRC, and the U.S. reception of it, demonstrates an important discord that permeates American discussions of liberty and individuality; religion, due to its role in childhood and family life, provides a valuable lens for understanding this conflict embedded in a pluralistic democratic society.

The United Nations Convention on the Rights of the Child and Its Reception:

The CRC represents an international attempt to create, for the first time, global standards for the treatment of children as autonomous beings.[89] It is philosophically significant that the CRC recognizes children as citizens. Children have historically been considered the property of their fathers, or mere extensions of their parents, but now we recognize children as individuals unto themselves, albeit with diminished capacities for autonomy.[90] The preamble of the CRC recognizes that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding," but also that "the child should be fully prepared to live an individual life in

[89] The contents of the CRC itself were historically separated into three distinct categories: entitlements, affirmative freedoms, and protections. However, in recent years, a different interpretation—Chambers and Wedel's "value-critical policy analysis model"—has risen in popularity. The interpretation identifies six elements in the CRC, including goals and objectives, eligibility, interactions, financing, benefits and services, and administration and service delivery. See Scherrer 12. This interpretation places more emphasis on the CRC as a "social policy document," supporting the claim of some legal experts that the CRC could "provide a framework against which we can measure our governmental policies for children—policies that are currently scattered among many agencies and levels of government, with no coordination or oversight." See Kilbourne 27.

[90] Kilbourne, 27.

society." The focus on children has therefore shifted from being considered as mere "objects of protection" to acknowledging their status as actual rights-bearers.[91] The CRC further recognizes children as right-bearing individuals in Article 14, which describes the "right of the child to freedom of thought, conscience and religion," as described by the "freedom to manifest one's religion or beliefs…subject only to such limitation as are prescribed by law and necessary to protect public safety." There is no formal enforcement mechanism included in the document itself, so adherence to the CRC relies on the voluntary efforts of states and nations.[92]

Although the CRC prescribes individual liberties to children that already exist in American legal thought—freedom of thought, conscience, and religion—the United States has refused to support the CRC. Part of the reason for the U.S.'s failure to ratify is a result of the complicated ratification process of the U.S. government. By UN standards, ratifying a document signifies a legal commitment to its rules; for a document to be ratified in the U.S., it must win a two-thirds majority in Senate. Both presidents Clinton and Obama have endorsed the document, but the Republican party has been adamant against its passing, and thus the CRC has never even made it to a vote.[93] U.S. opposition to the document falls into two main categories: criticism of the UN and human rights treaties in general, and philosophical disagreements from parental rights advocacy groups. The first category involves political concerns that the CRC would usurp American sovereignty by overriding existing laws or that enforcement of new social and economic rights could result in additional governmental costs.[94] With this is mind, the Home School Legal Defense Association (HSLDA), one of the most influential American parental

[91] Ibid.
[92] Ibid., 28.
[93] S.C. "Why Won't America Ratify the UN Convention on Children's Rights?"
[94] Kilbourne, 29.

rights groups, declares that the CRC "is a treaty which creates binding rules of law. It is no mere statement of altruism."[95] Concerns of the second category tend to be more philosophical in nature and thus perhaps even more complex. Some parents and groups—including HSLDA—fear that the CRC is more than just a document seeking to protect the well-being of children around the world, and instead is a document which seeks to infringe upon the rights both of the parents as well as the sovereignty of the family itself.

Part of the issue with the CRC is that much of the language of the document is purposefully vague or can be broadly interpreted. Therefore, many of the fears of parental rights groups could be attributed to misinterpretation: some groups claim that the CRC "put[s] an end to parenting as we know it," "give[s] our children unrestricted access to abortion, pornography, gangs and the occult," and "would create in children the legal equivalent of a 'fundamental' right to rebel against their parents."[96] However, the civil and political rights granted to children by the CRC are intended as protections against *governmental* interference in children's well-being, not as new privileges for the government to intrude upon family life.[97] The more fundamental issue identified by parental rights groups is the concept of family rights in general. Much of this concern is religious in nature, as many religious faiths prioritize the aggregate well-being of the family over the individual rights of its members, and the CRC emphasizes the individuals' rights over those of the collective.[98] As such, insistence on children's rights can undermine religious or cultural traditions. Here lies a recurring theme in American politics and society, and the conceptual heart of my paper: where should we afford personal liberties, and to what extent? For

[95] Farris, "Nannies in Blue Berets: Understanding the U.N. Convention on the Rights of the Child."
[96] Kilbourne, 28.
[97] Ibid., 29.
[98] Coward and Cook, 4.

example, should children have the right to reject the religious faiths of their parents—even while living at home? Can children be compelled to attend religious services? Where do the expressive interests of parents end, and the personal determination of children begin?

Parental rights groups such as HSLDA also give voice to a more foundational stance toward American political structure: the call for civil checks on government power. The influential economist and political scientist, Milton Friedman, argues that "every extension of the range of issues for which explicit agreement is sought strains further the delicate threads that hold society together. If it goes so far as to touch an issue on which men feel deeply yet differently, it may well disrupt the society."[99] In many ways, parents' rights groups seek to implement this very ideal of minimal government interference: theoretically, the CRC threatens to increase the scope of governmental oversight into a historically private sphere. Parental rights groups, therefore, do not only seek to protect the ideals of the family, but also provide a civil check on possible interference into the private sphere in the tradition of conservative politics. However, the protection of basic rights need not be at odds with conservatism. Friedman maintains that the "ultimate operative unit" in society is the family rather than the individual, and that parents are best situated to protect and provide for their children; however, he also asserts that children "have a value in and of themselves and have a freedom of their own that is not simply an extension of the freedom of the parents."[100] Indeed, the notion of securing rights from governmental interference—which is certainly an aspect of the CRC—seems very much in line with conservative values. At its core, the central question is who deserves full rights of self-determination, and at what age? Perhaps, then, the issue is less one of politics and more one

[99] Friedman, 30.
[100] Ibid.

of ideology: parents' rights groups do not take seriously children's rights as separate from the family, and this threatens to infringe upon children's individualization and development of autonomy.

Conflicts of Individual Liberties:

The struggle between the conflicting liberties of individuals recurs throughout both policy and philosophy. Mill's philosophy, which subsequently influenced the values of the U.S., promotes individual liberty as the core virtue of both a good citizen and democratic society. He argues that individualization—a consequence of individual liberty—is essential to well-developed humans. Moreover, he notes that this development of individuality is the greatest good for society and human affairs, and that anything that prevents this development is detrimental to the betterment of society.[101] As such, the protection of individual liberty should be a priority, both socially and legally.

Although Mill emphasizes the importance of the cultivation of individuality, he fails to develop a comprehensive philosophy on the relationship of childhood and the process of self-actualization. He asserts that children do not have the same moral status as adults, but acknowledges that childhood is an important period of individualization and that parents—and even society as a whole—have certain obligations to their children.[102] The current generation must ensure that the future generation will be capable of "rational conduct" later in life and prepare them to exist constructively within society.[103] This is especially important in a democratic society that relies on citizen participation and deliberation. Voters do not emerge

[101] Mill, 63.
[102] Ibid., 13.
[103] Ibid., 80.

fully formed on their eighteenth birthday. Instead, children need to actively develop autonomy in order to be able to govern themselves as adults. This, in many ways, encapsulates some of the essence of the conflict: children must be prepared to think for themselves even when they haven't reached the full status of adulthood. Mill places the responsibility for this preparation partially on the concept of collective society as a whole: "If society lets any considerable number of its members grow up mere children, incapable of being acted on by rational consideration of distant motives, society has itself to blame for the consequences."[104] Notably, Mill believes that these "natural" influences of society are enough to influence individual development, and that no government regulations or oversight is necessary in this process. Instead, the combination of education and the authority of opinions transmitted in childhood are sufficient, and the government does not need—nor should it have—the power to "issue commands and enforce obedience in the personal concerns of individuals."[105] Indeed, Mill strongly argues against *almost* all interferences in the private sphere, asserting that it limits individuals' liberties and has the potential to not only limit what the public believes to be unequivocally wrong, but also what may be considered innocent.[106] In other words, government interference can be a weapon to police unpopular lifestyles considered harmful by some but harmless by others; for example, in the U.S. today, the government could interfere in the private sphere to prohibit gay couples from raising a child together. It is also important to note that the private sphere itself does not contain a singular set of values. The public sphere relies on a certain education of its citizens, potentially causing the aforementioned conflicts between individuals, but the private sphere also contains certain conflicts of interests, especially those among family, parent, and child.

[104] Ibid.
[105] Ibid.
[106] Ibid., 86.

A lack of interference in the private sphere can also limit liberties; one can consider child abuse or neglect of education as issues warranting interference. Thus, despite Mill's insistence on limited government, he asserts that there should be *some* oversight in certain areas of the private sphere—for example, education. However, Mill does not satisfactorily consider the issue of what can be considered a "good" education, or what kinds of educations can cultivate the individuals his philosophy requires. It is important to note that Mill acknowledges the tension between children's and parental interests: "It is in the case of children, that misapplied notions of liberty are a real obstacle to the fulfillment of the State of its duties. One would almost think that a man's children were supposed to be literally, and not metaphorically, a part of himself, so jealous is opinion of the smallest interference of law with his absolute and exclusive control over them."[107] In other words, there are some interests of the child that are separate from those of their parents, and the State has a duty to protect these interests. From this observation, Mill derives the argument that education is "one of the most sacred duties of the parents" because it enables the child to perform constructively on the individual and social level.[108] The State's duty is to provide alternatives to the parent's "sacrifice" of educating the child himself.

At the same time, however, Mill recognizes that state-provided education has its own risks. He argues that "a general State education is a mere contrivance for moulding people to be exactly like one another" and that "all that has been said of the importance of individuality of character, and diversity in opinions and modes of conduct, involves, as of the same unspeakable importance, diversity of education."[109] A State education, Mill asserts, should be only one

[107] Ibid., 102.
[108] Ibid.
[109] Ibid.

competing standard amongst a diversity of educational opportunities.[110] While this insistence on diversity of education may seem, and may well be, a reasonable and even good assertion, it ignores questions of how to ensure that each child receives an education that empowers her to both perform her social role and achieve her own personal aims.

A general State education can provide a certain amount of oversight to ensure that children are exposed to various conceptions of the good, but within a plurality of school systems, it is very difficult to ensure that children are truly equipped to be individuals. One can think of religious schools that refuse to teach evolution, thereby denying children the opportunity to grapple with competing ideas of the origin story, or some homeschooling parents who shelter their children from engaging with religious diversity. Are children who receive an education from a narrow perspective equipped to be individuals in the Millian sense? Mill's philosophy relies on the existence of a society of individuals equipped with analytical skills and a certain level of open-mindedness, and it seems that an education that discourages true deliberation cannot produce these types of individuals. Because of this lack of attention to the actual *process* by which individuals become thus, Mill leaves open the possibility of an educational system that does not necessarily produce the very citizens it requires.

Both Mill's philosophy and the CRC demonstrate the potential conflicts between individual liberties in the context of families and education. Two particularly important questions follow from the tension: How should families balance the individual liberties of different members? How should society be structured in order to encourage this balance? Political theorist, Rob Reich, argues that "because consenting to principles of justice and political policies

[110] Ibid.

in a diverse society will involve understanding that others are motivated by different ends, consent will involve reflecting critically and independently upon one's own conception of the good and upon others' as well."[111] There is strong interest in cultivating individuals able to evaluate and understand the existence of competing lifestyles and beliefs in order that they can actively participate in democratic society. Documents like the CRC, then, that are divided between "the right of the child to freedom of thought, conscience and religion" and "the rights and duties of the parents…to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child" represent a discord that must be reconciled for the flourishing of a democratic, pluralistic society.[112] In the next section of this paper, I will describe in detail the nature of the question of parental expressive interests versus children's individualization—that is, the potentially conflicting interests of different familial entities. I will then examine the ways in which society influences the parent-child dynamic, and vice versa, in order to suggest social structures that would support and enhance the efforts of parents in raising autonomous children.

Parental Expressive Interests and Children's Individualization:

When examining the question of children's individuality, it is important to note two main ideas: first, that children are, in many ways, dependent on adults both physically and emotionally, as they lack in the necessary cognitive abilities to fully evaluate abstract ideas in the same manner as adults; second, that parents have their own interests in raising children in a particular conception of the good. Philosopher Colin Macleod argues that "the realization of a

[111] Reich, 456.
[112] Convention on the Rights of the Child. Article 14.

parent's conception of the good may consist partly in the degree they succeed in transmitting their way of life or at least significant components of their valued commitments to their children."[113] The importance of this statement is not to be overlooked; in seeking to protect children's individuality, a democratic society that rests on individual liberties does not desire to infringe upon those of the parent. Children's interests, on the other hand, lie not simply in being inducted or inculcated by a particular conception of the good, but in cultivating the moral powers necessary to evaluate competing conceptions. However, Macleod also notes that "the leading of a good life cannot simply be postponed until one is an adult."[114] Although it is desirable both on the part of the individual and of society that a child develop the skills for autonomy, she still has interests in living a good life in the present. Therefore, in seeking to explore the process of children's individualization, it is essential to remember that children have both long- and short-term interests that deserve protection.

Religion provides an especially poignant version of the conflicts between parental and child interests. For parents, this conception of the good runs more deeply than political or social world views; for children, full immersion into a religion threatens to limit their understanding of or ability to evaluate competing world views. Furthermore, religion, unlike certain lifestyle choices (such as political stances), is made more meaningful through its lived experience, and cannot be sufficiently understood or evaluated from an outside perspective. In other words, because of the *faith* involved in religious communities, a certain level of immersion is necessary to understand the nature of a certain religion. The significance of what it means to participate in certain religious rituals or adhere to religious beliefs demands a commitment that affects one's

[113] Macleod, 122.
[114] Ibid., 121.

life in a substantial way. This may be contrasted with, for example, being a Republican, which addresses only the political sphere of life; politics do not necessarily require full participation in ceremonies and rites or observance of particular values and teachings. Religion, on the other hand, is often a central aspect of family life that involves tradition and shared family goals and experiences. Philosopher Terry McLaughlin notes that a family's religion involves shared commitments and world views that binds the family together, and he argues that this "sense of solidarity…would be diminished if children were merely spectators upon certain key elements of the family's life."[115] Moreover, McLaughlin argues that this "sense of solidarity" and "key elements" of family life is what marks a family as such; in other words, they are essential to distinguishing families from other social groups of individuals. Merely practicing religious traditions in front of children without their participation, therefore, could infringe upon the family's ability to share life projects together and negatively impact the dynamics of the family unit. Thus, while it may seem that the way to support children's individuality is to not "indoctrinate" them into a certain faith, this spectator style approach to religious exposure could infringe upon both parental and familial interests, and—because of their interconnectedness—the child's. Religion includes both ritual elements and a conception of the good, and it is this interaction of these two that give religion its force.

Similarly, it is also important to recognize that parent's expressive interests do carry their own importance, and that a philosophy that prioritizes the individuality of the child in all cases is also insufficient in its own way. Philosopher Eamonn Callan asserts that child-rearing has an "expressive significance" in the lives of the parents; the process embodies the parents' values

[115] McLaughlin, 123.

and conceptions of the good, and a child-centered philosophy of upbringing cannot accommodate this deep significance.[116] It is acceptable, and even beneficial, to acknowledge that having the experience of influencing and shaping your child's worldview is a central experience of parenthood. The idea of "expressive interests" encompasses more than just the interest in having a cohesive family unit or meeting a child's needs.

The tension between children's individuality and parents' expressive interests often rises from an uncertainty about how to approach these types of questions: is there a way to reconcile a religious upbringing with values of autonomy? Certainly, the CRC, which protects both a child's right to define individual religious beliefs as well as the parent's right to raise a child based on a particular conception of the good, relies on a satisfactory answer to this question. McLaughlin argues that parents can indeed raise their children in religious homes without stifling their individuality. This "tenacity of engagement," as he calls it, refers to the contemplation and deliberation a child can give her beliefs.[117] Parents can encourage this process with the goal of their child becoming autonomous. Through this assertion, McLaughlin suggests that religion is not a liability to children's individual development, but perhaps even an advantage—religion introduces a means for children to engage with the most fundamental philosophical questions from an early age and throughout their lives. In other words, religion provides an orientation towards particular values and creates a framework for these values, and children are able to participate in this way of interacting with the world.

McLaughlin places the responsibility of crafting this sort of engaging and reflective childhood on the parents, who must provide a certain kind of religious upbringing: "This will not

[116] Callan, 144.
[117] McLaughlin, 121.

involve indoctrinating their children, but giving them a substantial exposure to a domain of experience, a tradition of thought and response, a view of and a way of life which tends to be rather stifled in the general conditions of the wider society and which is not therefore as available as it might be for the autonomous consideration of young people."[118] However, while this style of parenting provides the structure for children to develop the *ability* to evaluate different conceptions of the good, it does not necessarily expose them to these other beliefs. This problem reveals the complexity of the question at hand: not only do children have to develop the skills of autonomy, but they also must be properly exposed to competing conceptions of the good in order to fully exercise these abilities.

Exactly how children should gain knowledge of competing world views is a central lacuna in both Mill and the CRC. I have previously described these gaps in Mill's educational philosophy,[119] and the CRC calls for education to protect "the development of the child's personality, talents, and mental and physical abilities to their fullest potential" without defining the ways in which education can achieve this.[120] The dilemma of where children should gain knowledge of competing world views is central to the question of children's individuality and essential to the success of a pluralistic society.

Education can be one way to achieve this exposure. Children can learn about beliefs and lifestyles in the classroom, or, ideally, through their peers as well. Indeed, the project of public schools is in some ways representative of this ideal; in theory, public schools present both a curriculum that engages with diversity as well as a multiplicity of student backgrounds. Public schools are often touted by liberals as the ideal form of schooling, especially over religious

[118] Ibid., 126.
[119] Refer to pages 7-8.
[120] Convention on the Rights of the Child. Article 29.

schools or homeschooling (whose own issues I have previously discussed). However, public schools also cannot be held as the paragons of intellectual vitality. There exists a variety of issues with the public-school system—non-diverse student bodies, funding issues, socioeconomic stratification—that make it an imperfect solution to the dilemma at hand.

Another possible solution to the question of children's exposure to competing world views is one suggested by Colin Macleod, which he calls the "refined liberal conception of parental autonomy." In this conception, full parental autonomy is "constrained" by the requirement that children have full access to "deliberative resources"—including libraries, museums, and art galleries—that represent the plurality of thought within society.[121] Macleod's "refined liberal conception" acknowledges both the influence and importance of parental beliefs in relation to children's upbringing, and he asserts that a delicate balance must be found between the two by encouraging parents to expose their children to a particular conception of the good without limiting their abilities to understand other beliefs and lifestyles. However, Macleod's solution to children's exposure to these other conceptions of the good—through the "sphere of social interaction" and "access to relatively impartial sources of knowledge about other ways of life"[122]—may place too much faith in children's ability to properly synthesize and evaluate information in an independent manner. Mill notes that the best way to engage with competing ideas is by hearing them from "persons who actually believe them; who defend them in earnest, and do their very utmost for them."[123] There exists a strong truth in this for children as well as adults—that instead of learning about different conceptions of the good in an impartial manner, children understand them through the perspective of someone who actually holds the beliefs.

[121] Macleod, 130.
[122] Ibid.
[123] Mill, 37.

In order for children to gain exposure to competing conceptions of the good, and ideally, from persons who actually believe or practice them, there needs to be a cultural shift to viewing children as individuals whose role extends beyond the family. In other words, society needs to view the upbringing of children in a more collective sense, understanding that they are both individuals and citizens as well as members of a particular familial group. I do not mean "collective parenting" in the structural sense, where the borders of the actual family unit are blurred, and children are "shared" amongst different persons. Instead, I argue that if society truly wishes to create individuals in the fullest sense, there needs to be a notion of shared responsibility amongst all members of society. The vision of the parent-child relationship needs to continue to shift from the historical idea of children as "property," or the more modern conception that children are the realization of parent's personal projects, to the idea that children are first and foremost individuals whose interests also extend beyond the family. While the family is a fundamental source of emotional and developmental security, it need not be the sole grounds for autonomy-building, and there needs to be a concerted effort to achieve this dynamic. Adults outside of the family unit should assume certain responsibilities for other's children as members of a collective society and seek to provide both an example of and resource for competing lifestyle choices. Just in the way that members of a democratic society have a responsibility to protect the rights of others, so too there should be a responsibility to also protect the well-being of others, including children.

One aspect necessary to this cultural shift is to truly begin viewing children as individuals, regardless of whether or not they have fully achieved autonomy. This means respecting their journey towards personal expression, even if they begin to grow outside of

family beliefs and lifestyle choices. Certainly, the U.S. reception of the CRC demonstrates that, as a society, we continue to struggle with this notion. It is important to note that children can both maintain a certain age-appropriate deference to their parents (i.e., a toddler is less autonomous, and thus shows greater deference to her parents, than a teenager) as well as the validity of their own interests. Treating children as individuals does not entail treating them as adults, but instead addressing or acknowledging their concerns and opinions in a serious manner. Moreover, the importance of treating children's interests and opinions as valid concerns both in the family and in general society is essential to the process of creating citizens able to express their own positions in the political and social spheres.

The skepticism about state power and international legal agreements, as represented by parents' rights groups' resistance to the CRC, demonstrates a resistance to acknowledging the independent moral interests of children in either a social or political sense. The opposition to the codification of children's rights in domestic and international law hinders American and global development of these ideals. Without pressure from a supranational institution such as the UN, many states will be unwilling or unable to protect the rights of children, some of the most vulnerable members of society. Moreover, the concern for the protection of parental expressive interests need not hinder the advancement of children's moral and individual interests. I have demonstrated in this paper the various possibilities for raising children in a religious context while nonetheless cultivating their developments of autonomy. As such, the opposition to this codification of children's rights represents a denial of the independent moral rights of children, or at the very least, a lack of confidence in the State's justification for enforcing these rights because of the threat to parental discretion. This reasoning is neither in the best interests of

society nor—more importantly—of children themselves. In order to reconcile the perceived divide between parental and child interests, there must be an acknowledgement not only of the independent nature of children, but also of the state's or world's need to protect these rights.

Conclusion:

Society, both global and American, has progressed greatly in terms of defining children as distinct from their parents as well as acknowledging their unique set of interests. However, there still exist fundamental tensions in the American understanding of the process by which individuals develop as well as the way in which to evaluate conflicts between children's individuality and parents' expressive interests. The U.S. reception to the CRC, largely spearheaded by parental rights groups, represents one aspect of this issue; the indeterminacy in Mill's philosophy demonstrate another, more theoretical, aspect. In this paper, I examined religion as a way in which to evaluate the conflicts between American ideals of individuality and beliefs in the sanctity of the family. Through the examination of this dynamic, I explored the possible ways in which to reconcile a religious upbringing with values of autonomy and individualization, citing Terry McLaughlin's argument that religion can—provided a certain "tenacity of engagement"—encourage the development of children's autonomy. However, this argument addresses only one aspect of children's individualization, leaving unclear the ways in which children gain exposure to competing conceptions of the good. I explored education as one possible solution to this issue, but argued that because of the plurality of educational styles, it remains an unsatisfactory answer to this dilemma. Similarly, Colin Macleod's argument that access to libraries, museums, or other aspect of the public sphere would provide this exposure

does not address the truth in Mill's assertion that the best way to learn about beliefs and lifestyles is through interaction with one who practices them.

In order to achieve this type of exposure, I suggested that a cultural shift to viewing children as individuals is necessary, and that all of society needs to assume a certain level of responsibility in their upbringing. Ultimately, however, the most important aspect to respecting children's interests and development of individuality is to remain aware of their importance. Until society begins to take seriously the voices of children, it will fail to address satisfactorily the needs of children themselves and what is necessary to sustain democratic society.

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Closing the *Slaughterhouse*: Reviving the Privileges or Immunities Clause

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Abstract:

This article is, fundamentally, an attempt to embed the content of Article 11, §1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) in the body of American constitutional law. The aforementioned subsection states that "[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family," in effect enacting a right against poverty *qua* poverty. As it currently stands, no such right exists in the United States. This paper seeks to establish a constitutional basis for positive rights in general, and a right against poverty in particular, by means of the so-called Privileges or Immunities Clause. First, the *Slaughterhouse* cases are examined and critiqued, thereby reviving the Clause much as Justice Thomas's concurrence in *McDonald,* which is also considered and discarded as untenable. With an alternative view of the Clause in mind, the ruling in *Dandridge v. Williams* is found to be mistaken, and a right against poverty arises as a consequence of this reasoning.

Introduction:

It is clear that American jurisprudence, affords nothing more than rational basis review regarding legislation affecting impoverished citizens *qua* their status as impoverished. In particular, contra the attempts to protect disadvantaged individuals under the Equal Protection Clause, legislation is permissible insofar that it is relevant to the advancement of a government interest. *San Antonio Independent School District v. Rodriguez* effectively held that poverty is not a suspect class.[124] In effect, legislation affecting the poor need only be reviewed with little scrutiny, even if this legislation denies "the most basic economic needs of impoverished human

[124] *Cf*., Barnes, *et al*., "The Disparate Treatment of Race and Class in Constitutional Jurisprudence," 113. This would be explicitly affirmed in *Harris v. McRae*, 488 U.S. 297 (1980).

beings."[125] *Vis-à-vis* the Equal Protection Clause, the Court has "essentially announced a principle of judicial noninterference regarding the poor."[126] This is based on the stated principle that the federal judiciary is not the place or forum to make or adjudicate social or economic policy.[127]

Therefore, if one desires to establish a constitutional basis for substantive, positive rights, one must look to other clauses of the Constitution. It is my opinion that one may use the Privileges or Immunities Clause, in spite of its history, to grant positive rights to citizens, including those which may be utilized in the fight against poverty and other indignities. This paper represents an attempt to bring this cause to fruition by overturning the decision made in *Dandridge v. Williams*.

In Section II, the *Slaughterhouse* cases are introduced, examined, and are criticized. Following this, the revival of the Privileges or Immunities Clause in the 2010 case *McDonald v. Chicago* is brought forward for consideration. Justice Thomas's concurring opinion in the case is then introduced and criticized. Thenceforth it is established that the Privileges or Immunities Clause may indeed be utilized for progressive ends.

Entering the *Slaughterhouse:*

> *No State shall make or enforce any law which shall abridge the privileges or immunities of the Citizens of the United States.*[128]

[125] *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).
[126] Loffredo, "Poverty, Democracy, and Constitutional Law," 1283.
[127] *Cf.*, *Dandridge v. Williams*, 397 U.S. 471, 486 (1970). The hypocrisy of *U.S. v. Butler*, 297 U.S. 1, 71 (1936) comes to mind.
[128] U.S. Const. amend. 14, §1, cl. 2.

At first glance, the Privileges or Immunities Clause "appears to grant [United States citizens] a certain collection of rights—*i.e.,* privileges or immunities—attributable to that status."[129] Insofar that the Clause fails to specify the collection of rights afforded to the citizenry, it was certainly possible that the Fourteenth Amendment, at the time of its ratification, indirectly provided for the establishment of numerous positive rights. Justice Thomas, in his concurrence in *McDonald v. Chicago*, notes that the ambiguity of the language present in the Clause "left open the possibility that certain individual rights enumerated in the Constitution could be considered privileges or immunities of federal citizenship," to say nothing of rights which would be considered more fundamental, such as those enumerated in ideological documents predating the Constitution, both conceptually or temporally.[130]

This possibility was adjudicated in the *Slaughterhouse Cases* of 1873. In a closely-held opinion, the Supreme Court decided that the Privileges or Immunities Clause serves to protect only the legal rights resulting from the status of being a citizen of the federal entity of the United States, as opposed to rights which are (a) more fundamental in character or (b) pertain to state law.[131] The rights of citizens *qua* their status as being citizens of the United States were to be enumerated *vis-à-vis* the Privileges or Immunities Clause; those existing by virtue of state citizenship were to fall under the Privileges *and* Immunities Clause.[132] In this regard, then, the only rights protected by the Privileges or Immunities Clause are those specifically enumerated in the Constitution.[133] The Privileges *and* Immunities Clause, historically, is inter-state; it serves to prevent given states from discriminating against the citizens of any other state. The other clause

[129] *McDonald v. Chicago*, 561 U.S. 742, 812 (2010) (Thomas, J., dissenting).
[130] Ibid.
[131] McAffee, "Constitutional Interpretation—The Uses and Abuses of Original Intent," 282.
[132] *Slaughterhouse Cases,* 83 U.S. 36, 37 (1872), *cf.,* 73-75.
[133] Ibid., 79-80.

under consideration, however, has a federal element. It forbids states from intruding upon, or otherwise abrogating, the rights afforded to citizens insofar that they are a part of an implicit socio-legal contract with the federal government. Unlike the other, similarly-worded clause, the Privileges or Immunities Clause is the primary focus of this paper.

As time progressed, the Court began to interpret the Privileges or Immunities Clause even more narrowly. In *United States v. Cruikshank*, the Court held that certain rights, such as the right to peacefully assemble or the right to bear arms, were "found" to be previously "existing" by the founders of the United States and only thence written into the Constitution. These rights were considered to stem "from those laws whose authority is acknowledged by civilized man throughout the world."[134] On this basis, "no direct power over [these rights] was granted to Congress,"[135] and, therefore, since the United States can only enforce explicitly-enumerated laws against the states,[136] the plaintiffs had no standing to enforce their rights to assemble via the Fourteenth Amendment.[137] According to Justice Thomas, this reasoning, circular though it may be, has been the guiding light of American jurisprudence regarding the Privileges or Immunities Clause ever since.[138]

Criticisms of the Decision in the *Slaughterhouse* Cases:

It has been argued that the majority opinion in *Slaughterhouse* is flawed for two reasons. The first is that it unnecessarily restricts the scope of rights and privileges covered by the Privileges or Immunities Clause, and, secondly, that it "renders the clause superfluous or trivial."

[134] *United States v. Cruikshank*, 92 U.S. 542, 551 (1875); *Gibbons v. Ogden*, 22 U.S. 9 (Wheat. 1) 211 (1824).
[135] *United States v. Cruikshank*, 92 U.S. 542, 551 (1875).
[136] Ibid.
[137] *McDonald v. Chicago*, 561 U.S. 742, 815 (2010) (Thomas, J., concurring).
[138] Ibid.

[139] These two charges gain force if one considers the original purpose of section one of the Fourteenth Amendment, which was to protect newly-freed slaves and establish their rights as citizens of the United States.[140] The Civil Rights Act of 1866 was a natural extension of the abolition of the institution of chattel slavery. In stating

> *[t]hat all persons born in the United States […] are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude […] shall have […] full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens […]*[141]

Congress declared that all persons born in the United States possess certain basic rights in virtue solely of their relationship to the nation itself. However, legislation can be overturned, and section one of the Fourteenth Amendment may be seen as a vehicle to enshrine the rights enumerated in the Civil Rights Act of 1866.[142] Insofar as this is the case, the Clause may be seen as either "a supplementary protection of certain national rights […] or simply an additional provision to clear up another area of rights in which some uncertainty had persisted."[143] Historically, it has been included as an addition to a legal vehicle designed to advance and safeguard an array of positive rights. Such a conclusion was reached by Justice Field in his dissenting opinion in *Slaughterhouse*.[144]

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[139] McAffee, "Constitutional Interpretation—The Uses and Abuses of Original Intent," 283-284.
[140] Graber, "Subtraction by Addition? The Thirteenth and Fourteenth Amendments," 1502.
[141] Civil Rights Act of 1866, 14 Stat. 27-30 (1866), §1.
[142] *Slaughterhouse Cases,* 83 U.S. 36, 67-68 (1872).
[143] McAffee, "Constitutional Interpretation—The Uses and Abuses of Original Intent," 285.
[144] Ibid.

As a matter of constitutional law, however, Field claims that the very "privileges" and "immunities" which constitute the Privileges or Immunities Clause "are not new to the amendment; they were in the Constitution before the fourteenth amendment was adopted."[145] In particular, he points to the Privileges *and* Immunities Clause, and considers the jurisprudence around this section of Article IV, Section 2 of the Constitution.[146] In particular, he examines *Corfield v. Coryell*, in which Justice Washington held that there exist certain inalienable rights conferred by virtue of being a citizen of the United States:

> *The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of the several states which compose the Union, from the time of their becoming free, independent, and sovereign.*[147]

It must be noted that, in passing, this pronouncement presents some syntactic difficulties. One may be tempted to conclude that Justice Washington is referring to the states as "sovereign." However, it is clear that he is referring to the people; he refers to the *citizens* of the states as opposed to the states themselves as sovereign entities. This conclusion also finds its basis in precedent; numerous cases of the early Supreme Court, such as *Chisholm v. Georgia*[148] and *Martin v. Hunter's Lessee,*[149] explicitly disavow state sovereignty. Much to the point, in *Federalist No. 46*, James Madison proclaims that "the ultimate authority […] resides in the

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[145] Ibid.
[146] Privileges *and* Immunities refers to those privileges possessed by citizens of a certain state from being infringed upon by another state. Privileges *or* Immunities prevents individual states from infringing upon those that citizens have insofar that they are citizens of the United States.
[147] *Corfield v. Coryell,* 6 Fed. Cas. 546, no. 3,230 C.C.E.D.Pa. (1823).
[148] *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793); *Martin v. Hunter's Lessee*, 4 U.S. (4 What.) 316 (1819).
[149] *Martin v. Hunter's Lessee*, 4 U.S. (4 Wheat.) 316 (1819).

people alone […].”[150] Therefore, the privileges and immunities mentioned above include, but are not limited to

> *the enjoyment of life and liberty, […] to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole.*[151]

Notwithstanding, the Privileges or Immunities Clause has nothing to say about rights *per se*; it speaks of privileges and immunities. Therefore, one must consider both the etymology and the language of the operative words under consideration. “Privilege” is descended from the Anglo-Norman and Old, Middle French *privilège*, meaning “right, priority, privilege.”[152] “Immunity” is descended from the Anglo-Norman and Middle French *immunité*, meaning “inviolability.”[153] In modern English, including the language of the late eighteenth century, “immunity” means “freedom from legal obligation to perform actions or to suffer penalties,” and “privilege” means “right or immunity attached to a person or an office.”[154] In general, therefore, both privilege and immunity then and now refer to rights conferred on a certain individual. Justice Thomas recognizes this fact in his concurrence, noting that “[a]t the time of Reconstruction, the terms “privileges” and “immunities” had an established meaning as synonyms for “rights.”’[155]

On this basis, then, a reading which refers to the rights of the Privileges or Immunities Clause as isomorphic to those found elsewhere in the document, which would render it as failing

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[150] Madison, *The Federalist No. 46.*
[151] *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).
[152] Oxford English Dictionary, “Privilege.”
[153] Oxford English Dictionary, “Immunity.”
[154] Wex (Legal Information Institute), “Immunity”; Oxford English Dictionary, “Privilege.”
[155] *McDonald v. Chicago*, 561 U.S. 742, 818 (2010) (Thomas, J., concurring).

to be one pillar of protection for certain positive rights (*i.e.,* those of citizenship without regard to prior servitude), is conceptually problematic and logically unsound. It would be repugnant to political history, social justice, and the very notion that the provisions enumerated in the Constitution are each substantive and exist to denominate a unique component of our nation's legal framework. *Slaughterhouse*, in carving away civil rights from federal protection, narrows the scope of the Clause's protections to a body of rights far smaller than intended to be protected, especially considering the legislation which the Fourteenth Amendment was designed to protect.[156]

In this sense, then, the second criticism of *Slaughterhouse*, that it narrows the scope of protected rights, may be folded into the first, that it renders the Clause superfluous. It is facile to note, based on the linguistic analysis above, that the Privileges or Immunities Clause serves to protect the rights of citizens from abridgment or reproach by the various states. It is also clear that the Fourteenth Amendment, as a whole, not only extends the originally-enumerated rights present in the Bill of Rights to all persons legally residing within the United States; it also creates new rights via the Due Process and Equal Protection clauses. Insofar as *Slaughterhouse* narrows the objects applicable to the Clause in such a way that it necessarily excludes the rights enshrined by the other relevant clauses of the Fourteenth Amendment, it renders the Amendment itself unnecessary and trivial. There is no need to constitutionally protect rights by means of an additional clause if those rights are already in, and thereby under the aegis of, the original Constitution. Therefore, the majority opinion in *Slaughterhouse* runs counter to the guiding light found in the language of the Clause itself as well as the legislative purpose behind the

[156] This is to say nothing of *Cruikshank*.

promulgation of the Privileges or Immunities Clause and must therefore be taken off the tableaux of good law.

***McDonald,* or a Resurrection:**

a. Background and Introduction

We now turn to consider *McDonald v. Chicago*, in which it was found that the right of an individual to "keep and bear arms" is protected by the Due Process Clause of the Fourteenth Amendment. Justice Thomas, in his concurring opinion, agrees with this result, but reaches it by means of a different process than that employed by the plurality. In particular, he claims that "the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment's Privileges or Immunities Clause."[157]

Thomas follows this proclamation with a general history of the jurisprudence regarding the Clause and explains how its decimation in *Slaughterhouse,* furthered by *Cruikshank,* caused plaintiffs to seek federal protection for rights against the states by means of the Due Process Clause.[158] In typical fashion, Thomas rejects the employment of this latter strategy. He claims that the very fact that due process is required by the Constitution before rights are taken away in and of itself cannot support the edifice of rights currently assigned to this provision.[159] To return Fourteenth Amendment jurisprudence to stable footing, Thomas then advocates for a return to the original

[157] *McDonald v. Chicago*, 561 U.S. 742, 810 (2010) (Thomas, J., concurring).
[158] Id. at 814.
[159] Id. at 816.

meaning assigned to the Fourteenth Amendment. It is on this basis that he employs the Privileges or Immunities Clause in order to reach the same conclusion as the plurality.[160]

b. Criticisms of Thomas's Concurrence

> *Thus, the objective of this inquiry is to discern what "ordinary citizens" at the time of ratification would have understood the Privileges or Immunities Clause to mean. 554 U.S., at __ (slip op., at 3).*[161]

Thomas's opinion is clearly based on the judicial philosophy, "originalism." However, his position within this broad spectrum of jurisprudence is controversial. Some jurists look to the intent of the law's authors, a position known as the *intent* form of originalism.[162] Scholars on the other side of the debate believe that interpretations of the Constitution ought to be based on the colloquial, public understanding of the various provisions found in the Constitution and the Bill of Rights at the time these texts were adopted and ratified.[163] Justice Thomas is among those who follow the latter school of thought.

The prominence of articles intending to educate the public about the law testifies to the fact that knowledge regarding the Constitution, and the legal system more broadly, is not pervasively colloquial. Yet, extrapolating from the current state of affairs, it is likely that both the quantity and quality of information, in general and more particularly regarding law, available to the average citizen at the time of the drafting and ratification of the Constitution was far lower than that available to current citizens. A comparison of colloquial access to information is trivial in light of the recent development and commercialization of advanced telecommunication

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[160] Id. at 817.
[161] Id. at 818.
[162] McAffee, "Constitutional Interpretation—The Uses and Limitations of Original Intent," 279.
[163] Boyce, "Originalism and the Fourteenth Amendment," 915-916.

technologies and platforms which enable the digitization and mass dissemination of the entirety of human knowledge in a physically, socially, and financially accessible format.

Analyses from the Annenberg Public Policy Center and the Cato Institute both conclude that American citizens of this day and age are largely ignorant of the content of the Constitution.[164] Given the advances in educational attainment and information access which have taken place since the late eighteenth century, it is highly likely that the denizens of the early United States knew less about the content of the Constitution than do those who currently fall under its jurisdiction. Citizens know little now and they likely knew less then less then; lack of widespread education, to name but one obstacle, presented a barrier to constitutional knowledge which does not exist today. If one is to interpret the Constitution on the basis of what citizens knew in late eighteenth century, there would be little to interpret. The "ordinary citizen" approach to originalism, therefore, seems *prima facie* untenable. Indeed, many of the Framers themselves adopted a perspective on legal and constitutional interpretation based on "a search for the Constitution's "intention."'[165]

Therefore, it remains to consider the "intent" position. The application of this philosophical position requires the exposition of a precise hermeneutic and given the first-order demands of the originalist tradition, the nature of this interpretation must be sought in the thought of those who would have been performing this interpretation in the closing years of the eighteenth century. It has been argued that the Framers intended for the Constitution to be interpreted "in accord with its express language."[166] That is to say, it was the intent of those who

[164] Annenberg Public Policy Center, "Americans Are Poorly Informed About Basic Constitutional Provisions"; Somin (Cato Institute), "When Ignorance Isn't Bliss: How Political Ignorance Threatens Democracy."
[165] Powell, "The Original Understanding of Original Intent," 902.
[166] Ibid., 903.

wrote and ratified the Constitution that their document ought to be interpreted in accord with then-current-methods of statutory construction, including deference to the nature of the language then-employed and its historical usage when utilized and summoned with context to the document under consideration.

At first gloss, this may seem reasonable. However, this approach presents two primary difficulties. First, the very intent of the Framers as ostensibly enumerated above is a matter of debate. Scholars have contested the accuracy of the very accounts of the drafting process that the Framers gave. Madison not only altered his accounts of the debates that occurred during drafting, but his accounts also represent an extremely limited record of what actually took place during the inception and writing of the Constitution.[167]

Additionally, many of the documents detailing the arguments made during the drafting and ratification debates were, or have been, altered or corrupted.[168] The extant historical record clearly fails to present an objective account of the proceedings which accompanied the construction and ratification of the Constitution, to say nothing of the respective ideologies espoused by those who were most influential in its making. This disruption of the historical record is far from anomalous, but it presents a pernicious difficulty to those who purport to base their reasoning on the intent of the Framers. The historical documents neither present an accurate record of the proceedings which occurred, nor do they correctly record the ideologies espoused by the luminaries to those scholars who see "intent" as the primary guiding juridical light.

The "intent" version of originalism attempts to escape the pitfalls of its ideological cousin by narrowing its focus to the thoughts of those who framed the document itself. However, the

[167] Farber, "The Originalism Debate: A Guide for the Perplexed," 1088.
[168] Ibid.

fundamental naïveté of this philosophy is that it assumes the intent of those individuals present at the construction and ratification of the Constitution. It is impossible to accurately ascertain this intent since the debates surrounding this document, in their entirety or even in the barest forms of accuracy, are difficult if not impossible to reconstruct. While idealistic in its goals, the "intentionalists" blind themselves, out of intellectual convenience or dogmatism, to the realities encompassing the history of our judiciary and its primordial past.

Regarding the second point of contention, Thomas correctly notes that the Privileges or Immunities Clause refers explicitly to "citizens" as opposed to "persons."[169] While the Fourteenth Amendment concerns "[a]ll persons born or naturalized in the United States, and [those] subject to the jurisdiction thereof," franchise was not granted to adult women until 1913.

The modern conception of citizenship is defined as a legal relationship between an individual and the state encompassing various duties rendered to the latter by the former and certain rights held by the former against the latter. Furthermore, since enfranchisement is an indispensable link between the individual and the state, adult women, strictly-speaking, had no standing as true citizens until the second decade of the twentieth century. While they were denizens of this country, they had no initiative to effect political change. They were deprived of numerous other privileges afforded to male members of society.

Therefore, while they were nominally citizens, in practice, women were relegated to a class of "sub-citizenship" which today would be categorized as a lack of any form of substantive citizenship. Today, if one were to seek to apply the given Clause based on "the most likely public understanding of a particular provision at the time it was adopted," one would be

[169] *McDonald v. Chicago*, 561 U.S. 741, 820 (2010) (Thomas, J., concurring).

compelled to issue rulings in line with the conception that large populations legally residing in the United States and born under its gaze lack fundamental rights now afforded to citizens *by the very nature* of the Fourteenth Amendment.[170] Such a suggestion is not backwards; it is immoral and reprehensible. The very word "civilization," by its etymological roots, implies a process of gradual enlightenment, an increase of civility towards others, an abolition of prejudice, blind hatred, and willful ignorance. On its very face, then, the proposed method and manner of constitutional interpretation is *un*civilized; it runs counter to the *civilizing* process; it seeks to exclude certain groups from the *polis* and the larger culture on an irrational basis. An honest application of the aforementioned approach would therefore present itself as a barbaric usurpation of the controls which have, slowly and steadily, guided us from the mud and onto (relatively-drier) ground.

A New Future for the Clause:

It remains to chart a new path forward for the jurisprudence regarding the Privileges or Immunities Clause. We shall utilize the clause under consideration to derive the establishment of positive rights. John Harrison, rejecting *Slaughterhouse*, considers the difference between "substantive" protections, which mandate the promulgation of or prevent the abrogation of certain state laws, and "equality-based" protections. "Equality-based" protections have nothing to do with the content of laws *as such*; such protections only require that laws treat all citizens as equals. He reads the Privileges or Immunities Clause as providing for only equality-based protections of certain rights against the states.[171] I disagree in principle. However, the statute with

[170] Id. at 834.
[171] Harrison, "Reconstructing the Privileges or Immunities Clause," 1387-1388.

which *Dandridge* deals is specifically not an entitlement to benefits *as such*, and the Privileges and Immunities Clause trivially deals with bestowments on the citizenry by means of certain legal instruments as opposed to more fundamental law.[172] It is my view that the Privileges and Immunities Clause cannot be used to summon positive rights from the void. Rather, it relies upon a prior granting of a mere privilege and may thence be utilized to add substance to the latter.

In particular, I hope to provide a rationale for others to overturn *Dandridge v. Williams*. This case held that Maryland's cap on welfare benefits for a program named Aid for Families with Dependent Children (AFDCO), regardless of family size or financial need, did not violate the Equal Protection Clause. In effect, the ruling disavowed the right to a per capita minimum income for those receiving government benefits as some or all of their fungible income insofar that government benefits may hypothetically enable one to live decently. Whether or not this was or is possible, for the purposes of this argument, is irrelevant.

In an originalist's ideal world, the Court would disavow all prior law applying rights against the states by means of the Due Process or Equal Protection clauses in favor of the Privilege or Immunities Clause. Regardless of the repugnance of this view towards the principle of *stare decisis*, such a view would render the establishment of the positive rights we are looking for in this paper impossible. For practicality, therefore, we assume that Thomas's revival of the aforementioned Clause does not inviolate 138 years of case law between *Slaughterhouse* and *McDonald*.

[172] 42 U.S.C. §601(b) (1997).

As is made clear by *San Antonio*, *Maher v. Roe*, and *Harris v. McRae*, it is evident that "poverty, standing alone, is not a suspect classification."[173] However, the Fourteenth Amendment was drafted to extend a body of rights to a previously rightless population, as well as to provide an additional array of safeguards with regard to those rights. If there is motivation in the Constitution for an argument in favor of providing rights to the poor, it is in the Fourteenth Amendment's Privileges or Immunities Clause.

TANF (Temporary Aid for Needy Families) benefits are a privilege. They are established under Title IV, Part A of the Social Security Act. Two of its goals are to

> (1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;
>
> (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage[.][174]

In general, the purpose of the program is to provide monetary aid to persons who meet certain statutorily-defined criteria, with a view to enabling such persons to eventually leave the program by means of gainful employment. In order to be eligible for block grants from the federal government, each state must submit a plan every 27 months, which is to define the means by which the state will

> (i) [c]onduct a program, [which, among other things, is] designed to serve all political subdivisions in the State (not necessarily in a uniform manner), that provides assistance to needy families with (or expecting) children and provides

[173] *Ante* 1; *Maher v. Roe,* 432 U.S. 464, 465 (1977); *Harris v. McRae*, 448 U.S. 297, 323 (1980).
[174] 42 U.S.C. §601(a)(1-2) (1997).

> parents with job preparation, work, and support services to enable them to leave the program and become self-sufficient.[175]

One must note that the statute states that not all political *regions* of a state ought to be treated in a uniform manner with regard to the funds allotted to the state by the federal government. The employment of positive language in this case to specify that geographical uniformity of distribution of benefits need not be an element of a state's plan appears to suggest that the statute would also run as follows, should the argument in *Dandridge* be valid:

> (i) Conduct a program […] that provides assistance to needy families with (or expecting) children (not necessarily in a uniform manner) and provides parents with job preparation, [etc.] (not necessarily in a uniform manner) to enable them to leave the program and become self-sufficient.

The language allowing for variation in benefits does *not* extend to persons receiving benefits as such. This language does not exist in the statement of purpose either. One could reasonably expect language to be present codifying the rule established in *Dandridge,* should the legislators have intended for the permissibility of a "family cap." One could also expect such phrasing by which benefits could be distributed in an inequitable or variable manner amongst persons or family units receiving these benefits. An originalist must concede that the lack of positive language specifying the permissibility of per recipient or unit variation in benefits with a view to its inclusion elsewhere on a purely textualist matter merits normative consideration.

Furthermore, if one believes intent is found in the language of statutes, such as the statement of

[175] 42 U.S.C. §602(a)(1)(A)(i) (1997).

purpose, the lack of positive language permitting per unit variability in benefits speaks to the same conclusion.

There is no allowance for per person or per family (*i.e.,* per unit) variability in benefits allotted to the states on an originalist reading. The language is not there and the intent originalist would need a tortured, irrational argument to conclude the opposite of what her ally, the textualist, is forced to admit. It not only follows that Maryland's AFDC plan (and, in this case, Indiana's TANF plan) fail to conform to the dictates of the law. It also follows that *Dandridge* was based on a fundamental misreading of the statute under consideration. The result reached by the majority is metaphysically incompatible with the letter and language of the law. With the law itself in view, the majority decision fails against a strategy exhumed by one of its supporters. The Privileges or Immunities Clause is not the savior many conservatives dream it will be. As has been shown, it may serve to establish rights against the states *vis-à-vis* the ruling in *Dandridge*, as opposed to merely being a tool with which one may beat back decades of progress in favor of justice against violations of the inherent dignity of human beings.

Conclusion:

The initial jurisprudence regarding positive rights and their relationship with poverty law has been examined. The *Slaughterhouse* cases have thence been interrogated, and their interactions with this area of law have been established. The supposed modern revival of the Clause in *McDonald v. Chicago* post-*Slaughterhouse* has been discussed, along with a criticism of the very basis of Thomas's conclusion. Further, a conclusion is made that the developments around this Clause may serve to benefit cases for the establishment and maintenance of positive

rights. An example of this is made in an attempt to abrogate the reasoning found in the majority opinion of *Dandridge v. Williams*. It becomes clear that there exists an additional route for the establishment, maintenance, and protection of certain positive rights by means of the Privileges or Immunities Clause.

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***Shelby v. Holder*: Dismantling the Twin Pillars of the Voting Rights Act**

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Abstract:

Despite the fact that the 1965 Voting Rights Act (VRA) has historically been recognized as one of the most monumental pieces of legislation in U.S. history, the 2013 Supreme Court decision in *Shelby County v. Holder* undermined the key pillars of the Act, leaving it with a highly limited enforcement mechanism. This paper analyzes the Supreme Court's reasoning in ruling to strike down its central provisions, ultimately arguing that the majority decided *Shelby County v. Holder* incorrectly. The analysis proceeds by examining the three major flaws in the majority's opinion in turn. Firstly, the Court fundamentally failed to appreciate the purpose of the VRA by ignoring second-generation barriers to voting and adopting an extremely narrow understanding of voting discrimination. Secondly, the majority is inconsistent in its application of the equal sovereignty doctrine in its evaluation of changing racial conditions. Thirdly, the Court departed from previous legal precedent to mistakenly prioritize a doctrine that rests on weak legal footing over the fundamental right to vote of all Americans. In sum, the Supreme Court reversed the progress of the Civil Rights Movement by depriving the Voting Rights Act of its most meaningful and effective enforcement provisions.

In signing the Voting Rights Act in 1965, President Lyndon Johnson called the piece of legislation, "one of the most monumental laws in the entire history of American freedom."[176] Despite the crucial role of the Act in ensuring that every American is allowed equal access to the nation's political processes, the Supreme Court felt the need to deviate from its usual restraint in exercising its power of judicial review over Congress to dismantle two of the Act's pillars, leaving it with meager enforcement power.[177] In a 5-4 decision in favor of Shelby County,

[176] Johnson, Lyndon B. "Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act," National Archives. Public Papers of the Presidents, Washington D.C. (1965): 840-841.
[177] Stephanopoulos, Nicholas O. "The South After Shelby County," abstract, The University of Chicago Public Law & Legal Theory Working Papers 451 (2013): 1-56.

Alabama, the Court invalidated both the formula used to determine which states must undergo federal review and the requirement that eligible states must gain authorization before enacting changes to their election laws. In the unfortunate 2013 decision of *Shelby County v. Holder*, the Court ruled that the "substantial federalism costs" of the Voting Rights Act were high enough to outweigh one of the most fundamental rights in a democracy – the right of all citizens to cast their vote for leaders of their choice. As such, in deciding *Shelby County v. Holder* (2013), the Court's majority seems to have forgotten that state sovereignty lies with the people of the state, rather than the state governments.[178] In the battle between the two spirits of the Constitution – popular and state sovereignty – the Court seems to have ignored the former and ruled in favor of the states. The doctrine of equal sovereignty elevates the "dignity of states over the equality and dignity of citizens" by focusing on the harm to the states instead of harm to individual voters, most of all politically marginalized voters, of which people of color had been most directly targeted.[179] Basing the opinion on the questionable doctrine of equal state sovereignty, a false conception of changing racial conditions, and an extremely narrow construction of voting discrimination, the majority decided *Shelby County v. Holder* incorrectly. As such, I will first examine the majority's ignorance of second-generation voting barriers, then discuss the inconsistent and even flawed application of the doctrine of equal state sovereignty to the case at hand, and conclude by examining the Court's inexplicable departures from well-established legal precedent.

An understanding of the significance of the Voting Rights Act merits some historical

[178] McCulloch v. Maryland, 17 U.S. 316 (1819).
[179] Schmitt, Jeffrey M. "In Defense of Shelby County's Principle of Equal State Sovereignty," Oklahoma Law Review 68, no. 209 (2016): 211.

context and insight into the purpose of its provisions. The VRA was drafted and signed into law at the height of the Civil Rights Movement in order to enforce the newly enacted Fifteenth Amendment of the Constitution. That Act has been hailed to be the most effective piece of federal civil rights legislation ever passed; its importance in beginning the process of restoring the African American right to vote cannot be overstated.[180] Allowing federal oversight and freezing all state laws that were presumed to violate the Fifteenth Amendment pending review by the Justice Department, the VRA was instrumental in restoring African American suffrage. Unfortunately, the constitutional guarantee that "the right of citizens of the United States to vote shall not be denied or abridged ... by any State on account of race, color, or previous condition of servitude" was ignored by numerous states, which employed creative methods to prevent African Americans from voting, including grandfather clauses, poll taxes, literacy tests, and other insurmountable requirements.[181]

Acknowledging that individual litigation "resembled battling the Hydra" in that the Court "repeatedly encountered the remarkable variety and persistence of laws disenfranchising minority citizens," Congress responded by passing the VRA in order to, "address entrenched racial discrimination in voting, 'an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.'"[182] More specifically, Section 5 of the Act sought to enforce the Equal Protection Clause by requiring states to obtain federal preclearance before enacting any laws or policies related to voting; Section 4 applied this requirement to select states based on a coverage formula that

[180] "Introduction to Federal Voting Rights Laws: The Effect of the Voting Rights Act," U.S. Department of Justice (2009).
[181] U.S. Const. amend. 15, §1.
[182] Shelby County v. Holder, 570 U.S. 529 (2013), at 2.

targeted states with recent, documented histories of racial voting discrimination. In examining whether the VRA's "extraordinary measures" satisfied constitutional requirements, the majority – Justices Roberts, Scalia, Kennedy, Alito, and Thomas – ruled that these provisions violated the "historic tradition of equal state sovereignty" and imposed overwhelming cost to federalism in their disparate treatment of the states, particularly in the face of marked improvements in voting conditions.[183] The Court thus struck down Section 4 as unconstitutional, a decision that also made Section 5 impossible to enforce. As such, the Supreme Court hollowed out the Voting Rights Act by striking down its substantial enforcement provisions, leaving only the purely rhetorical prohibitions and individual lawsuits to remedy voting discrimination.

The first fatal flaw in the Court's reasoning is its absolute ignorance with regards to second-generation barriers to voting. In deciding *Shelby County*, the majority has relied on the false assumption that the "extraordinary" measures enacted by Sections 4 and 5 are no longer necessary because the "marked" improvements in voting conditions only apply to first-generation barriers: those that prevent African Americans from simply reaching the ballot box.[184] The extensive Congressional record highlighted the importance of second-generation barriers, showing that, "although discrimination today is more subtle than the visible methods used in 1965, the effect is the same, namely a diminishment of the minority community's ability to fully participate in the electoral process."[185] Nevertheless, the Court ignored an ample amount of evidence and argued that Congress reauthorized the Act as if nothing has changed. However, "the contending narratives of 'look how far we've come' versus 'see how much voting

[183] Id.
[184] Id., at 7, 16.
[185] H. R. Rep. No. 109–478 (2006): 6.

discrimination persists' are usually not the stuff of constitutional arguments."[186] One must also look to the way that the black vote is diluted through gerrymandering, at-large elections, majority runoff requirements, and full slate voting - barriers that are less obvious than those during the Jim Crow era, but just as debilitating in a democratic context. Nevertheless, the Court claimed that because "blatantly discriminatory evasions of federal decrees are rare," the coverage formula in Section 4 violated the equal sovereignty principle in that the "racial disparities in registration and turnout no longer distinguished the covered states from other states."[187] It is one thing to ignore the fact that the ability to cast a ballot does not necessarily translate into equal participation in the electoral process, but it is a major judicial misstep to only focus on "blatantly" discriminatory practices, despite the fact that the Act is meant to prevent practices of "denying or *abridging* the right to vote."[188]

The Court's insistence on improved discriminatory conditions highlights the second major weakness of the majority's argument: its inconsistency with regards to the principle of equal sovereignty. If the doctrine is meant to prevent the disparate treatment of the states, it would follow that distinguishing between states should be prohibited at *all* times, regardless of the severity of the conditions that merit federal oversight. However, the majority claims that the extraordinary discrimination that once justified violating equal state sovereignty no longer exists, despite congressional showings to the contrary: extensive "evidence of continued discrimination

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[186] Ansolabehere, Stephen et al. "Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act," Harvard Law Review Forum 126 (2012-2013): 206.

[187] 570 U.S. 529, at 3; Blacksher, James and Lani Guinier. "Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote Shelby County v. Holder," Harvard Law & Policy Review 8, no. 1 (2014): 44.

[188] Davidson, Chandler. "The Voting Rights Act: A Brief History," in *Controversies in Minority Voting: The Voting Rights Act in Perspective*, The Brookings Institution (1992): 24; U.S. Const. amend. 15, §1.

clearly shows the continued need for Federal oversight in covered jurisdictions."[189] As such, this line of the majority's reasoning begs the question: if the Court opposes the constitutionality of the provisions based on the need to, "justify current burdens with a record demonstrating current needs," why was the fact-intensive congressional report essentially ignored in favor of the majority's own perceptions of current needs? Is the decision truly about the Court looking to constitutional principles in order to protect the doctrine of equal state sovereignty or about the Court weighing in on the conditions of voting discrimination with little guidance apart from the majority's biases?[190] The Supreme Court seems to be, once again, unable to resist the temptation of reading its own policy preferences into the Constitution in a bout of collective amnesia that led it to forget that "the only check upon [the Court's] exercise of power is [its] own sense of self-restraint."[191]

The third – and arguably most significant - shortcoming of the Court's reasoning is its flawed application of equal state sovereignty to the case at hand. Although the crux of the majority's argument depends on this doctrine, it rests on extremely weak footing and is hardly applicable to the provisions of the Voting Rights Act. Firstly, the equal sovereignty doctrine has, "no basis in constitutional text," and ignores the history of the U.S. by, "failing to appreciate how the Civil War amendments, including the Fifteenth Amendment, changed the state-federal balance of power."[192] Although the states were able to retain broad autonomy over powers that are not specifically granted to the federal government, Congress exercised its explicit constitutional power to "enforce the 15th Amendment by appropriate legislation" to enfranchise

[189] 570 U.S. 529 (2013), at 6 (Ginsburg R., dissenting).
[190] Id., at 3 (Thomas C., concurring).
[191] United States v. Butler, 297 U.S. 1 (1936) (Stone H., dissenting).
[192] Schmitt, 210-212.

voters in the face of state resistance.[193] As such, the majority bases its claim that Section 4 is unconstitutional, not upon a "constitutional imperative, but mere 'historic tradition'" that mostly rests on selective quotations of Chief Justice Roberts' own opinion in *Northwest Austin Municipality v. Holder* (2009), despite its holding that the special provisions of the VRA were perfectly constitutional and a valid exercise of Congress's power.[194] It is unclear how a vague, poorly established doctrine was able to take precedence over an explicit constitutional grant of power to Congress in guiding the Court's reasoning in *Shelby County*.

It seems that the culprit is the Court's historic propensity towards selectively quoting legislation and legal precedent. Although the majority opinion relies extensively on *South Carolina v. Katzenbach* (1966), Chief Justice Roberts conveniently ignores that in *Katzenbach* the Court held, "in no uncertain terms," that the principle of equal sovereignly only applies to, "the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared."[195] After all, the myriad federal statutes that focus on specific states have not been similarly challenged by the Court.[196] Justice Roberts, however, failed to cite even a single precedent where the doctrine of equal sovereignty was applied to conditions in existing states, relying solely on cases involving the admission of new states. In fact, in its "questionable application of an ambiguous doctrine," the majority in *Shelby County* relied on a case involving the right to vote only for the third time.[197] The first was the morally abominable ruling in *Dred Scott v. Sanford* (1857).[198] Chief Justice Taney drew the equal sovereignty

[193] U.S. Const. amend. 15, §2.
[194] Blacksher & Guinier, 41; Northwest Austin Municipal Utility District No. 1 v. Holder, 557 U.S. 193 (2009).
[195] 570 U.S. 529 (2013), at 30; South Carolina v. Katzenbach 383 U.S. 301 (1966), at 328-329.
[196] 570 U.S. 529 (2013), at 31 (Ginsburg R., dissenting).
[197] Schmitt, 213.
[198] Blacksher & Guinier, 39.

principle from the Privileges and Immunities Clause of the Fourteenth Amendment, claiming that the grant of citizenship to former slaves in one state would have to apply to other states, resulting in an impermissible affront to the equal sovereignty of slaveholding states.[199] The only other precedent involving the equal state sovereignty of states already in the Union is *Plessy v. Ferguson* (1896) – the case where the Court established the doctrine of "separate, but equal."[200] As such, Justice Roberts did not cite either *Dred Scott* or *Plessy*, morally despicable decisions that would have supported his legal argument, but would also likely have destroyed the Court's image and legitimacy in the public eye. Although it would be a stretch to claim that, "there is no doctrine of equal sovereignty," and that the *Shelby* opinion, "rests on air," it would truly be an affront to the spirit of the Constitution and the guarantee of equal protection to rely on precedent that once denied blacks citizenship and equality in deciding a case involving the Voting Rights Act.[201]

Scholars who have spoken in defense of equal sovereignty have confirmed that the doctrine is perfectly valid, but was improperly applied by the majority in *Shelby County*. When applied to states already in the Union, it is meant to ensure that

> *when Congress limits the sovereign power of some of the states in ways that do not apply to others, it has good reason to do so. Statutes that violate the equal sovereignty principle are not necessarily invalid; instead, Congress must demonstrate that the statute's limited geographic reach is sufficiently related to*

[199] Dred Scott v. Sanford, 60 US. 393 (1856), at 406.
[200] Alexander, Michelle. *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*. New York Press (2012): 194.
[201] Posner, Richard A. "The Supreme Court and the Voting Rights Act: Striking down the law is all about conservatives' imagination," *Slate*, The Slate Group, 26 Jun. 2013.

> *the problem the law is addressing. Because the record in Shelby County arguably demonstrated more pervasive discrimination in the covered jurisdictions than elsewhere, the Court easily could have held that Congress had a good reason to limit the sovereignty of the covered states.*[202]

In fact, keeping respect for state sovereignty in mind, Congress has tried to limit such intrusions by instituting various measures: reauthorization requirements, a limited geographic scope, and bailout provisions. If anything, the temporary nature of the provisions enhances their constitutionality by ensuring that Congress does not subject the states to federal supervision any longer than necessary. After all, it would be nonsensical to allow the provisions to expire if the problem continues to persist. Similarly, the limited scope of the provisions is also "a virtue, not a vice," considering that Congress chose to limit its attention to areas where federal oversight was truly necessary to enforce the Fifteenth Amendment.[203] The D.C. Circuit Court, ruling on *Shelby County*, concluded that the statute identified suspect jurisdictions in a manner that was in no way arbitrary and was thus "an integral part of the coverage mechanism."[204] It is of note that the coverage formula did not target Confederate states solely, but also jurisdictions in California, New York, Michigan, and New Hampshire. The 'disparate' treatment of the states that the Court finds problematic was actually Congress's attempt to minimize its intrusions on state sovereignty. Thus, it seems that the majority ruled the VRA to be unconstitutional based on principles of equal state *treatment*, rather than equal sovereignty.[205]

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[202] Schmitt, 213.
[203] Greenbaum, Jon et al. "Shelby County v. Holder: When the Rational Becomes Irrational," Howard Law Journal 57, no. 3 (Spring 2014): 850; 383 U.S. 301 (1966).
[204] Shelby County, Ala. v. Holder, 679 F.3d 848 (D.C. Cir. 2012), at 874.
[205] Schmitt, 213.

Furthermore, the majority's equal state sovereignty argument fails to distinguish whether the problem is the unequal treatment of the states or the unequal intrusion of Congress into their political decision-making. The majority does not argue that Congress abused its power in enacting Section 4, but rather that, "Congress's enforcement power cannot be exercised in a way that violates the equal sovereignty of the former Confederate states."[206] However, in ruling that "it would have been irrational for Congress to distinguish between states" based on what they deemed to be an outdated formula, the majority "never established what an acceptable formula would look like."[207] The majority does suggest that it would have allowed a differently tailored preclearance coverage formula. As such, it seems that the issue is not selective coverage *per se*, but rather the way it has been administered. Even the addition of the bailout provisions - which would allow jurisdictions that have not used a forbidden test or device, failed to receive preclearance, or lost a Section 2 suit in the past ten years to bail out of the coverage formula – failed to satisfy the Court. Considering that the VRA was designed to battle entrenched, long-term discrimination, the ten-year limit seems justified: discrimination on the basis of race can neither be simply, nor quickly eliminated. As such, Congress attempted to respect equal state sovereignty by establishing a multiple tier coverage system to prevent encroachment on states' rights as much as possible, despite the fact that the Supremacy Clause explicitly gave it the authority to do so where necessary.

The final flaw in the majority's ruling in *Shelby County* is the Court's judicial overreach. The majority has sharply departed from previous legal precedent and standards of review in a

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[206] Blacksher & Guinier, 41.

[207] 570 U.S. 529 (2013), at 23; Wiley, Paul M. "Shelby and Section 3: Pulling the Voting Rights Act's Pocket Trigger to Protect Voting Rights after Shelby County v. Holder," Washington and Lee Law Review 71, no. 3 (Summer 2014): 2128.

way that showed little deference to Congress, even encroaching on the power of the Legislative Branch. Following a strict, constitutionalist interpretation, the Court's shift in reasoning represents a blatant contradiction to the standard used in *South Carolina v. Katzenbach* in a largely unexplained "eagerness to move away from its own majority reasoning."[208] In *Katzenbach*, the Court confirmed the constitutionality of the Voting Rights Act based on the enforcement clause of the Fifteenth Amendment, ruling that the provisions under question were a valid expression of Congress's explicit constitutional power to enforce the Amendment by appropriate legislation.[209] More specifically, the majority reiterated that the Fifteenth Amendment "supersedes contrary exertions of state power," having been specifically designed to "prioritize federal enforcement to eliminate racial discrimination in voting over state sovereignty issues." The Court further justified its ruling in *Katzenbach* by making it clear that "[w]hen a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review, but such insulation is not carried over when state power is used as an instrument for circumventing a federal protected right."[210] After all, it is not the responsibility of the Court to determine what the appropriate legislation is, but rather rule on the constitutionality of congressional statutes; performing the former role would violate the separation of powers principle and lead to the kind of tyranny that opponents of the Supreme Court feared at its inception.[211]

Additionally, the Court chose to overlook *City of Boerne v. Flores* (1977), a case that

[208] Harris, Corey J. "The Past as Prologue: Shelby County v. Holder and the Risks Ahead," Berkeley Journal of African-American Law and Policy 16, no. 33 (2015): 33-38.
[209] 383 U.S. 301, (1966).
[210] Greenbaum, 866; 383 U.S. 301 (1966), at 325.
[211] Harris, 38.

developed the standard of review for congressional power specifically under the Reconstruction Amendments, requiring enforcement legislation to exhibit "congruence and proportionality between the injury to be prevented and the means adopted to that end."[212] Both lower courts' rulings on *Shelby County* applied this standard. The Supreme Court's decision, on the other hand, ignored the Boerne Test in order to avoid a test of the preclearance system that would have likely favored the VRA.[213] The first prong of the test – identifying the scope of the constitutional right at issue – would have favored Sections 4 and 5 because they protect the fundamental right to vote and freedom from racial discrimination by the government.[214] The second prong – examining whether Congress identified a history and pattern of unconstitutional conduct – would have taken into account the fact-intensive investigation that showed contemporary patterns of discrimination in covered jurisdictions.[215] The third prong would likely have been the most contested element of the test because it requires the Court to determine whether the VRA was "an appropriate response to history and pattern of conduct."[216] It is probable that the Court would still have ruled against the provisions, based on the fact that the majority completely ignored second- and third-generation voting barriers and the "tailoring effect of the bailout" option, failing to truly consider whether the benefits of the preclearance provisions outweighed 'affronts' on equal state sovereignty.[217]

Instead, the Court in *Shelby* used a rational basis standard of review, which is normally "highly deferential" to Congress in assuming a "strong presumption" of the legislative act's

[212] City of Boerne v. Flores, 521 U.S. 507 (1997), at 511-512.
[213] Greenbaum, 826.
[214] Id., 829.
[215] Id., 830.
[216] Id., 831.
[217] Id., 831.

validity.[218] The *Shelby* Court, however, showed little deference in conducting the rational basis test. After all, each previous reauthorization of the Act by Congress was deemed to be a "valid exercise of congressional power" by previous Supreme Court justices.[219] Notable legal scholar Erwin Chemerinsky claims that increased skepticism of race-related legislation can be explained by the conservative ascendancy on the Court and a so-called "federalism revolution" that has manifested itself in extreme interpretations of state sovereign immunity and numerous invalidations of federal laws.[220] In practice, the Roberts Court has heavily relied on the Tenth Amendment in using the implicit constitutional principle of equal sovereignty to demand a "higher standard from Congress than simply rationality."[221] Of course, this interpretation stands on extremely weak footing, considering the lack of direct textual basis for equal state sovereignty with regards to federal legislative enactments, as opposed to the explicit constitutional grant of such power to Congress. After all, "the Court's role is not to substitute its judgement for that of Congress, but to determine whether the legislative record sufficed to show that Congress has rationally determined that its chosen provisions were appropriate methods."[222] Unfortunately, the Court gave in to the quasi-legislative temptations of judicial review, overlooking an extensive congressional record and deviating from the guidance of fundamental law, thus substituting the majority's own policy preferences for those of Congress.

Justice Ginsburg has best expressed the Court's overreach into congressional territory, reminding the majority in her dissent that, "when confronting the most constitutionally invidious

[218] FCC v. Beach Communications Inc., 508 U.S. 307 (1993), at 314-315.
[219] 570 U.S. 529 (2013), at 6 (Ginsburg R., dissenting).
[220] Chemerinsky, Erwin. "The Federalism Revolution," New Mexico Law Review 31, no. 7 (2001): 30.
[221] Greenbaum, 843.
[222] City of Rome v. United States, 446 U.S. 156 (1980), at 176-177.

form of discrimination and the most fundamental right in our democratic system, Congress' power to act is at its height."[223] Unfortunately, Ginsburg's reminder went unheard: the majority chose to disregard the extensive congressional record and prior legal precedent to strike down those provisions of the VRA that provided tangible protections against voting discrimination, forcing the most vulnerable communities to fend for themselves through individual litigation.[224] In fact, Chief Justice Roberts accepted the constitutionality of Section 2 – which prohibits voting discrimination against minorities – because it relies on individual lawsuits, not preclearance. However, Congress has shown that case-by-case litigation is an inadequate method for protecting the right to vote, taking up more of the courts' time and imposing unnecessary financial burdens on those who are already politically, socially, and financially marginalized in ways that reach beyond blatant restrictions from accessing the ballot box.[225]

In ruling on *Shelby County v. Holder*, the Supreme Court has favored ambiguous doctrine of equal state sovereignty over the sovereignty of the American people, seemingly forgetting that, "the government of the Union is, emphatically and truly, the government of the people ... its powers are granted by them, and are to be exercised directly on them, and for their benefit."[226] By ruling that the central provisions of the Voting Rights Act constituted an intolerably disparate treatment of the states, the majority failed to weigh "the actual need for the preclearance scheme against the federalism cost" imposed upon the states in protecting the most fundamental right of their citizens.[227] The stripping of the Voting Rights Act of its substantive protections is a

[223] 570 U.S. 529 (2013), at 8 (Ginsburg R., dissenting).
[224] Harris, 38; Posner.
[225] 570 U.S. 529 (2013), at 8.
[226] McCulloch v. Maryland, 17 U.S. 316 (1819).
[227] Greenbaum, 831.

gargantuan step backwards from the hard-earned victories of the Civil Rights Movement. In the words of dissenting Justice Ruth Bader Ginsburg, throwing out the provisions of the Voting Rights Act that have worked and continue to work to stop voting discrimination "is like throwing away your umbrella in a rainstorm because you are not getting wet."[228] Not only has the majority failed to notice that it is still raining, but also that in some states it may actually be pouring. In an open show of disdain for popular sovereignty, the Court has chosen to trade in the rights of the American people to participate in the nation's political processes for a nebulous doctrine that has its roots in the Court's "dishonor roll of infamous decisions" – that of *Dred Scott* and *Plessy v. Ferguson*.[229] Despite the fact that the "right to vote is the crown jewel of American liberties," the Supreme Court has once again reaffirmed that "power concedes nothing without demand" and even that may sometimes not be enough.[230]

[228] 570 U.S. 529 (2013), at 33 (Ginsburg R., dissenting).
[229] Rosenberg, Gerald N. "Introduction to Constitutional Law: Equal Protection Clause," Lecture at the University of Chicago, Chicago IL, March 11, 2019.
[230] Reagan, Ronald. "Remarks in the East Room of the White House at the signing of the reauthorization of the Voting Rights Act," Washington D.C. (1982); Douglass, Frederick. "West India Emancipation Speech," delivered at Canandaigua, New York (August 3, 1857).

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