

# GROVE CITY COLLEGE

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## JOURNAL OF LAW & PUBLIC POLICY



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### ARTICLES

Women on Corporate Boards: Non-Quota  
Initiatives to Increasing Board  
Gender Diversity in the U.S. . . . . *Stephanie N. Shetler*

*Chandler v. Florida*  
Innovative or Originalist? . . . . . *Peter J. Garthwaite*

To Boldly Go: International Space  
Law and the Expansion Of  
Res Communis Doctrine. . . . . *John S. Ehrett*

Subjectivity and the  
American Court: an Analysis  
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Volume 5

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Please use footnotes rather than endnotes. All citations and formatting should conform to the 18th edition of *The Bluebook*.

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# GROVE CITY COLLEGE

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Grove City College was founded in 1876 in Grove City, Pennsylvania. The College is dedicated to providing high quality liberal arts and professional education in a Christian environment at an affordable cost. Nationally accredited and globally acclaimed, Grove City College educates students through the advancement of free enterprise, civil and religious liberty, representative government, arts and letters, and science and technology. True to its founding, the College strives to develop young leaders in areas of intellect, morality, spirituality, and society through intellectual inquiry, extensive study of the humanities, and the ethical absolutes of the Ten Commandments and Christ's moral teachings. The College advocates independence in higher education and actively demonstrates that conviction by exemplifying the American ideals of individual liberty and responsibility.

Since its conception, Grove City College has consistently been ranked among the best colleges and universities in the nation. Recent accolades include: The Princeton Review's "America's Best Value Colleges," Young America's Foundation "Top Conservative College," and U.S. News & World Report's "America's Best Colleges."

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The *Grove City College Journal of Law & Public Policy* was organized in the fall of 2009 and is devoted to the academic discussion of law and public policy and the pursuit of scholarly research. Organized by co-founders James Van Eerden '12, Kevin Hoffman '11, and Steven Irwin '12, the *Journal* was originally sponsored by the Grove City College Law Society. The unique, close-knit nature of the College's community allows the *Journal* to feature the work of undergraduates, faculty, and alumni, together in one publication.

Nearly entirely student-managed, the *Journal* serves as an educational tool for undergraduate students to gain invaluable experience that will be helpful in graduate school and their future careers. The participation of alumni and faculty editors and the inclusion of alumni and faculty submissions add credence to the publication and allow for natural mentoring to take place. The *Journal* continues to impact educational communities around the country and can now be found in the law libraries of Akron University, Regent University, Duquesne University, the University of Pittsburgh, and Pennsylvania State University. The *Journal* has been featured by the Heritage Foundation and continues to be supported by a myriad of law schools, law firms, and think tanks around the nation.





## EDITOR'S PREFACE

Dear Reader,

Welcome to Volume 5 of the *Grove City College Journal of Law & Public Policy*! This edition holds particular significance to me since it is my last as a contributing student. I will certainly miss working with such talented peers on such a worthwhile project. This edition, however, represents something more than yet another successful year: it represents student achievement. A generation ago, a few energetic Grove City College students approached the former Dean Sparks about starting an undergraduate law journal. Grove City College, a small college in which only a tiny fraction of its 2,500 students had even seen a law journal, did not appear to be an ideal birthplace for a student-run academic publication. Even if the editors were able to muster enough articles for one edition, would there be enough left over for a second? Which faculty and alumni would serve on an editorial board to review them? How could a group of sub-twenty-two-year-olds propel forward a quality publication for any substantial length of time?

Yet, here is Volume 5. Rather, here are *we*. A generation later and we have made the dreams of those founding students a realization. Moreover, I am confident that the next generation of students will ensure that our current visions similarly blossom in the future. The *Journal* represents the journey of a bold idea that, with hard work, passion, and extraordinary support from the College and friends, became an enduring element of the College's academic life. Current students have never known the College without the *Journal*, and they are the students who are investing their own energies and fresh ideas into the publication. They don't realize that every word they type, every comment they scribble in a margin, and every citation they correct proves that students don't just learn; we teach. We don't only receive others' ideas; we create our own. We aren't stalling to prepare for our future; we are achieving our goals right now.

I am honored that I was able to serve as the editor in chief of a publication staffed by these driven, talented, and creative students. It is only with their commitment, and the support of the Grove City College faculty, friends, and alumni, that the *Journal* can continue to open the doors of academic discussion to undergraduates who are serious about contributing to the conversation surrounding law and public policy. I hope that our story encourages you to also take risks and embrace opportunity. At the very least, I hope you enjoy the culmination of the work of undergraduate students and their small college, and join me in looking forward to the bright future of the *Grove City College Journal of Law & Public Policy*.

A handwritten signature in black ink, reading "Julia L. Haines '14". The signature is written in a cursive, flowing style with a long horizontal flourish at the end.

Julia L. Haines '14  
Editor-in-Chief

## FOREWORD

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Dear Reader,

Welcome to the Volume 5 edition of the Grove City College *Grove City College Journal of Law & Public Policy*. The *Journal* is one of the few that is published as an undergraduate writing endeavor in our nation.

In past editions, undergraduate students, law students and practicing lawyers have offered articles. In this issue all articles are written by undergrads. And as you will note upon reading, we are treated to a potpourri of subjects and analysis. One writer submits her thoughts and proposals as a matter of policy toward increasing female representation on corporate boards. We will also see the effect of the first free speech case to reach the Supreme Court (interestingly over 100 years after the passage of the 1<sup>st</sup> amendment) and the current dynamic tension inherent with the tenets of national security. We will then take a look at court proceedings and the right and effect of media in the courtroom. From court proceedings we will intellectually zoom into outer space and examine emerging international law as it affects the sovereignty of nations beneath. Next, to a more subtle question we examine subjectivity in Supreme Court outcomes as we look at the concept of “evolving standards of decency”. The word evolving is subjective – what are the implications for dispassionate judicial review? And finally, an article on the doctrine of *Jus Cogens* as it is recognized in international law and as that doctrine applies in a pluralistic society.

All in all an intellectual smorgasbord on which to feast—please enjoy and ponder.



Richard G. Jewell '67 JD  
President



# WOMEN ON CORPORATE BOARDS: NON-QUOTA INITIATIVES TO INCREASING BOARD GENDER DIVERSITY IN THE U.S.

*Stephanie N. Shetler\**

*ABSTRACT: Board diversity, identified as one of the top ten governance trends of the 2013 proxy season, remains a priority for corporations to address. Gender diversity is viewed as a crucial element of a diverse board. Although trends indicate that women are joining boards at an increasing rate, the majority of corporate boards are still overwhelmingly male. The author analyzes both quota and non-quota initiatives to enhance the number of women in the boardroom. Initiatives recommended to increase board gender diversity in the United States include softer forms of short-term goal setting, targeting, and disclosure, and a long-term focus on increasing the pipeline of qualified female board candidates.*

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\* Stephanie Shetler is a senior accounting major with a concentration in forensic accounting. She has accepted a position at the Pittsburgh office of Ernst & Young, and looks forward to joining the Assurance Services Practice upon graduation. Stephanie is grateful to Dr. Andrew Markley for being her advisor on this project. She would also like to thank her parents and Chris for their unwavering support.

## INTRODUCTION

A renewed public interest in the corporate governance practices of publicly traded corporations both in the United States and in most developed countries comes in the wake of the most recent financial crisis. Particularly, weaknesses in corporate governance structures at companies and banks have been cited as reasons for the excessive risk taking, skewed incentive compensation for senior managers, and predominance of board culture that values short-term gains over sustained, long-term performance.<sup>2</sup> In light of these recent events, corporate governance, while not a new concept, has become a near-household term, recognized by the public as affecting overall economic well-being.

All corporations work within a governance framework. This framework is set by law, by the corporation's charter documents, by the owners, and by the expectations of those that they serve. The corporate governance framework differs by country, largely due to the interplay involvement with a particular country's rules and institutions but also as it relates to both history and culture.<sup>3</sup> It is important to understand that the corporate governance framework also continuously changes shape and develops through time. Thus, the focus of corporate governance issues can be identified over time. Over the past 20 or so years, corporate

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2 E.g. Stijn Claessens and Burcin Yurtoglu, International Finance Corporation, *Corporate Governance and Development - An Update*, 2012; Rushworth M. Kidder, Minority Business Roundtable, *Diversity on Corporate Boards*; Lisa M. Fairfax, The Conference Board, *Revisiting Justifications for Board Diversity*, 2011.

3 Stijn Claessens and Sir Adrian Cadbury, International Finance Corporation, *Corporate Governance and Development*, 2003 .

governance issues in the U.S. appear to have been mainly two-fold in focus: on shareholders and stakeholders and on corporate scandals.

The question left to be answered asks what the focus of corporate governance will be over the next 20 or so years. The issue of gender diversity in the boardroom may very well be that primary focus of corporate governance moving forward. Identified as one of the top 10 governance trends of the 2013 proxy season, board diversity remains a priority for corporations to address, and gender diversity is viewed as a critical component of a diverse board.<sup>4</sup> Gender diversity, many scholars argue, is a tool in strengthening overall corporate governance.<sup>5</sup>

This ethical issue of gender diversity on boards is currently being faced by publicly traded companies worldwide. American companies are being challenged to compete globally, and the competition for talent is only continuing to intensify.<sup>6</sup> With women representing roughly half the population, half of college students, and half the workforce, it is no surprise that companies must search for talent from a combined collection of both men and women in order that they will not find themselves at a complete

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4 KEY DEVELOPMENTS OF THE 2013 PROXY SEASON, 5 (Ernst & Young LLP 2013).

5 E.g. Susan Bloch, *Why We Need More Women in the Boardroom*, HUFFINGTON POST, 2013; Nanette Fondas, *Women on Boards of Directors: Gender Bias or Power Threat?*, in WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL CHALLENGES AND OPPORTUNITIES (Ronald J. Burke & Mary C. Mattis eds., Kulwer Academic Publishers, 2000).

6 AVERIL LEIMON, FRANCOIS MASCOVICI, & HELEN GOODIER, COACHING WOMEN TO LEAD 8 (Routledge, 2011).



competitive disadvantage.<sup>7</sup>

Interestingly, the debate over more women on boards is quickly moving from “why” to “how.” Leaders are addressing this issue globally and, due to the wide range of corporate and political cultures, varying solutions have been recommended. Many European nations support quotas to improve the gender balance on corporate boards. Alternatively, initiatives recommended to increase the number of women on boards in the United States include softer forms of short-term goal setting, targeting, and disclosure and a long-term focus on increasing the pipeline of qualified female board candidates.

#### STATISTICS ON WOMEN IN THE BOARDROOM

Unfortunately, the achievement of gender diversity is not at the top of, or even on, the strategic agenda of many companies. The lack of focus on increasing gender diversity is mirrored by the slow pace at which advancement has been made. Ernst & Young has analyzed the trends of female directors at U.S. corporations from 2006 to 2012. The study shows that while the rate at which women are joining U.S. boards is increasing, this pace is not one which will result in a significant strengthening of board gender diversity in the short-term. In six years, the proportion of board seats filled by women rose from 11 to 14 percent at S&P 1500 companies and from 14 to 17 percent at S&P 500 companies.<sup>8</sup> An

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7 Lisa Quest, *Getting More Women in the Boardroom: Should the U.S. Use Mandatory Quotas Like Europe?* At 2.1 (Forbes, 2011).

8 GETTING ON BOARD: WOMEN JOIN BOARDS AT HIGHER RATES, THOUGH PROGRESS COMES SLOWLY, 2 (Ernst & Young LLP 2012).

August 2013 mid-year update shows a slight increase in these figures: the proportion of board seats filled by women at S&P 1500 companies is now 15 percent. At S&P 500 companies, 18 percent of directors are female.<sup>9</sup>

Notwithstanding this growth, 26 percent of S&P 1500 companies had no female directors in 2012, 36 percent had only one female director, and 27 percent had only two female directors. Evidence shows that a strong majority of the U.S. boards with no women in 2006 have not added a woman since. Of the companies with no female directors on their boards in 2006, 62 percent remain entirely male. However, it is encouraging that a larger increase in gender diversity has occurred among boards that already had at least one female director serving. This trend indicates that these organizations recognize the positive impact that gender diversity has on board function and corporate performance. Roughly 60 percent of the companies that added a female director already had at least one woman on the board.<sup>10</sup>

The data presents another silver lining: women are joining boards at an increasing rate. In 2011, women comprised 18 percent of new board members in the U.S.; this figure has risen to 21 percent in the year 2012. Although the trends are certainly pointing in the right direction, the majority of boards are still overwhelmingly male. Only 4 percent of U.S. companies have passed the “tipping point of three” in which at least one third of the board

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9 GETTING ON BOARD: 2013 MID-YEAR UPDATE, 1, (Ernst & Young LLP 2013).

10 Ernst & Young LLP, *supra* note 7, at 3.

is female.<sup>11</sup>

The figures are similar in Europe where, as of January 2012, women account for just 13.7 percent of directors of the largest publicly traded companies in EU member states.<sup>12</sup> Although the numbers vary across the member states, as some have taken greater steps to increase gender diversity on boards than others, such overall slow progress in the total women on corporate boards has motivated leaders in Europe and around the globe to examine both the barriers women face and the possible expedients to resolve this issue of boardroom diversity.

#### THE “WHY” OF WOMEN IN THE BOARDROOM

It is necessary to understand why more women should assume non-executive director positions before the initiatives being taken to increase female directorship can be discussed at length. How successful getting women on boards will be depends upon why the organization is taking the initiative. According to Groysberg and Bell, organizations have three major approaches to diversity. The first perspective is that diversity exists in the population at large, thus the organization wants diversity on its board as a matter of fairness and to admonish discrimination. The second is to gain greater access to desirable customer bases

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11 Ernst & Young, *supra* note 7 at 3-4. (Incidentally, there is a movement of advocates called the Thirty Percent Coalition that is pushing public company boards in the U.S. to achieve 30 percent female representation by the end of 2015. This group of leaders believes in the power of collaborate effort to achieve gender diversity across public boardrooms.)

12 DELOITTE, WOMEN IN THE BOARDROOM: A GLOBAL PERSPECTIVE 15 (Boardroom Diversity Review, 2013).

and markets, i.e., female consumers. The third and, according to Groysberg and Bell, most effective approach is when the company seeks board diversity in order to gain access to and learn from new perspectives. When this last approach is the goal of the corporation, diversity produces the greatest impact as it is integrated into all practices and informs all discussions and decisions.<sup>13</sup>

Essentially, corporations must view a lack of board diversity as both a business issue and a talent resource issue, not merely a women's issue.<sup>14</sup> Increasing the number of women in the boardroom is obviously a "women's issue" in that it is an issue of direct concern to women. However, it should not be exclusively a "women's issue" in the sense that it should not be the responsibility of women to "solve." Often a female is assigned the role of organizing an analysis of the topic and drafting proposals to increase diversity. When all-male leadership acts this way, it is as if they are leaning down from above the glass ceiling to ask the women below why they are not making it to the top, which unconsciously communicates to these women that women are responsible for the lack of women at the top.<sup>15</sup>

The business case for increasing board diversity is clear: women are successful both at the collegiate level and in their early careers, but it has been observed that as women progress through

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13 E.g. Boris Groysberg & Deborah Bell, *The Women Who Become Board Members*, HARVARD BUSINESS REVIEW, 3 (July 2013); Groysberg & Bell, *Dysfunction in the Boardroom: Understanding the Persistent Gender Gap at the Highest Levels*, HARVARD BUSINESS REVIEW 92 (2013).

14 Tim Smedley, 'Glacial' Rate of Progress Brings Calls for Quotas, FINANCIAL TIMES 1 (19 September, 2013).

15 AVIVAH WITTENBERG-COX & ALISON MAITLAND, WHY WOMEN MEAN BUSINESS 163-164 (John Wiley & Sons, Ltd, 2009).

a corporation, attrition rates increase, and at a rate higher than that of their male counterparts.<sup>16</sup> This phenomenon decreases the pool of women available for the highest levels of corporate management and, particularly, for board of director positions. The underrepresentation of women on corporate boards indicates that companies are missing out by not being able to draw from the widest possible range of talent – and evidence shows that the competition for this source of talent is global.<sup>17</sup>

Studies have found a number of benefits associated with an increase in women at the board table. By increasing the appointment of female directors, board thinking can be transformed in a way that impacts key decisions and processes as well as day-to-day business activities. Findings generally show that more female directors are associated with increased institutional capacities, more strategic protocols and organization, and improved intra-board communication as well as overall management style.<sup>18</sup>

Gender diversity on the board creates a forum in which there are different views and ways of thinking, which allows companies to identify and address issues and solve problems in a unique way.<sup>19</sup>

In relation to the aforementioned improved overall management style, gender diversity in the boardroom has been found to improve

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16 COMMITTEE FOR ECONOMIC DEVELOPMENT, *FULLFILLING THE PROMISE: HOW MORE WOMEN ON CORPORATE BOARDS WOULD MAKE AMERICA AND AMERICAN COMPANIES MORE COMPETITIVE* 12-13 (2012).

17 *Id.* at 13.

18 Peninah Thomson & Jacey Graham, *A WOMAN'S PLACE IS IN THE BOARDROOM*, 119 (2005).

19 Susan Bloch, *Why We Need More Women in the Boardroom*, HUFFINGTON POST 1, 2013

employee motivation.<sup>20</sup> Female directors tend to pay attention to “soft” management issues that all-male boards often disregard. Male directors generally agree that their female counterparts are more deeply aware of social dynamics and that their focus is more in line with human issues.<sup>21</sup> This social awareness and human focus of female directors is also an advantage to improving customer satisfaction and corporate brand image as a whole. A study shows that boards with female directors are more likely to take into consideration the long-term, societal perspectives of all stakeholders which, in turn, improves corporate brand image.<sup>22</sup> According to the European Commission, 69 percent of companies that have implemented a diversity program noted an improvement in their brand image.<sup>23</sup>

Furthermore, an increase in the number of female directors has been associated with improved corporate governance and, specifically, an amplified discussion of “tough issues.” Studies show that boards with a greater proportion of women are less inclined to let CEOs dominate. A small number of female directors have the power to influence a board’s execution of the governance function. Scholars propose several factors that may cause this enhanced governance performance. First, female directors must overcome many barriers to achieve directorships and, there-

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20 Anne Sweigart, *Women on Board for Change: The Norway Model of Boardroom Quotas As a Tool for Progress in the United States and Canada*, NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS, 81, 90 (2012).

21 Thomson, *supra* note 17 at 119.

22 CED, *supra* note 15 at 13-14.

23 MCKINSEY & COMPANY, WOMEN MATTER: GENDER DIVERSITY, A CORPORATE PERFORMANCE DRIVER 10-11 (2007).

fore, are highly motivated and prepared. The result is that these women hold higher expectations of a director's responsibility. In addition, they bring to the board different perspectives as a result of diverse personal and professional backgrounds. Not surprisingly, female directors are typically outsiders and, consequently, this causes them to more likely be objective and independent.<sup>24</sup> As "outsiders," these women are often less afraid to take on the "tough issues" that board directors face. It can be the case that a group of highly cohesive individuals (i.e. an all-male board) falls into groupthink and often conflict avoidance.<sup>25</sup>

Another study shows that this tendency of female directors to talk about conflict-inducing issues is related to the concept of liminality. Liminal persons are "those in transition between out-group and in-group status."<sup>26</sup> This study suggests that once a woman achieves a seat at the table, her experiences in overcoming barriers in a male-dominated field cause her to be better equipped to address the difficult issues that her male colleagues have been known to avoid due to "corporate hierarchy and male loyalty norms."<sup>27</sup> Both characteristics and skill help these barrier-breaking women to take advantage of their liminal status on

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24 Nanette Fondas, *Women on Boards of Directors: Gender Bias or Power Threat?*, in *WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL CHALLENGES AND OPPORTUNITIES* 172-173 (Ronald J. Burke & Mary C. Mattis eds., Kulwer Academic Publishers, 2000).

25 Nancy McInerney-Lacombe, Diana Bilimoria & Paul F. Salipante, *Championing the Discussion of Tough Issues: How Women Corporate Directors Contribute to Board Deliberations*, in *WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL RESEARCH AND PRACTICE* 123, 123-124 (Susan Vinnicombe et. al eds. Edward Elgar Publishing, Inc, 2008).

26 *Id.*

27 *Id.*

boards.<sup>28</sup> (It is important to note, however, that if women progress from liminality to full inclusion, they too may be more resistant to new ideas and more reluctant to upset the norms of the group by championing the discussion of tough issues.<sup>29</sup>)

In addition to the benefits described above, capital markets and investors are increasingly inspecting gender diversity and including gender quality ratings as a part of their criteria.<sup>30</sup> For example, investment funds such as CalPERS in the U.S. and Amazone in Europe include gender diversity as an investment criterion. Rating agencies such as Core Rating, Innovest, and Vigeo are now developing tools to measure gender diversity.<sup>31</sup>

Ernst & Young reports that directors who have a diversity of expertise, skill sets, and experience strengthen board quality and consequently the corporation's bottom line.<sup>32</sup> Based on an analysis of the world's 290 largest companies, sales and earnings at companies with at least one female director are significantly higher than at companies with no women on the board.<sup>33</sup> A study performed by Nancy Carter and Harvey Wagner found that companies with the most female directors (19-44 percent) significantly outperformed those with the least (0-9 percent) by 16 percent

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28 *Id.* at 135-137.

29 *Id.* at 137 (The authors of this study assert that the likelihood of this scenario will need to be further investigated by future research that examines the incidence, nature, and conditions of the special contributions that women make as liminal members on the board).

30 Sweigart, *supra* note 19 at 90.

31 McKinsey & Company, *supra* note 22, at 11.

32 Ernst & Young, *supra* note 7, at 2.

33 Viviane Reding, *The Tug-of-War over the Women Quota*, European Commission (Munich, 2012).



on return on sales, 26 percent on return on invested capital, and 53 percent on return on equity.<sup>34</sup> Therefore, from both a qualitative and quantitative standpoint, it is crucial that boards are made up of a diverse group of high caliber directors in order to compete in the global economy.

#### BARRIERS WOMEN FACE: WHY HAS GROWTH BEEN SO SLOW?

When asked about the lack of gender diversity in the boardroom, Nancy Green, a director at Hallmark Cards, responded: “I don’t think it’s a conspiracy to not have women.”<sup>35</sup> Agreeing that it is not a conspiracy, then what is to “blame” for the slow growth of women in the boardroom? Men and women differ in their perspectives regarding delays to this growth. In a 2012 survey, 45 percent of male directors said that the reason why the number of female directors has barely changed is a lack of qualified candidates or a “leaky pipeline,” but only 18 percent of female board members agreed.<sup>36</sup> Male directors often think that there are not enough qualified businesswomen. Meanwhile, female directors believe that the many barriers, biases, and other challenges faced from boards and nominating committees make it extremely difficult for qualified women to break into the networks and actually attain board directorship positions.<sup>37</sup>

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34 E.g. Catalyst. *Why Diversity Matters*, <http://www.catalyst.org/issues/diversity-matters>; Joanna Barsh & Lareina Yee, *Unlocking the Full Potential of Women in the U.S. Economy*, THE WALL STREET JOURNAL 5 (2011).

35 Jeff Green, *The Boardroom is Still the Boys’ Room*, BLOOMBERG BUSINESSWEEK, at 2:2 (2012).

36 *Id.* at 1

37 Boris Groysberg & Deborah Bell, *The Women Who Become Board Members*, HARVARD BUSINESS REVIEW, 2 (July 2013);

#### INEXPERIENCED VS. UNQUALIFIED

These differing perspectives can be attributed to how male and female directors answer the “qualifications question.” Men tend to view inexperience as a fixed and disqualifying trait. On the other hand, women see inexperience as a manageable fact that can be addressed through learning and development.<sup>38</sup> Women do not equate “inexperienced candidates” with “unqualified candidates.” This cognitive disconnect between male and female directors helps to explain what the men consider to be a lack of board-ready women.

#### IMBEDDED MINDSETS

Along with this disparity comes what some scholars consider to be the ultimate barrier women face: imbedded mindsets. These entrenched beliefs can be institutional as well as individual, and are a powerful force that limits opportunity for many women even today. These beliefs are rooted in the corporate culture that has evolved over decades and, not surprisingly, reflects the values, motivations, and views of the historically male majority. These mentalities often lead to the assumption that women cannot handle certain positions.<sup>39</sup> For example, when women are evaluated for promotions, they are judged primarily on performance, while

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38 Groysberg & Bell, *Dysfunction in the Boardroom: Understanding the Persistent Gender Gap at the Highest Levels*, HARVARD BUSINESS REVIEW 95 (2013).

39 Joanna Barsh & Lareina Yee, *Unlocking the Full Potential of Women in the U.S. Economy*, THE WALL STREET JOURNAL 4 (2011).

men are often promoted based upon their potential.<sup>40</sup> No matter how comprehensive the diversity program, it cannot by itself eradicate these imbedded mindsets. There is a need for systematic, organizational change to overcome this barrier that women face in achieving director positions.<sup>41</sup>

## MOTHERHOOD

Undoubtedly, when discussing the barriers that women face in attaining board seats, one must consider the role that motherhood plays throughout the progression of a woman's career. Referred to as the "double burden" syndrome, it is important to recognize the difficult task that motherhood imposes on working women.<sup>42</sup> Balancing work and domestic responsibilities is no easy feat. Undoubtedly, becoming a mother alters the vision that these women have of their world, giving different meaning and purpose to their work. While research shows that most working mothers who return to the workforce do so because they want to, having children does change the way these women view their work.<sup>43</sup> On the other hand, it is not uncommon for women to leave employment for an extended time during childrearing years. Unfortunately, early- and mid-career development can be strongly impacted by this decision, which places these mothers behind their colleagues

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40 *Id.* at 6.

41 *Id.* at 4.

42 GEORGES DESVAUX, SANDRINE DEVILLARD & SANDRA SNACIER-SULTAN, *WOMEN MATTER 2010: WOMEN AT THE TOP OF CORPORATIONS - MAKING IT HAPPEN 6* (McKinsey & Co., 2010).

43 Leimon, Mascovici & Goodier, *supra* note 5, at 30.

in terms of later advancement and even board achievement.<sup>44</sup> In the U.S., 62 percent of women perceive family obligations as an obstacle to promotion.<sup>45</sup>

Also, many mothers may work part-time or turn down promotion in order to maintain a better work-life balance.<sup>46</sup> But the concern for having a life outside of work affects all groups within the workforce, not just mothers. Research shows that attitudes among fathers, mothers, and childless workers are converging: 50 percent of fathers with one child and 55 percent of women without children say that they will not accept a new position that results in a reduction of work-life balance.<sup>47</sup>

#### RETICENCE

Interestingly, female respondents to a global survey identify another barrier affecting the slow growth of women in the boardroom: the reticence of women to advocate for themselves. Many women shy away from promoting themselves and as a result hinder their achievement in the corporate world.<sup>48</sup> The beliefs many women have about themselves may stop them from even striving for advancement. Research shows that many women have a tendency to wait to fill in more skills or just wait to be asked rather than jumping at an opportunity to advance.<sup>49</sup> These limiting beliefs are causing women to stand in their own way, creating an

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44 CED, *supra* note 15, at 15.

45 McKinsey & Company, *supra* note 22, at 8.

46 CED, *supra* note 15, at 15.

47 Barsh & Yee, *supra* note 26, at 6.

48 Desvaux, Devillard & Snacier-Sultan, *supra* note 29, at 6.

49 Barsh and Yee, *supra* note 26, at 4.

additional, personal barrier to their own success.

#### BARRIERS WOMEN FACE ON THE BOARD

Do not be mistaken, the barriers that women face do not stop once they achieve a seat at the board table. These board women, sometimes referred to as “survivors” because they were able to make their way up the corporate ladder despite the barriers, can face intense scrutiny from the other directors. Board dynamics can kill all of the benefits of diversity that they bring with them if the diverse individuals are not integrated properly, if the board is not a real team.<sup>50</sup>

Many board women have stated that they were not treated as full members of the group, citing that male directors seem oblivious to the fact that they may create hostile board cultures. In fact, 87 percent of female directors reported facing gender-related hurdles once on the board. There are four common types of obstacles that women say they face: one, they are not being heard and listened to, two, they are not being accepted as equals or as part of the “in” group, three, they find it difficult to establish credibility, and four, they feel that they are seen as the “voice of women,” stereotyped by expectations of women’s behavior. However, the majority of male directors (56 percent) disagree, believing female directors do not face any hurdles not also faced by their male counterparts.<sup>51</sup> The men who do agree that women face additional hurdles on the board claim “limited access to and acceptance on

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50 Groyberg & Bell, *supra* note 34, at 3.

51 Groyberg & Bell, *supra* note 35, at 94.

boards because of weaker networks and the old boys' club" as the number one obstacle that women face.<sup>52</sup> So, it is clear that bringing in qualified female directors is not the end-all; it is essential that women be fully integrated onto their boards.

#### TIPPING POINT

The number of women on a board also plays a role in leveraging diversity. It was mentioned above that only 4 percent of U.S. companies have passed the "tipping point of three" in which at least one third of the board is female. The tipping point of three can also be used in a different context, referring to three women on a board of any size.<sup>53</sup> Jan Babiak, a member of the "first and only club," cites what it is like to be the first and only woman in the boardroom. The lone woman is largely an irritation to the men in the room because she disrupts the boys' club; she is resented by the men who have to behave slightly differently with a woman in the room. Also, the single female board director is faced with the burden, and the stereotype, of representing all of womankind.<sup>54</sup>

According to Babiak, a second woman on the board poses a unique set of difficulties. When there are two women, she feels that there is a societal need for them to support each other, wheth-

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52 *Id.* at 95.

53 THE GENDER EQUALITY PROJECT. GENDER IMBALANCE IN CORPORATE BOARDS IN THE EU (2011). (Varying objectives have been recommended as the "tipping point" to gender diversity in the boardroom. Determining the minimum goal for the underrepresented sex on corporate boards requires an understanding of the critical mass. The most common objectives for corporate boards to benefit from gender diversity are 30 percent representation or 3 women on a board of any size. These are considered the critical mass in that, at such a point, there are enough women to change the dynamics of the group.)

54 Interview with Jan Babiak at Lipscomb University (21 June 2012).

er or not they agree, and avoid what may appear to be a “catfight” to the men in the room. When there are three female directors, however, then someone can disagree. The actions of the room move toward the societal norm.<sup>55</sup> Studies show that three or more women on the board create an environment where women are no longer seen as outsiders and are more able to influence both the content and process of board discussions; they are more comfortable raising a variety of issues which, in turn, benefits the board.<sup>56</sup> Also, Babiak addresses that, at this point, there begin to be diversions of thinking among the women. Because, just as any one man does not represent all men, any one woman does not represent all women.<sup>57</sup>

#### STEREOTYPES

Regardless of whether or not the tipping point of three has been reached, women face a number of stereotypes on corporate boards of directors. One such stereotype is referred to as the “Iron Maiden” phenomenon. This situation occurs when the minority woman or women on the board insist on being fully included in the group but, at the same time, cut off all sexual innuendoes and resist behaving as the boys do. She will be distanced by the male majority and regarded as a “bully broad” whether or not that is the

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55 *Id.*

56 Sumru Erkut, Vicki W. Kramer & Alison M. Konrad, *Critical Mass: Does the Number of Women on a Corporate Board Make a Difference?* WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL RESEARCH AND PRACTICE 222, 228 (Susan Vinnicombe, et al., eds., Edward Elgar Publishing Limited, 2008).

57 Babiak, *supra* note 51.

reality of the situation.<sup>58</sup>

On another note, the “Queen Bee” stereotype has been used to classify a number of female directors. This typecast is specific to situations in which there is only one woman on the board. A woman is classified as a Queen Bee when she tries to exclude other women from achieving the same level or status that she holds. The first and only female board director may treat other women coldly due to insecurity and perhaps a warped sense of competition. These actions have been referred to as “women’s cruelty to women.”<sup>59</sup>

These stereotypes that female directors encounter affect how women as a whole are viewed even when being considered for directorships. Many scholars and world leaders believe the barriers women face both in achieving and after achievement of board positions are too crippling to the significant advancement of women in the boardroom at this time. They suggest quotas to improve the growth rate of female appointment to the board.

#### QUOTAS ON WOMEN IN THE BOARDROOM

Recent support for quotas to enhance the number of women on the boards of corporations comes primarily from Europe. Gender diversity is considered a founding principle of the European Union and as such the European Commission has taken steps to address gender equality. In 2006, the European Commission issued

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58 DOUGLAS M BRANSON, *NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM* 66-67 (NYU Press 2007).

59 *Id.* at 67.



its first “Strategy for Equality between Women and Men.” The Commission issued the Second Strategy in 2010, which explicitly includes the issue of women on corporate boards of directors, making the issue a matter of high priority. Shortly thereafter, in April 2011, the Commission issued a Green Paper on Corporate Governance in which parties were invited to comment on a number of items, including the issue of women on corporate boards of directors. All respondents were in favor of more diverse boards, but few were in favor of strong measures such as mandatory quotas; these parties preferred self-regulation. Viviane Reding, EU Justice Commissioner, answered this response by calling on publicly listed companies to sign the “Women on the Board Pledge for Europe.” However, one year later, a progress report showed that only 24 public companies had signed the pledge and voluntarily adopted measures to increase the representation of women on the board.<sup>60</sup> As a result, Reding proposed a quota on November 14, 2012 that would have forced public companies in the EU to appoint women to 40 percent of their non-executive board seats by 2020, or risk tough sanctions.<sup>61</sup> This original proposal was seen as too inflexible and faced fervent opposition from many leaders, especially those in the United Kingdom and Germany.

Due to opposition, a “watered-down” version of the quota

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60 PAUL HASTINGS, *BREAKING THE GLASS CEILING: WOMEN IN THE BOARDROOM* 58-60 (2013). <http://www.paulhastings.com/genderparity/>.

61 E.g. Gemma Varriale, *Women on Board Quota to Threaten Europe Multinationals?*, *INTERNATIONAL FINANCIAL LAW REVIEW* 3 (2012); Spiegel Online, *Closing the Gender Gap: European Commission Calls for Quotas* 2 (14 November 2012). <http://www.spiegel.de/international/europe/european-commission-moves-towards-approving-board-gender-quotas-a-867181.html>.

for women sitting on company boards was proposed in the EU. The new proposal makes the 40 percent quota an objective rather than a binding target and allows member states to determine the type of sanctions to impose on non-compliant corporations, as long as they are both appropriate and dissuasive.<sup>62</sup> The affected publicly traded companies include those with more than either 250 employees or €50 million in annual revenues.<sup>63</sup> In order to become law, the proposal must be approved by the European Parliament and the Council of the European Union.<sup>64</sup> Although rejected in its original form, the quota could still become law; it is believed that the softer, objective-style quota will help in gaining the political support necessary for it to be passed.<sup>65</sup>

#### NORWAY

Many European nations support quotas and had already adopted legislation to promote quota-driven gender equality on company boards prior to the EU directive.<sup>66</sup> In 2006, Norway became the first nation to set targets for board diversity and since 2008 Norway has enforced a gender quota requirement for corporate board directorship. Norway's Companies Act specifies that

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62 Danielle Myles, *Will Europe's Women on Boards Quota Work?*, INTERNATIONAL FINANCIAL LAW REVIEW (2012).

63 Gemma Varriale, *Women on Board Quota to Threaten Europe Multinationals?*, INTERNATIONAL FINANCIAL LAW REVIEW 1-2 (2012).

64 Spiegel Online, *Closing the Gender Gap: European Commission Calls for Quotas 2* (14 November 2012). <http://www.spiegel.de/international/europe/european-commission-moves-towards-approving-board-gender-quotas-a-867181.html>.

65 Smedley, *supra* note 13, at 1.

66 *EU Defends Women-on-Boards Plan*, BBC News (14 November 2012).

each sex must be represented by at least 40 percent on the boards of public companies.<sup>67</sup> A violation of the Act is punishable by dissolution of the corporation.<sup>68</sup> As a result of the quota, Norway has the greatest number of female directors among the European nations; women make up 42 percent of boards of the largest listed companies in Norway.<sup>69</sup>

After more than five years of implementation, studies vary on the outcome that gender quotas have had on the bottom line of corporations in Norway. Some studies show that the quotas have resulted in marginal increases in company profits, while others show no changes or a slight decline. A University of Michigan study performed by Amy Dittmar and Kenneth Ahern found that the increased number of women on boards in Norway led to a drop in company value.<sup>70</sup> In the three days following the unanticipated announcement of the new law, firms experienced on average a 2.6 percent drop in company value. Firms with no women on the board experienced a five percent drop in value at that time.<sup>71</sup> Further declines proceeded throughout the year as women were added to corporate boards in compliance with the law. However, the declines do not correlate to the gender of the new board members, according to Dittmar and Ahern. They attribute the lack of

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67 Sweigart, *supra* note 19, at 82.

68 *Id.* at 89.

69 Deloitte, *supra* note 11, at 25.

70 Sweigart, *supra* note 19, at 84.

71 (In order to remove the impact of other market trends, Dittmar and Ahern ran differences-in-differences tests of the announcement returns for Norwegian and U.S. firms by gender representation. The results indicate that an average Norwegian firm suffered a substantial market value loss at the announcement, compared to U.S. firms in the same industry.)

experience of these newly appointed directors as the cause of the decline. The women who were appointed to the board in order to meet the quota had less experience in upper management than their male counterparts and the women who had already served as directors.<sup>72</sup> However, it is ultimately too early to measure the full financial impact of the quotas in Norway.<sup>73</sup>

Although Norway was the first to take action, many European nations support the use of quotas to increase gender diversity in the boardroom. Other member states that now have national quota legislation include France, Italy, Belgium, Denmark, Portugal, Austria, the Netherlands, Spain, Greece, Finland, and Slovenia.<sup>74</sup>

#### IMPLICATIONS OF QUOTAS

Although the impact of board diversity quotas on the bottom line of corporations is of significant interest and debate, the social impacts of such quotas are a factor as well. One argument against quotas is that they inevitably give rise to tokenism. Clodagh Hayes, partner with Linklaters in London, maintains that she is fundamentally opposed to quotas because they lead to a suspicion that those women had only been appointed for legal purposes, rather than reasons of merit.<sup>75</sup>

In 1977, Professor Kanter of Harvard University published a book which deals with the effects of tokenism. Her land-

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72 Amy Dittmar, *Using Quotas to Raise the Glass Ceiling: The Norway Numbers*, THE NEW YORK TIMES ONLINE (22 March 2010).

73 Leimon, Mascovici and Goodier, *supra* note 5, at 189.

74 Reding, *supra* note 30, at 4.

75 Varriale, *supra* note 60, at 1-2.

mark study identifies three consequences of a businesswoman's status as a token: visibility, polarization, and assimilation. Visibility puts pressure on the token as an outcome of intense scrutiny. Polarization makes it challenging for the token to integrate into the group, which could lead to social isolation. The new female director may be alienated from the other board members (both the men and the women who came up "the hard way"). Assimilation results in the stereotyping of token minorities in such a way that the token female is not seen as an individual, but rather a representative of the whole gender.<sup>76</sup> Therefore, Kantor's research shows that although the token woman does not have to work hard to have her presence noticed, she does have to work hard to have her achievements noticed.<sup>77</sup>

Along with the drawback of tokenism, quotas have led to a phenomenon in which a few of the most qualified women sit on several boards. In Norway, these women have been dubbed the "Golden Skirts." The overall number of female directors in Norway remains stable despite the fact that all publicly listed firms must comply with the 40 percent quota.<sup>78</sup> Multiple corporations appoint the few "Golden Skirts" to their boards, rather than expanding their pool of candidates.<sup>79</sup> This may go so far as to create the impression that these women are only halfheartedly involved, which could result in a damaged perception of the role

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76 Sweigart, *supra* note 19, at 94-95.

77 Branson, *supra* note 55, at 114.

78 Sweigart, *supra* note 19, at 83.

79 Varriale, *supra* note 60, at 2.

that women have on boards of directors.<sup>80</sup> Also, sitting on so many boards of directors simultaneously can result in inadequate performance. This issue of “overboarding” is not unique to women. In the 1970s, former U.S. Supreme Court Justice Arthur Goldberg resigned from the eight boards on which he sat explaining that, even with his talents, he could not concurrently perform at the level of sufficiency necessary for good corporate governance.<sup>81</sup>

#### NON-QUOTA INITIATIVES IN THE UK

As was mentioned above, leaders in the U.K. largely oppose the use of quotas in the advancement of women on boards of directors. In a 2011 report, Lord Davies made recommendations to address the imbalance of women and men in the boardroom. Davies encourages a business-led approach to improving the proportion of female directors. He asks that corporations set voluntary targets for the number of women that they aim to have on their boards. This approach requires the cooperation of investors, chairmen and chief executives, and search firms in order to succeed. Governments are to take more of a supporting role.<sup>82</sup> In an April 2013 update, Davies was pleased to announce that businesses are responding to his earlier voluntary call for change. The FTSE 100 is on a path to achieve 25 percent women on boards by 2015 and 34.4 percent by 2020 as long as the current momentum

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80 Sweigart, *supra* note 19, at 92.

81 Branson, *supra* note 55, at 155.

82 Hastings, *supra* note 57, at 108.

is maintained.<sup>83</sup>

Davies' viewpoint is founded on this principle: "setting down stretching but achievable targets, while putting in place policies (or a route map) to allow you to get there and measuring progress along the way, is a proven method of getting things done." This strategy is a way for the board to show its commitment to the issue while also sending a message to stakeholders that the company takes gender diversity on the board seriously.<sup>84</sup> Companies in the U.K. are required to report on their diversity policies (including gender). They must report any measurable objectives and progress made against those objectives. Also, a voluntary Code of Conduct for Executive Search Firms is in place. So far 47 search firms are following the Code which signifies their commitment to identifying and recruiting the best female talent for corporate boards. Such non-quota initiatives are in line with the voluntary business-led approach to which the U.K.'s government is committed. Davies states, "In today's tough economic environment business must retain the flexibility to respond to changing circumstances and have the freedom to make decisions." It is his hope that the ability of the government to make real progress in the U.K. will help to show the EU that European level quota legislation is unnecessary for significantly improving board gender diversity.<sup>85</sup>

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83 LORD DAVIES OF ABERSOCH, WOMEN ON BOARDS, APRIL 2013 (UK Department for Business, Innovation & Skills, April 2013).

84 *Id.* at 8.

85 *Id.* at 5.

### NON-QUOTA INITIATIVES FOR THE U.S.

Corporate leaders in the United States are in search of a voluntary, market-based solution to drive board diversity.<sup>86</sup> For that reason, initiatives recommended to increase the number of women on boards in the U.S. are modeled after the non-quota initiatives in place in the UK and include softer forms of short-term goal setting, targeting, and disclosure. But first, in order for any initiative to be effectively implemented, the CEO must be wholly committed. As one study points out, “Positive practices stand little chance of developing fully if senior management does not commit to changing the culture of the organization under the sponsorship of the CEO.”<sup>87</sup> Awakening leadership to the importance of women serving on boards is the first step, and a crucial one at that.

Once the CEO and senior leadership team is, for a lack of better words, on board with the idea, they must define the goals of the company and design a plan to achieve those goals. In all aspects, businesses operate more effectively when they have well-defined goals and accountability for reaching those goals. For this reason, the U.S. should follow the U.K.’s initiative in asking companies to voluntarily adopt and report on stretching, yet clear, targets for the appointments of female directors. By doing so, corporations will be forced to closely examine the issue of board gender diversity and set aspirational targets that they will work to achieve.<sup>88</sup>

In order for corporations to achieve their adopted targets for gender diversity at the board table, change needs to occur in

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86 Ernst & Young, *supra* note 7, at 7.

87 Desvaux, Devillard & Snacier-Sultan, *supra* note 29, at 15-16.

88 CED, *supra* note 15, at 17.



the director nomination process as a whole. Research on the selection and appointment process of directors is lacking and, thus, board appointments remain a black box.<sup>89</sup> Even though the process is largely a mystery, many people suggest two possible paths to take in order to get on a corporate board. The first and most common suggestion is that an individual break into the “right” network. The idea here is that board members and executives rely on their own (mostly white, mostly male) networks to fill empty seats. The second path is to seek a progression of board seats; for example, one may begin on a not-for-profit or community board, which may eventually bring about appointment to a privately held corporate board and ultimately a publicly held corporate board. Both approaches are flawed in that they are lacking in transparency and objective measures.<sup>90</sup>

A small number of boards are beginning to implement a more objective nomination process. These boards select each member based upon the skill sets and attributes that are needed in order for the board to be most effective. When a board is designed in this way rather than through personal networks, it is often times more diverse and better equipped to execute its many functions.<sup>91</sup> The future of director selection should be increasingly objective and focused on the skills of the candidates. Of course, this idea can be difficult to implement when a board reflects competing constituencies.

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89 Groyberg & Bell, *supra* note 35, at 89.

90 Boris Groyberg & Deborah Bell, *Joining Boards: It's Not Just Who You Know That Matters*, *Harvard Business Review* (16 July 2013). <http://blogs.hbr.org/2013/07/joining-a-board-who-you-know-m/>.

91 *Id.* at 1.

Since search firms play such a large part in the nomination process, their role must be addressed as well. In order to achieve board diversity goals in the short-term, corporations and, subsequently, search firms must expand the search for female directors. They must look beyond former or sitting CEOs since women are underrepresented in that group as well.<sup>92</sup> By expanding the search criteria, qualified women who lack the CEO credential will be considered. Additionally, the National Football League's "Rooney Rule" could pose a solution. The "Rooney Rule" requires all NFL teams to interview at least one minority when filling a head coaching position; the teams are not required to hire that individual, but they must make a good faith effort when assessing the candidates. In a similar way, companies could require search firms to include a defined proportion of women when considering board director candidates.<sup>93</sup>

Another issue involving the board nomination process centers on the concept of creating more vacancies for women to have the opportunity to fill. Supporters of such measures as term limits and retirement ages maintain that the increasing pace at which women are being elected to boards will not amount to much in the short-term if very few positions open up each year. Groysberg and Bell see term limits as a way to remove underperforming directors while creating vacancies for women to fill.<sup>94</sup> However, some U.S. investors are generally averse to mandatory term limits, just as they are to quotas in increasing the number of female

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92 Ernst & Young, *supra* note 7, at 4.

93 CED, *supra* note 15, at 15-17.

94 Groysberg & Bell, *supra* note 34, at 2.

directors.<sup>95</sup>

The setting of stretching goals must then be followed by a route map to get there. In the U.S., this targeting may take the form of individual development programs and support for women's networks. Aspirational targets set by corporations will not be met at the board level if diversity is not considered at every level of the organization. Individual development programs address this concern through two channels: skill-building programs aimed at women and encouragement or mandates for senior executives to mentor junior women.<sup>96</sup> By targeting gifted female employees and mentoring them through aggressive programs, the pool of available and qualified female candidates for board positions will be increased.<sup>97</sup> Women's networks help by giving women a voice, supporting their development, and creating a way for them to influence and challenge policies and decisions. In addition, the founders, leaders, and active members of women's networks tend to become better known both formally and informally in the company, raising the profile of female leadership.<sup>98</sup>

For a company's plan to be effective, progress against an initiative must be measured. So, in addition to goal setting and targeting, public disclosure in the U.S. may help to increase the number of women in the boardroom. In December 2009, the SEC adopted an amendment to Regulation S-K which provides for disclosure of whether, and if so how, a nominating committee consid-

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95 Ernst & Young, *supra* note 8, at 5.

96 Desvaux, Devillard & Snacier-Sultan, *supra* note 29, at 15.

97 CED, *supra* at note 15, at 18-19.

98 Thomson, *supra* note 17, at 173.

ers diversity for director candidates. However, the rule does not have a set definition of diversity.<sup>99</sup> Ernst & Young analyzed the subject matter of the diversity disclosures of Fortune 100 companies and found that a mere 18 percent of companies specifically and voluntarily disclose the gender/ethnic makeup of the board.<sup>100</sup> The U.S. should consider adopting the U.K. policy in which all publicly traded companies must disclose the number of women who hold senior management positions and are employed throughout the organization as a whole, as well as the number of women who serve on their boards.<sup>101</sup> Forced to justify any lack of gender equality, corporations may be more likely to do something about the imbalance in order to avoid embarrassment or criticism.<sup>102</sup>

From a long-term perspective, the underrepresentation of women in the boardroom is considered to be a consequence of women lacking at the top executive levels. Despite the number of qualified women outside of the executive suite, studies show that executive leadership is the qualification most commonly cited by companies when looking for board directors. This is why non-executive boardroom quotas can be viewed as a bad answer to the wrong problem. U.S. companies can increase the number of qualified female board candidates in the long-term by supporting the advancement of women at all levels of the corporation.<sup>103</sup> There should be a “pipeline” of talented female leaders who make

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99 E.g. Ernst & Young LLP, *supra* note 8, at 5; CED, *supra* note 15, at 17.

100 Ernst & Young, *supra* note 8, at 5.

101 Lord Davies, *supra* note 80, at 11.

102 Sweigart, *supra* note 19, at 88-89.

103 Ernst & Young, *supra* note 7, at 5.

it to the upper executive and board levels of a corporation and, once the current “leaky pipeline” is fixed, it will continue to keep flowing, supplying corporations with qualified female board candidates for years to come.<sup>104</sup>

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104 Varriale, *supra* note 60, at 3.





# CHANDLER V. FLORIDA: MEDIA IN THE COURTROOM WITHIN THE PURVIEW OF THE 14TH AMENDMENT

*Peter Garthwaite\**

**ABSTRACT:** *The Fourteenth Amendment of the Constitution guarantees that no person can be deprived of life, liberty, or property without due process of law. A fair trial is an implicit tenet in the guarantee of due process and must be retained through courtroom decorum, trial actor impartiality, and fulfillment of the public requirement expressed in the Sixth Amendment. The advent of courtroom television broadcasting compromised the due process of defendants by displaying them in a negative light and subject to biased treatment by the actors in a trial. In *Estes v. Texas*, the landmark predecessor to *Chandler v. Florida*, the Court declared that the practice of televising courtroom proceedings was unconstitutional via the potential due process infringements that were inherent in television coverage at the time, including negative bias displayed toward the defendant compromising the impartiality of the trial actors and the various technical distractions accompanying the broadcast teams. The issue of televised court proceedings returned to the Supreme Court with *Chandler v. Florida* and was reevaluated under new considerations. In deciding *Chandler v. Florida*, the Court determines televised trial and pretrial coverage is a legitimate state interest and shifts the burden of proof to the accused, which must evince a violation of his or her due process.*

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Television has become an increasingly prominent medium for entertainment and communication in the lives of Americans. It has allowed the public to view individuals and events from New York and Los Angeles in the comfort of their own living rooms. The power the media has garnered through the ability to influence and to mold public opinion is immense. For example, the manner in which a public figure is presented may generate enthrallment or scorn. The evolution of television and the press has infiltrated almost all aspects of public life, including the courtroom. Within the confines of the courtroom, the power of the media to shape the image of an actor within a trial may threaten the integrity of the trial and the character of the American justice system. In *Estes v. Texas*, 381 U.S. 532 (1965) and *Chandler v. Florida*, 449 U.S. 560 (1981), the Supreme Court adjudicated that when media coverage compromises the defendant's right to a fair trial, it must be prohibited or restricted. By the enumeration of the Fourteenth Amendment, the Sixth Amendment, and the concept of federalism expressed in the Tenth Amendment, the Court's decision to adhere to the guidelines of *Estes v. Texas* in deciding *Chandler v. Florida* to protect the states' interest in televised trial coverage is undeniably correct.

Billie Sol Estes was indicted in a Texas county grand jury for swindling. His case received a significant amount of pretrial coverage, and as a result, Estes presented a motion of closure to remove all visual media coverage from the courtroom. The hearing for his motion was televised, and the movement of cameras

into and about the courtroom was cumbersome.<sup>2</sup> In 1965, television broadcasting technology was in its infancy and the cameras' large, bright lights pervaded the courtroom, while wires ran throughout it.<sup>3</sup> In addition to the visual broadcasting equipment consuming the courtroom, audio equipment overwhelmed the judges and parties via microphones on the tables in addition to excessive technician activity. The pretrial broadcasting activity "led to considerable disruption of the hearings."<sup>4</sup> The environment within the courtroom was disrupted by the blustering movement of the broadcast teams. Excessive pretrial coverage, not only in substance but in scope (as the trial received national notoriety), created a considerable burden on the trial proceedings and the individuals involved in the trial.

Estes contended that the broadcasting of portions of his pretrial coverage infringed upon his right of due process under the Fourteenth Amendment. The Fourteenth Amendment reads, "... nor shall any state deprive any person of life, liberty, or property, without due process of law."<sup>5</sup> Video cameras, wires, and bright lights violate due process by creating a distracting environment inside the courtroom that adversely affects the impartiality of actors involved in the trial, and pretrial coverage may have prejudicial impact upon jurors and the public. The Sixth Amendment guarantees an impartial jury to the accused; some of its clauses are

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2 Estes v. Texas, 381 U.S. 532 (1965)

3 Shelly Rosenfeld, *Will Cameras in the Courtroom Lead to More Law and Order? A Case for Broadcast Access to Judicial Proceedings*, 6 AMERICAN UNIVERSITY CRIMINAL LAW BRIEF 12, 14 (2010).

4 381 U.S. at 532.

5 U.S. Const. amend. XIV. § 1.

incorporated into the Fourteenth Amendment due to their inherent effect on the administration of justice. It states, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.”<sup>6</sup>

The aforementioned clause of the Sixth Amendment is incorporated into the Fourteenth due to its necessity in guaranteeing a free trial. The intention of the Founding Fathers in drafting the Sixth Amendment was to eradicate the possibility of secret tribunals, which would create the opportunity for government oppression within the setting of a closed courtroom. Justice Black describes the causes for repressing the possibility of secret tribunals and the necessity of upholding the Sixth Amendment to preserve the integrity of fair trials in *In Re Oliver*, 333 U.S. 257 (1948). He states:

The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy’s abuse of the *lettre de cachet*. . . Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.

The right to a public trial is inherent in the common law tradition, since the public presence ensures accountability on behalf of trial

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6 U.S. Const. amend. VI.

actors, including judges, witnesses, and jurors.

The Court has recognized that the public rightfully may observe what occurs at a trial, and the court has no legitimate authority to “suppress, edit, or censor events, which transpire in proceedings before it.”<sup>77</sup> Members of news stations and other media providers are no different than the general public, insofar as they do not violate the accused’s right to a fair trial. The public may receive printed news of trial activities that they would have observed had they attended the trial, given that no erroneous information is printed that would affect the impartiality of further proceedings.<sup>8</sup>

However, the media’s access to a trial is not limitless and certain restrictions are conferred upon the press where the defendant’s due process is in jeopardy. The Court concluded in *Nixon v. Warner Communications*, 435 U.S. 589 (1978), that the guarantee of a public trial “confers no special benefit on the press. Nor does the Sixth Amendment require that the trial- nor any part of it- be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and report what they have observed.”<sup>79</sup> While the Court recognizes the right of the media to attend a trial as members of the public, it also limits the media’s role within the confines of the courtroom. Such restrictions become particularly

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7 Craig v. Harney, 331 U.S. 367, 367 (1947).

8 J.R. Wiggins, *Should Canon 35 Be Amended? A Newspaper Man Speaks for the News Media*, AMERICAN BAR ASSOCIATION JOURNAL, 839 (1956).

9 Chandler v. Florida, 449 U.S. 560 (1981).

pertinent when television broadcasting is involved, since factors arise that may threaten the fairness of a trial that would otherwise be nonexistent with standard journalism.

Newspaper and television coverage are dissimilar mediums for transmitting trial proceedings. A newspaper journalist may bring a pen and pencil into a courtroom, record the proceedings, and go wholly unnoticed by the defendant, jury, witnesses, and judge. A team of television broadcasters is incapable of stealth or secrecy in recording the events and may present psychological distractions to the actors of the trial. The footage and commentary surrounding the coverage may adversely influence trial actors' dispositions against the defendant. Such psychological distractions and prejudicial impact would carry an exterior influence into the trial that presents a sizable impact on the decision, violating the defendant's guarantee to a fair trial. As Justice Holmes noted half a century earlier, "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."<sup>10</sup>

The Court in *Estes* concluded the presence of televised broadcasting violates the right of the accused to a fair trial and therefore must be prohibited. The Court promulgated that the potential of obstruction of justice by media, and therefore due process infringement, was enough for the prohibition of media in the courtroom. Speaking for the Court in *In Re Murchison*, 349 U.S. 133 (1955), Justice Black stated:

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10 *Patterson v. Colorado*, 205 U.S. 246 (1907).

A fair trial in a fair tribunal is a basic requirement of due process. Fairness, of course, requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness... To perform its function in the best way, 'justice must satisfy the appearance of justice.'

The Court founded the ruling that potential prejudice was sufficient to prohibit media trial coverage via precedents in *Rideau v. Louisiana*, 373 U.S. 732 (1963) and *Turner v. Louisiana*, 379 U.S. 472 (1965). In *Rideau* and *Turner*, the Court adjudicates that the potential of impingement of the defendant's right to due process compromises the concept of a fair trial, and measures created by the states that further this premise of injustice are inherently unconstitutional. *Rideau* and *Turner* were also precedents for *Sheppard v. Maxwell*, 384 U.S. 333 (1966), a case with similar media infringements as in *Estes*, where the pretrial coverage was so expansive and disparaging toward Sheppard that a fair trial was impossible to attain.<sup>11</sup> The result of *Sheppard* was the same as *Estes*, as the coverage in *Sheppard* was sufficiently misleading and led to a favorable outcome for the appellant. The decisions in *Estes* and *Sheppard* place the burden of proof chiefly on the state, since the defendant must not even attempt to prove that the presence of media is a distraction to the actors of the trial.

Justice Clark outlines four major obstructions of a fair trial derived from the presence of television broadcasting that vio-

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11 Gerhard Casper & Philip Kurland, 63 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*, 13,17 (1966).

late a defendant's due process and therefore render state action via broadcast media coverage unconstitutional. The first of these obstructions is the psychological impact of the television on jurors. As a case gains national or notorious attention, the jurors might hear the facts of the case prior to summoning and enter the trial with predispositions about the defendant.<sup>12</sup> Four of the jurors selected to hear *Estes* admitted to following all or segments of the pretrial coverage in the news prior to jury selection. The influence from public opinion, particularly on juries who are not sequestered during a trial, creates a considerable weight on the minds of the individuals deciding the outcome of the case. The decision may become less evidence based and increasingly built upon individual predilections. By entering a trial with a predisposition for or against a defendant forged by televised recordings, the juror's impartiality is compromised and the trial assumes a fundamentally unfair nature. This biased nature violates the defendant's right to due process of law ascribed by the Fourteenth Amendment.

Second, witnesses may also become reluctant to appear before a television. They may "view and hear the testimony of the preceding witnesses, and so shape their testimony as to make its impact crucial."<sup>13</sup> The ability of witnesses to observe the trial proceedings prior to testifying endangers the "solemn decorum"<sup>14</sup> of the court procedure and may have significant and drastic influences on the outcome of a case.

Third, the effect on trial judges is also crucial, particu-

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12 381 U.S. at 532.

13 381 U.S. at 532.

14 *Id.*

larly where the judge presides over a district that elects its judicial officials. In broadcasting the trial, public opinion will be forged into sympathy or contempt toward a defendant. For a judge, this situation creates a paradox between fairly deciding the case on the premise of law or treatment of a case as a political incentive. By deciding contrary to public opinion, a case with enough attention and notoriety may cause a judge's electorate to effervesce with disfavor. When the judge is not elected, he or she still must preside over the maintenance of the broadcasting crews, creating an unnecessary and burdensome distraction within the courtroom.<sup>15</sup>

Lastly, the presence of television broadcasting affects the accused by depicting the defendant in an unpopular context.<sup>16</sup> The trial broadcast will reach a multitude of viewers, each of whom will pass judgment on the defendant based upon what they have seen. In the instance of notorious or national interest cases (as almost all televised cases are), the defendant usually will be depicted in negative light, which violates the impartiality afforded in due process. Televising the pretrial also alters the attorney-client relationship, since the personal business of an attorney and the defendant is compromised through press recordings and televised broadcasts.

A decade and a half later, *Chandler v. Florida* reached the Supreme Court to challenge the precedent set in *Estes v. Texas*. The opportunity was presented when the State of Florida amended 32 F.S.A. Judicial Conduct Canon 3A(7), which stated, "A

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15 *Id.*

16 *Id.*



judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto.”<sup>17</sup> The canon was amended to read: “Electronic media and still photography coverage of public, judicial proceedings in the appellate and trial courts of this state shall be allowed.”<sup>18</sup> The canon contradicted the decision reached in *Estes* and allowed a perceived violation of due process of law.

Many changes had occurred since the time of the *Estes* decision in 1965, including new justices to the Supreme Court and advancements in television technology. The Nixon appointees, including Warren Burger to Chief Justice, Henry Blackmun, Lewis Powell, and William Rehnquist, were intentionally chosen as constitutionally minded conservatives.<sup>19</sup> The television was also evolving rapidly, which made the words of John Marshall Harlan’s concurrence in *Estes* appear prophetic. He concluded,

. . . we should not be deterred from making the constitutional judgment which this case demands by the prospect that the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination in accordance with the traditional

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17 Gerhard Casper and Philip Kurland, 121 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*, 65 (1982).

18 *Id.* at 66.

19 TINSLEY YARBROUGH, *THE BURGER COURT: JUSTICE, RULINGS, AND LEGACY 76-98* (ABC-CLIO, 2000).

workings of the Due Process Clause.<sup>20</sup>

The new era ushered in a sense of states' rights and advancements in television and broadcasting technology, which would play a pivotal role in the decision of *Chandler v. Florida*.

The facts of the case will briefly be discussed, as they are not essential to the key holding in *Chandler v. Florida*. Two Miami policemen were charged with conspiracy to commit burglary, grand larceny, and possession of burglary tools when they broke in and entered into a prominent Miami Beach Restaurant.<sup>21</sup> Due to local attention, the state chose to enact canon 3A(7) for the case. The defendants claimed that they were being treated with bias and that the statute violated their right to a fair trial under due process but reported no specific distractions caused by the presence of television cameras.

The setting of the courtroom in *Chandler* was noticeably different than that of *Estes*. The “twelve camera men jostling for position” were replaced with one television camera, and only one camera technician was permitted in the courtroom.<sup>22</sup> When multiple news stations desired to broadcast the trial, they were required to pool resources and gather the coveted media from the same source. The camera was required to remain in a fixed position in a remote area of the courtroom. Film, lenses, and videotape equipment could not be changed once the trial commenced. Restrictions on audio use also applied to Florida courtroom decorum.

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20 381 U.S. at 532.

21 *Chandler v. Florida*, 449 U.S. 560 (1981)

22 *Id.*

Broadcasting crews were permitted to use only existing recording systems for audio pick-up, and the audio they gathered could not include conferences between lawyers, attorneys, respective parties, or bench conversations.

The Court initiated by denying that *Estes v. Texas* ruled televised court proceedings unconstitutional outright. The appellants insisted *Estes* asserted a general rule claiming the presence of television broadcasting warrants a proscription of media coverage within the courtroom, claiming, “The mere presence of television and still photographic cameras during a criminal trial is inherently prejudicial and denies the accused his right to a fair and impartial trial.”<sup>23</sup> The Court, and specifically Burger, differs in that opinion, as he claims that the prejudice against the defendant exists within the prejudicial impact of the coverage, and is not inherent in the practice of coverage itself.<sup>24</sup> The distinction between the mere presence of the coverage and the prejudicial impact, occurring through the manner by which the coverage was enacted, renders the *Estes* decision as constitutional “per se.”<sup>25</sup> The impingement of due process was only observed in *Estes* due to the facts of the case and is not a general preclusion against states to attempt legislation that would institute courtroom coverage by television or photography.

The appellants rely on Justice Clark’s plurality opinion from *Estes*, which stated that the potential prejudice was enough

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23 Gerhard Casper and Philip Kurland, 121 *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*, 73 (1982).

24 *Id.*

25 *Id.*

to rule media coverage in the courtroom unconstitutional. Chief Justice Burger, however, relies on Harlan's aforementioned concurrence in the decision. Harlan stated, "Forbidding this innovation [television coverage in the courtroom], however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the states from pursuing a novel course of procedural experimentation" (*Estes v. Texas*, 381 U.S. 532 (1965)). The concept of federalism was a point completely overshadowed in *Estes v. Texas*. The Court plants the burden of proof squarely upon the state; in *Chandler*, the burden of proof is reversed to the appellant, observing and respecting a state interest.

The states have long been encouraged to create alternative judicial means to adjust to the changes occurring in society, whether they are social, economic, or technological.<sup>26</sup> The Constitution provides no enumerated instructions regarding the media in the courtroom, nor is it explicitly proscribed in the due process clause (or anywhere else for that matter). Given the explicit language of the Tenth Amendment, which reads "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people,"<sup>27</sup> the legislation provided in canon 3A(7) is rightfully rendered constitutional. The Court has adjudicated that the states should take an experimental role in legislation, promulgating in *Addington v. Texas*, 441 U.S. 418 (1979): "The essence of federalism is that states must be free to develop a variety of solutions to

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26 *Id.* at 475.

27 U.S. Const. amend. X.

problems and not be forced into a common uniform mold.”

Justice Brandeis may have contributed the most famous encomium for federalism in his dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932). Brandeis asserted:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy instances of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

The experimentation with media trial coverage is precisely the type of “novel social and economic experiment” that Brandeis was referring to in his dissent. Television technology had evolved rapidly since a decision pertinent to media trial coverage was rendered, and the best way to test whether due process was still violated by the presence of broadcasting in a courtroom would be through state legislation. The states also adopted safeguards to ensure that a defendant’s due process was not violated, which will be explored shortly.

The Court has expressed that state sovereignty can only be rendered unconstitutional when a statute enacted to promote the public good “*has no real or substantial relation* to those objects, or is beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution” [empha-

sis added] (*Jacobson v. Massachusetts*, 197 U.S. 11 (1905)). The desire of the state to use television and photography inside the court room assuredly furthers a state interest. The public interest in community events and happenings is fundamental in a citizen's civic duty. The general safety of the community is also within the purview of the state police powers, and by broadcasting the trial of perpetrators the public may see that the general safety is being upheld.

Justice Burger proceeds to review whether the appellants demonstrated true infringement of their due process. He states, "A defendant has the right to review to show that the media's coverage of his case... compromised the ability of the jury to judge him fairly." He continues by claiming, "A defendant might show that broadcast coverage of his particular case had an adverse impact on the trial participants sufficient to constitute a denial of due process. Neither showing was made in this case."<sup>28</sup> The Court has clearly shifted the burden of proof from the appellee to the appellant to display a violation of due process and furthers the notion that *Estes* did not preclude the states' right to protect important interests and social experiments.

The Court observed the safeguards implemented in amending Canon 3A(7) to avoid the adverse risk to the defendant found in *Estes*. The trial court first advises jurors not to watch the local news on television; instead, they are urged to view the national news.<sup>29</sup> The courtroom distractions presented by televi-

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28 *Chandler v. Florida*, 449 U.S. 560 (1981).

29 *Id.*

sion broadcasts are significantly minimalized, and the trial court judge may edit or expel the broadcast procedures where due process violations are observable. The state also takes precautions to shelter witnesses of note or vulnerability (such as minors, sex crime victims, and generally timid witnesses) from viewing or appearing in broadcasts of the trial or pretrial.<sup>30</sup>

Through the safeguards that Florida proposes in Canon 3A(7), the state guarantees the defendant due process. The Court carefully differentiates between risk of violation of due process and the actual, determinable breach of the constitutional guarantee. By ensuring diversion of jury attention away from the news, protection of witnesses from media coverage, and restricted media access at the control of the trial judge, *Chandler* minimalizes the threat to due process that televised trial procedures potentially present and gives way to fruitful state experimentation.

The appellants in *Chandler* insist that the presence of cameras and media inside the courtroom alone provides a psychological distraction that will inevitably affect their participation and lead to a violation of due process. Burger and the court contend that lacking a convincing body of empirical data and research, the assertion that media presence alone adversely affects trial actors psychologically is without merit and cannot be upheld. Burger claims, “At present, no one has been able to present empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse effect on that process.”<sup>31</sup> With-

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30 *Id.*

31 *Chandler v. Florida*, 449 U.S. 560 (1981).

out suggesting a specific offense relatable to media coverage condemning the court of violating due process, the appellants fail to prove that media presence alone violates their right.

The Court's decision in *Chandler v. Florida* remains within the judicial context of *Estes v. Texas*. As in *Estes*, the Court adjudicates in *Chandler* that the presence of media broadcasting a trial may violate due process insofar as the broadcast adversely affects the actors in the trial to perform impartially. The decision satisfies the Sixth Amendment guarantee of an impartial jury, the Fourteenth Amendment right of due process of law, and the right of the public to be informed in community events. The *Chandler* decision's most prominent facets is the deference to state autonomy in experimental legislature, exemplified by Canon 3A(7) of Florida judicial code, and the burden of proof requiring the accused to demonstrate due process impingement. While *Estes* focuses on the defendant's rights and does not recognize a state interest, *Chandler* adheres to the Nation's federalist tradition and upholds the statute as a means of experimentation within the state's role as a laboratory. The decision meets all constitutional requirements, including the fundamental concept of federalism omitted in *Estes*, and is undisputedly correct.





TO BOLDLY GO:  
INTERNATIONAL SPACE LAW AND THE  
EXPANSION OF RES COMMUNIS DOCTRINE

*John S. Ehrett\**

*ABSTRACT: International space law, while a relatively recent development in legal history, has far-reaching implications for the traditional conception of national sovereignty. Specifically, the doctrine of res communis – if imprudently incorporated into the broader body of international law – poses a new set of sovereignty challenges on both international and domestic levels. This article explores the history and sources of international space law before proceeding to analysis of the sovereignty questions currently facing world policymakers. The author finds that multilateral agreements conducted on an ad hoc basis are likely to offer a better approach to natural resource management than the broad global strategy currently advanced by res communis theorists.*

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## INTRODUCTION

The classic 1970s film *Star Wars* sets forth a vision of galactic ideological conflict between two forces: one committed to liberty, the other a literal “Evil Empire” bent on establishing totalitarian control. Indeed, given the Cold War context in which the franchise emerged, perhaps its political undertones are less than surprising. For indeed, the world had just undergone a series of profound changes: with the launch of *Sputnik 1* into orbit in 1957, humanity had for the first time ventured beyond the boundaries of Earth. When Neil Armstrong set foot on the Moon in 1969, it truly was “one giant leap for mankind” into a new, unexplored, and potentially limitless universe. Naturally, these human efforts to explore space were, at the time, bitterly divisive. Old rivalries between nations, when coupled with the vast technological potential of space exploration, threatened to revolutionize the geopolitical order. And accordingly, at the height of the American-Soviet “space race,” many would likely have agreed that the global community needed a unified framework for approaching this new sphere of interaction.

The United Nations stepped up to offer such a framework, in the shape of five governing treaties. These treaties form the backbone of modern international space law. The United Nations treaties intend to govern a wide variety of international actions in outer space – from the proper treatment of crashed astronauts to fair economic practices on resource-rich extraterrestrial bodies.

For international law to exist as a viable instrument, it must successfully arbitrate disputes between nations – and in

doing so, rely on supranational considerations. As the actions of one actor – state or non-state – in outer space may have dramatic consequences for other states, a system for international decision-making is justified. However, any circumstance in which international adjudication is needed necessarily engenders questions of domestic political sovereignty. The following article will endeavor to address these questions of domestic sovereignty.

The following article will explore several concepts governing international space law. First, it will explain international space law, highlighting the key developments in this unique sphere of policymaking. Second, it will analyze the five major treaties presently governing United Nations actions in the realm of international space law.<sup>2</sup> Third, it will cover current international space law utilized by the United Nations in its broader policymaking practices, and explore precedent interpreting the United Nations policy cited above.<sup>3</sup> Finally, it will provide a brief consid-

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2 These five treaties are the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (1967); the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (1968); the Convention on International Liability for Damage Caused by Space Objects (1972); the Convention on Registration of Objects Launched into Outer Space (1976); and the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (1984)

3 This corpus of law includes the Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space (1963); the Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting (1982); the Principles Relating to Remote Sensing of the Earth from Outer Space (1986); the Principles Relevant to the Use of Nuclear Power Sources in Outer Space (1992); and the Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries (1996).

eration of emerging trends in the field of outer space law. It will demonstrate that under emerging standards of what constitutes the international law of outer space, the United Nations enjoys a degree of authority over space that may eventually conflict with domestic political sovereignty.

## I. HISTORY OF INTERNATIONAL SPACE LAW

The law of outer space is one of the newest, and least-defined, areas of international law. Given the uniquely supranational context in which space-related activities occur – since outer space transcends traditionally-understood national boundaries – the UN has stepped in to fill the administrative void. In attempting to properly understand the current difficulties policymakers face, a short discussion of the underlying history may prove instructive.

Following the launch of *Sputnik 1*, it quickly became clear that the international community needed to reach a consensus of sorts regarding space exploration. The potential for both use and abuse was certainly great; a peaceful coexistence would be necessary in order to avert global conflict. Accordingly, in 1958, the General Assembly of the United Nations established an *ad hoc* Committee on the Peaceful Uses of Outer Space. The UN requested the committee to report on “[t]he area of international co-operation and programmes in the peaceful uses of outer space which could appropriately be undertaken under United Nations auspices to the benefit of States irrespective of the state of their

economic or scientific development.”<sup>4</sup> As Indian legal scholar Kailash Thakur describes, the Committee emphasized the equality of UN member states and additionally proposed that the UN’s binding documents – the UN Charter and the Statute of the International Court of Justice – should be understood as applying to activities occurring within outer space.<sup>5</sup> Since no one nation could claim sovereignty, an international authority was seen as the best means of establishing order. A variety of treaties and governing documents would later emerge from this shared understanding, each of which would outline some specific obligations of state actors in the international space community.

In December 1959, the United Nations formally codified the Committee on the Peaceful Uses of Outer Space. This Committee would be charged with promoting international cooperation and securing “the common interest of mankind as a whole.” Currently, the Committee, which continues to operate on an *ad hoc* membership basis, is authorized “to review the scope of international cooperation in peaceful uses of outer space, to devise programmes in this field to be undertaken under United Nations auspices, to encourage continued research and the dissemination of information on outer space matters, and to study legal problems arising from the exploration of outer space.”<sup>6</sup> Under the auspices

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4 United Nations, General Assembly Resolution 1348 (XIII) (1958), available at [http://www.unoosa.org/oosa/SpaceLaw/gares/html/gares\\_13\\_1348.html](http://www.unoosa.org/oosa/SpaceLaw/gares/html/gares_13_1348.html).

5 Kailash Thakur, *Outer Space and Military Supremacy: Jurisdiction in International Law* 27 (1985).

6 United Nations, *United Nations Committee on the Peaceful Uses of Outer Space* (2012), available at <http://www.unoosa.org/oosa/COPUOS/copuos.html>.

of this Committee, subsidiary bodies were formed to implement its recommendations in the broader international sphere. It is out of this framework that the modern international law of outer space has developed.

## II. FUNDAMENTALS OF INTERNATIONAL SPACE LAW

Setting aside for the moment the key question of what exactly constitutes outer space, it becomes imperative to understand from what sources international space law springs. The United Nations Office for Outer Space Affairs (UNOOSA), based in Vienna, defines “space law” as emerging from not only the five major international treaties, but also from additional documents such as treaties, conventions, and the rules and regulations promulgated by international groups. Two tiers of authority, then, exist at the UNOOSA level: treaties, and the documents developed under their auspices.

Under prevailing standards of international jurisprudence, the status of both tiers may be relevant when considering questions of customary international law. Even seemingly inconsequential agreements – though technically non-binding – may be considered binding precedents. The UNOOSA acknowledges that a pathway based on “generally accepted practice” exists, by which purportedly non-governing documents may take on legal weight. Thakur concurs with this mentality: “...customary international law, along with resolutions or declarations of United Nations and other International organization and writings of highly qualified Publicists provide authoritative or auxiliary sources for the deter-

mination of this branch of law.”<sup>7</sup> Effectively, then, the UNOOSA’s five treaties and five sets of principles constitute the foundation of modern international space law. Though all states may not be parties to a given treaty or set of principles, both tiers of authority may factor into the decision-making processes of the international legal system. This notion of tiered authority draws support from the scholarship of legal theorists Joanne Irene Gabrynowicz and Jacqueline Etil Serrao, who observe in the *Journal of Space Law* that “[e]ach set of principles has varying weight at international law....International space law also consists of custom and practice.”<sup>8</sup>

Having established a proper understanding of the UNOOSA’s hierarchy of governing protocols, we return to the definitional question: what exactly constitutes “outer space” for the purposes of international governance? Or, when put in terms of sovereignty, what separates a state’s national airspace from the sphere of space subject to UN jurisdiction? Unlike a territorial state proper, no natural delineation appears to exist that would establish where a country’s administrative authority over aerospace begins.<sup>9</sup>

Numerous theoretical methodologies for delimiting outer space have been advanced. Particularly notable – though impractical – are the *Usque ad Coelum* theory (extending state jurisdiction *infinitely* upwards in space),<sup>10</sup> the effective control theory (extending the jurisdiction of a state up to limits where the scientific prog-

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7 Thakur at 25.

8 Gabrynowicz and Serrao.

9 Thakur at 19.

10 *Id.* at 44.



ress of a state permits the effective control over the space above it),<sup>11</sup> and the interest theory (extending state jurisdiction in outer space as far as is reasonably required by a state's interests).<sup>12</sup> In all three of these cases, state sovereignty is treated as the paramount consideration.

Though no universally accepted delimitation exists, the theory of the Kármán line (named for Hungarian-American physicist Theodore von Kármán) is popularly accepted by the international community. The Kármán line approach serves as the baseline for the European Space Agency (ESA) and the Fédération Aéronautique Internationale (FAI), among others. The Kármán line, located about 52 miles from the Earth's surface, is an aeronautical standard of measurement – in the words of the ESA, “any vehicle at this altitude would have to travel faster than orbital velocity in order to derive sufficient aerodynamic lift from the atmosphere to support itself.”

The most crucial international concept governing space law, however, is the principle of *res communis*, or “things common to all; things that cannot be owned or appropriated, such as light, air, and the sea.”<sup>13</sup> In authoring treaties, the United Nations has fleshed out this principle somewhat: instead of merely accepting the existence of resources from which all benefit, the United Nations has held that the international community shares a common interest in these common goods (thus making the UN the appropriate governing/regulatory authority where the distribution

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11 *Id.* at 49.

12 *Id.* at 49.

13 *Black's Law Dictionary.*

of common goods is concerned). The idea of *res communis*, then, must be considered in two ways: it is both a property possessed by outer space and a justification for regulation by supranational authorities.

In the introductory clauses of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (a document later nicknamed the “Space Treaty” of 1967), the United Nations highlights “the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes.”<sup>14</sup> A similar phrase appears in Article I of the document: “The exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.”<sup>15</sup> This notion of “common interest” has broad implications for the field of space law: nations are not to *acquire* aspects of outer space, but rather the resources of outer space are to be understood as belonging to the international community at large.<sup>16</sup> Such an evolution of the concept of *res communis* represents a departure from previous international legal standards: before the Moon Treaty was signed, the moon and related bodies were considered *res nullius*, meaning that their resources could be subject

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14 United Nations, *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies* (1967), available at <http://www.oosa.unvienna.org/pdf/publications/STSPACE11E.pdf>.

15 *Id.*

16 Gabrynowicz and Serrao.

to claims by nation-states. This was changed by the Moon Treaty, which stipulated that such resources were “incapable of appropriation under the Treaty Provisions.”<sup>17</sup> Put more simply, no private or public actor – no matter how technologically innovative or entrepreneurial – is authorized to engage in extractive activity on celestial bodies; an international administration is instead required.

This general mindset permeates all aspects of the Space Treaty. In brief, the Treaty bars claims of national sovereignty upon extraterrestrial bodies (e.g. annexing the Moon), proscribes the introduction of weapons of mass destruction into outer space, calls for the respectful treatment of astronauts as “envoys of mankind,”<sup>18</sup> authorizes liability suits for claims of damage from space-based objects, mandates registration and control of space-based objects, and promotes the sharing of information derived from space exploration. Perhaps the fullest flowering of this *res communis* attitude, however, is found in Article XII, which reads: “All stations, installations, equipment and space vehicles on the Moon and other celestial bodies shall be open to representatives of other States Parties to the Treaty on a basis of reciprocity.”<sup>19</sup> Questions of the relationship between celestial resources and national sovereignty take on particular significance in light of subsequent United Nations treaties.

The second major space law treaty, the Agreement on the

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17 Thakur at 31.

18 *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies.*

19 *Id.*

Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, is substantially narrower in scope. The Agreement provides that astronauts who have suffered harm, and/or fallen into the jurisdiction of another state, be offered assistance in their return to the state that launched them. Given the evident overlap with the broader Space Treaty, the pre-ambulatory clauses indicate that the Agreement serves simply as a “further concrete expression”<sup>20</sup> of the Space Treaty’s principles. Again, emphasis is placed on the ideals of *res communis* – reference is made to “international cooperation in the peaceful exploration and use of outer space”<sup>21</sup> and “sentiments of humanity.”<sup>22</sup> The third major space law treaty, the Convention on International Liability for Damage Caused by Space Objects, provides a systematic framework for determining liability and calculating damages for harms caused by space activities. Bilateral negotiations and settlements are the preferable forum for claims resolution, but United Nations authorities may be invoked if this arbitration proves unfruitful. Yet again, the aforementioned *res communis* clause (emphasizing “the common interest of all mankind in furthering the exploration and use of outer space for peaceful purposes”<sup>23</sup>) is advanced in the opening clauses.

The fourth major space law treaty, the Convention on Registration of Objects Launched into Outer Space, provides that “a

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20 United Nations, *Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space* (1968), available at <http://www.oosa.unvienna.org/pdf/publications/STSPACE11E.pdf>.

21 *Id.*

22 *Id.*

23 *Id.*

central register of objects launched into outer space be established and maintained, on a mandatory basis, by the Secretary-General of the United Nations.”<sup>24</sup> Again invoking the *res communis* standard, the Convention proceeds to establish a mandatory international registration system, administered by the Secretary-General, containing detailed information on all objects launched into outer space. This information includes the name of the launching state, designator or registration number, date and location of launch, basic orbital parameters, and general function.

The fifth major space law treaty, the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (popularly known as the “Moon Treaty” of 1984), is by far the most controversial of all space law protocols advanced by the United Nations. At first glance, it appears to merely reinforce principles outlined in the foundational Space Treaty – but upon more thorough examination, the Moon Treaty contains several important implications for the states which choose to ratify it.

Controversy appears first in Article 2, which opens with the following bold declaration: “All activities on the Moon, including its exploration and use, shall be carried out in accordance with international law...”<sup>25</sup> Similarly, Article 4 states that exploration and use of Moon resources “shall be the province of all mankind and shall be carried out for the benefit and in the interests of all

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24 United Nations, *Convention on Registration of Objects Launched into Outer Space* (1976), available at <http://www.oosa.unvienna.org/pdf/publications/STSPACE11E.pdf>.

25 United Nations, *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies* (1984), available at <http://www.oosa.unvienna.org/pdf/publications/STSPACE11E.pdf>.

countries.”<sup>26</sup>

The most drastic statements of the Moon Treaty are found in Article 11, paragraph 3: “Neither the surface nor the subsurface of the Moon, nor any part thereof or natural resources in place, shall become property of any State, international intergovernmental or non-governmental organization, national organization or non-governmental entity or of any natural person.”<sup>27</sup> Paragraph 5 elaborates: “States Parties to this Agreement hereby undertake to establish an international regime, including appropriate procedures, to govern the exploitation of the natural resources of the Moon as such exploitation is about to become feasible.”<sup>28</sup>

Attorney and Moon Treaty critic Michael Listner explains the pragmatic implications for the international community, highlighting the requirement that the UN be tasked with administering any extractive economic activity that might occur on the Moon. Listner argues that under the Moon Treaty, “the harvesting of those [celestial] resources is forbidden except through an international regime established to govern the exploitation of such resources when it becomes feasible to do so.”<sup>29</sup> Listner goes on to weigh the mandates of the Moon Treaty against those of the earlier Space Treaty: “The *res communis* doctrine resounds most prominently when dealing with property ownership rights in outer space. The Outer Space Treaty not only forbids claiming of terri-

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26 *Id.*

27 *Id.*

28 *Id.*

29 Michael Listner, *The Moon Treaty: failed international law or waiting in the shadows?* (2011), <http://www.thespacereview.com/article/1954/1>.

tory by nations, but its child, the Moon Treaty, attempts to extend that prohibition to private legal entities also.”<sup>30</sup> In practice, this means that no independent nongovernmental group or corporation may invoke “property rights” in the context of celestial exploration.

Naturally, such an approach has not found broad favor within the international community – particularly among the states who have invested most heavily in space exploration. A document calling for an “equitable sharing by all States Parties in the benefits derived from those [Moon] resources”<sup>31</sup> (Article 11, paragraph 7, clause (d)) is inherently unlikely to attract support from public or private actors. In short, treating the Moon and other bodies under the *res communis* standard potentially incurs significant scientific and economic costs, which will be further discussed in Part III. While scant attention has been paid to the significance of the Moon Treaty in recent years, due to more pressing international concerns, future technological developments will inevitably raise these questions of international jurisdiction and national prerogatives.

The five aforementioned treaties alone, while certainly vital, constitute only a part of established international space law. The UN Office for Outer Space Affairs also relies upon several documents, or “sets of principles” in adjudicating issues. One of these documents, the Declaration of Legal Principles Govern-

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30 Michael Listner, *It's time to rethink outer space law* (2005), <http://www.thespacereview.com/article/381/1>.

31 *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*.

ing the Activities of States in the Exploration and Use of Outer Space, mirrors the Space Treaty in several respects. Predating the Treaty by four years, it embraces many of the same concepts – “the common interest of all mankind,”<sup>32</sup> the impermissibility of national appropriation of extraterrestrial territory, the responsibility of states to retain liability for damages caused by space objects, and the protection of astronauts, among other doctrines. Another important document, the *Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries*, epitomizes most strongly the “common interest” ethos of the United Nations. The Declaration offers an expansive view of this principle: mankind does not merely share an interest in space, but space itself is “the province of all mankind.”<sup>33</sup> Such a view is consistent with the Moon Treaty’s call for the division of natural resources by an international regime.

As seen here, a persistent theme in the literature of UN space law is the validity of the “common interest of all mankind” as a moral guiding-light for policymakers. At all levels of the space exploration process, the Office for Outer Space Affairs seeks to bring the actions of sovereign state actors into conformity with international norms. And indeed, one might argue that there

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32 United Nations, *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space* (1963), available at <http://www.oosa.unvienna.org/pdf/publications/STSPACE11E.pdf>.

33 United Nations, *Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries* (1996), available at <http://www.oosa.unvienna.org/pdf/publications/STSPACE11E.pdf>.



is a strong conceptual justification for international uniformity regarding many of these issues.

Unqualified incorporation of the *res communis* doctrine into international space law, however, leads to several consequences with important implications for both the sovereignty of states and the flourishing of scientific and economic activity.

### III. IMPLICATIONS FOR NATIONAL SOVEREIGNTY

Any actions taken by the United Nations or another supranational body must necessarily strive towards a difficult calculus: balancing state sovereignty with the broader interests of the international community. This paradox of governance has persisted since the earliest days of the organization, and it is, unsurprisingly, manifested in the field of international space law.

In grasping precisely which international standards are binding upon a sovereign state, several factors warrant analysis. First, and perhaps most important, is the consideration of any treaties to which the state may be a part. Second, the standards imposed by customary international law should be examined. This “customary international law,” as the seminal theorist Ian Brownlie explains, emerges from sources as diverse as national press releases, state legislation, a “pattern of treaties in the same form,” and even decisions made by domestic executives.<sup>34</sup> Third, the weight of inflexible common-law norms – e.g. prohibitions against torture, unwarranted aggression, etc. – must be evaluated. In the field of international space law, all three of these legal fac-

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34 Ian Brownlie, *Principles of Public International Law* (2008).

tors are currently operative.

Few individuals would dispute that a party to a treaty is bound by its standards. Legal writer Ram Jakhu concurs: “The intention of the authors of the [Space] Treaty was clearly to create binding obligations. The Treaty’s principles must be interpreted as legally authoritative norms that govern international relations in all matters relating to outer space.”<sup>35</sup> However, the question of customary international law is by its very nature ill-defined. This creates an inherent condition of legal murkiness, given that that the ongoing evolution of governing documents has created a moving target for nations seeking to conform to their international legal obligations.<sup>36</sup>

Given this state of perpetual flux, seemingly insignificant past precedents may abruptly reemerge, to substantial effect. This article holds that under current standards of international law, UN requirements regarding outer space may conflict with the legitimate assertion of national sovereignty by United States actors or those of other nation-states.

A discussion of the sovereignty question proper must first turn to the legal implications of the *res communis* principle. Pervasive in the United Nations literature regarding outer space law is the doctrine of “common interest” stemming from the belief that the resources of outer space are the property of humanity at large. Drawing from both this bedrock UN principle and his rec-

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35 Ram Jakhu, *Legal Issues Relating to the Global Public Interest in Outer Space*, 32 *Journal of Space Law* 31 (2006).

36 Ruwantissa Abeyratne, *ICAO’s Involvement in Outer Space Affairs – A Need for Closer Scrutiny?* 30 *Journal of Space Law* 185 (2004).

ognition of the uniqueness of the regulatory challenge posed by outer space, Jakhu endorses a sweeping vision of international space law. Three core tenets characterize this vision: a belief that contemporary principles of international regulation and accountability, not common-law understandings of property and sovereignty, should govern outer space; a belief that these modern principles are absolutely binding upon all states; and a conviction that the “global public interest in outer space” is the source of such binding force.<sup>37</sup> This philosophy goes far beyond the Space Treaty of 1967: not only does it suggest that international actors are bound by the formal treaties to which they have acceded, but it also expands these principles to the sphere of customary international law. In other words, nations are to be held responsible to the international community based on the standards of a treaty they have never joined. Moreover, such a philosophy suggests that these collectivizing principles are morally obligatory upon all nations – treating the *res communis* standard of outer space as beyond question, and placing it on a level with prohibitions against piracy, genocide, and torture.

The far-reaching ramifications of this mindset – particularly the assertion that the “global public interest in outer space” must guide all policymaking in the field of space law – cannot be overemphasized. Such a stance rejects the view that *any* particularized national concerns can legitimately play a role in the domain of international law: “interdependence and international cooperation” must, in all cases, trump “State sovereignty and

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37 *Id.*

independence.”<sup>38</sup> This exemplifies the *monistic* theory of international law, as described by I.D.P. O’Connell – the view “that international law has primacy over municipal law in both international and municipal decisions.”<sup>39</sup> This mindset emerges naturally from a broad endorsement of *res communis* as a foundation for decision-making; such an endorsement infers that the interest of the global community in outer space in promoting equal access to celestial resources is so great as to rise to the level of a moral obligation. Under this standard, if ethnic cleansing is considered a crime against humanity, so too should unauthorized exploitation of space resources be considered an attack upon all.

The impact for sovereign states, then, is that international standards must always, *without exception*, enjoy precedence over national considerations in the area of outer space law. Not only are these international standards viewed as morally superior to any assertions of national sovereignty, but Jakhu even contends that the very existence of independent interests in outer space threatens the global social order: “The advancement of exclusive national interests could not only mar progress toward global betterment but also threaten human civilization in ways that might lead to its destruction.”<sup>40</sup> This belief – that permitting the operation of sovereign entities in outer space for their own purposes will spawn global catastrophe – undergirds much United Nations literature on the subject. The clear objective here is to ward off a possible “tragedy of the commons” effect, in which mass celestial

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38 *Id.*

39 I.D.P. O’Connell, *International Law* (1970).

40 Jakhu.

exploitation occurs at the hands of the technological élite. What is never once meaningfully considered, however, is whether an international administrative regime will serve as a better steward of cosmic resources than individual nations operating within a free-market context.

Analysis of the sovereignty question must now turn from the theoretical to the practical. The definition of outer space as a jurisdiction governed via *res communis* principles seems to automatically supersede any national sovereignty questions. The subjective nature of “customary international law,” however, poses a greater challenge to the United States, and this is best illustrated through consideration of the controversial Moon Treaty. Notably, due to several of the provisions, which have incurred international disfavor, few nations have actually acceded to the Moon Treaty. However, an important threshold has already been crossed: six nations have signed onto the Treaty. Article 19, paragraph 3 of the Moon Treaty stipulates that, “This Agreement shall enter into force on the thirtieth day following the date of deposit of the fifth instrument of ratification.”<sup>41</sup> Thus, the Moon Treaty has in fact “entered into force” as a doctrine of the United Nations.

Some United States jurists may dismiss the Moon Treaty as non-binding, given the American framework for the establishment of treaties: under the Constitution of the United States, a treaty only becomes binding if it is approved by the President and subsequently ratified by the Senate. This procedure, however, is not

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41 *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies.*

part of the United Nations methodology. When weighed against the “common interest of all mankind,” such rigorous processes become merely the “strict observation of State sovereignty and independence,” which advocates of greater international control have indicted. The Moon Treaty, by virtue of its entry into force through the ratification of five states, has become “the practice of international organs” – and by extension, a part of the *corpus* of customary international law. Listner explains: “Even with only six nations ratifying the Moon Treaty, the fact that eleven other nations...have acceded to or become signatories to the Moon Treaty creates a shadow of customary law that could grow...especially if those non-parties take no action to refute its legitimacy.”<sup>42</sup> In a dispute over the proper management of natural resources on the Moon, then, the United States could find itself charged with violating the *res communis* principles of international law. The repercussions of an unfavorable judgment – both in terms of diplomatic standing and economic hardship – could be substantial indeed, with the potential to impact scientific inquiry and space exploration for decades to come.

A similar economic question was considered during deliberations regarding the proposed “Law of the Sea” treaty (also known as the UNCLOS), which affirmed the *res communis* doctrine at the expense of discrete public and private interests. The risk of lost incentives was advanced as a major concern

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42 Listner, *The Moon Treaty: failed international law or waiting in the shadows?*

of private businesses.<sup>43</sup> Their argument stressed that those with the capabilities best suited to engage in innovative endeavors are generally not motivated by a compelling concern for the global public interest, but rather by private gain; all, however, are ultimately enriched by the technology and skills developed during this quest. Furthermore, given the lack of international consensus on a number of important policy issues, retaining the capacity to accumulate resources – albeit in a non-destructive manner – may be understood as a matter of national security. In many ways, these concerns simply foreshadow those raised regarding the Moon Treaty. Full-scale implementation of the Treaty – resulting in the establishment of an inflexible international regime for extraterrestrial resource extraction – could conceivably risk stifling innovation and limiting productivity. This, in turn, could jeopardize the “interest of all mankind” if a broad dependence on lunar resources becomes commonplace: after all, who will fill the scientific void if the requisite technology is unavailable and no compelling incentives exist for its development? While large-scale economic exploitation by private entities is not without its social and environmental costs – and a full discussion of these issues is beyond the scope of this article – the broad liberty to engage in commercial activity has generated investment in technologies that have benefited millions.

On a judicial level, the acceptance of the Moon Treaty as binding international law establishes a troublesome precedent

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43 Ray W. King, *Deep Seabed Resources: Who Has The Right To Exploit Them*, 11 *Colonial Lawyer* 8 (1981).

for the United States and other independent nation-states. The Moon Treaty exists independently of the prescribed constitutional framework for treaty ratification, and has only been ratified by six sovereign states – none of which have played a substantive role in the evolution of space exploration. If this is in fact the standard set forth, a minority of sovereign states may establish a treaty (derived from a supposedly universal moral obligation) which may be legally invoked against states not party to said treaty. By extension, if the Moon Treaty is accepted as a valid and binding source of customary international law, the exercise of national sovereignty in the international sphere becomes effectively meaningless.

A philosophy of international law rooted in an obligatory affirmation of the *res communis* principle necessarily deemphasizes the role of individual state actors; indeed, *any* pursuit of unilateral interest becomes contrary to the broad “global public interest” which is held to be paramount.<sup>44</sup> If this philosophy becomes normative, the need of supranational organizations to balance the interests of sovereign states against the interests of the global community no longer exists; instead, a unitary international legal system may credibly emerge – one lacking the constraints provided by national sovereignty claims within the current model. It remains to be seen whether international judicial bodies will subsequently gain broad powers to compel compliance in the supranational domain, particularly when their attempted exercise of such authority conflicts with prerogatives previously held by

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44 Jakhu.



nation-states and their court systems.

This concern regarding the influence of international standards on domestic matters is not without support in the literature of international law. The repercussions of a codified *res communis* doctrine may extend even to the municipal level, as legal scholar Kernal Baslar observes. Whereas Jakhu stops short of proscribing any and all resource extraction activities in *res communis* spaces, Baslar rejects outright the notion of property rights in the “global commons.” In responding to a proposed framework for resource extraction by sovereign state actors, Baslar writes, “[this] model is not a fair one, since it does not take into account environmental problems, sustainable development, and the rights of future generations.”<sup>45</sup> This theory, a logical implication of transforming the idea of “global common interest” into a matter of universal moral duty, expands the scope of supranational authority far beyond the traditional domain of *res communis* jurisdiction. In such a theory, the doctrine of *res communis* – and the “common heritage of mankind” – transcends national boundaries, with marked implications for national sovereignty. Specifically, if *res communis* is understood to be broadly binding – which, given the doctrine’s proposed status as a “moral obligation,” is a natural outcome – it behooves supranational bodies to proactively secure resource equality. Per Baslar: “[T]he inherent unfairness of morally arbitrary ‘geological lottery’ should be avoided in order to attain global justice and justify the right to control the national

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45 Kernal Baslar, *The concept of the common heritage of mankind in international law* 55 (1997).

resources. To achieve these goals, the freedom of others to pursue absolute liberty and crude forms of libertarian property ownership should be abandoned.”<sup>46</sup>

Few would dispute that some areas are more resource-rich than others; in a legal philosophy grounded in an expansive embrace of the *res communis* theory, this disparity warrants international intervention. This condemnation of “property ownership” writ large is not limited to the concept of one nation seizing resources formerly held in the global commons (e.g. the U.S. hypothetically beginning mineral extraction operations on the Moon). Rather, this theory stems from an expansive interpretation of the “common heritage of mankind,” with unexpectedly broad ramifications: specifically, “the essence of the word ‘common’ should not only be interpreted so as to cover international spaces but also be modified to include scarce national resources within the national boundaries.”<sup>47</sup> Such a stance mandates not only the regulation of traditional *res communis* spaces by an international regime, but also holds that *all* natural resources – entirely irrespective of state sovereignty – are to be treated as part of the “global commons.” It is notable that in both of the above statements, the phrase “national resources” is used in lieu of the more-familiar “natural resources,” a linguistic choice which indicates the wide-scale implications of such a philosophy.

If this permutation of the *res communis* doctrine is embraced, any traditional conception of national sovereignty nec-

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46 *Id.* at 59.

47 *Id.* at 59.

essarily collapses. The international community or its assignee, accordingly, assumes total responsibility for the disposition of natural resources, both in space and on earth. The implications stemming from a seemingly simplistic legal principle – *res communis* – extend well past the international judicial system: naturally “[n]ew alternatives need radical changes in the structure of the present world order.”<sup>48</sup> Postmodern academic Richard Rorty, in an address at Colorado College, praised this possibility: “In [the vision common to *Star Wars* and *Star Trek*], human beings finally get their act together, establish a world federal government which abolishes both war and inequality of opportunity, and turn their eyes toward the surrounding galaxy.”<sup>49</sup> For Jakhu, Baslar, Rorty, and other scholars like them, this may be the ideal – but for national policymakers tasked with considering matters of security in a world still divided by competing interests, such a model seems unworkable at best, and dangerously idealistic at worst.

#### IV. CONCLUSION

International space law is an evolving area of international jurisprudence. Unlike the age-old questions of piracy or aggression, the question of outer space exploration offers an entirely new set of legal quandaries. The United Nations, through its Office for Outer Space Affairs, has sought to resolve several of these quandaries through the formulation of various treaties and sets of principles – documents which form the foundation of international

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48 *Id.* at 56.

49 Richard Rorty, *The Communitarian Impulse* (1999), <http://www2.coloradocollege.edu/Academics/Anniversary/Transcripts/RortyTXT.htm>

outer space law.

Throughout the course of the preceding article, a key trend in these documents – namely, the expansion of the *res communis* principle at the expense of national sovereignty – has emerged. From the very definition of outer space itself – the Kármán line, which makes no conceptual allowance for the jurisdiction of specific powers – to the far-reaching implications of the Moon Treaty, international space law has steadily drifted away from preexisting conceptions of national sovereignty.

Given the challenges outlined with regard to the application of *res communis* principles throughout international space law, policymakers should act decisively. The legal philosophy espoused by some thinkers – that the principles of space law regarding equitable behavior are to be treated as binding moral precepts – should be summarily rejected for the time being; such a philosophy is grounded in an idealized view of global consensus that does not actually exist. Those responsible for crafting domestic space policy should call for a narrower approach in determining what precisely constitutes an international moral norm and also reject the application of *res communis* principles on the domestic level.

Regarding the Moon Treaty specifically, a strong affirmation of national sovereignty, including an assertion of the right of private entities to benefit from extraterrestrial natural resources, may be warranted. Listner explains that the slow encroachment of the Moon Treaty is due primarily to a lack of response by U.S. jurists: “Although the United States is not a signatory to the Moon

Treaty, it has not taken open actions to actually refute its legal viability. The result is that the Moon Treaty and its *res communis* doctrine has slowly crept into the realm of accepted international law.”<sup>50</sup> If nations such as the United States wish to retain positions of global leadership, it is imperative that policymakers act to resist the slow erosion of national sovereignty.

It is not unreasonable, however, to recognize the unique challenges posed by national activities in outer space: given past abuses, concerns over gratuitous commercial exploitation are certainly not illegitimate. One potentially viable solution to this difficulty is the generation of a body of international multilateral agreements between nations which could substitute for top-down, supranational dictates by a single regulatory authority.<sup>51</sup> This model, interestingly, would employ customary international law as a tool for retaining national sovereignty: under Brownlie’s definition of customary international law, “a pattern of treaties in the same form” may constitute an element thereof. This, when coupled with limitations on the understanding of *res communis* as a binding moral doctrine, may reasonably counterbalance the framework of massive international regulation advanced by some scholars.

The encroachment of the *res communis* doctrine is far from overt. Though its implementation might begin in a seemingly tangential sphere (*viz.* outer space law), the proponents of such a philosophy have seemingly grander visions in mind. The ultimate

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50 Listner, *It’s time to rethink outer space law.*

51 *Id.*

goal of such theorists – the eventual emergence of a transnational body tasked with securing resource equality – appears incompatible with traditional conceptions of national sovereignty. Regardless of the particular solution pursued, policymakers should move promptly to reassert the importance of domestic sovereignty. Proposing a constructive alternative, such as a strategic pattern of multilateral treaties directed toward suitable ends, may well be the best means of doing so.



SUBJECTIVITY AND THE  
AMERICAN COURT:  
AN ANALYSIS OF *ROPER V. SIMMONS*

*Benjamin P. Leavitt\**

*ABSTRACT: As part of the larger juridical movement of incorporation, the Supreme Court ruled in *Roper v. Simmons* that the application of capital punishment to juveniles is cruel and unusual. The Court based this decision, a reversal of its earlier stance, on interpretational criteria from *Trop v. Dulles* and *Gregg v. Georgia*: “evolving standards of decency” as determined by national consensus and proportionality. Such a basis for justice, however, by its inherent self-contradiction, removes all confidence in the objective morality of law.*

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## INTRODUCTION

Criminal justice systems have great difficulty handling juvenile offenders. Two objectives compete as lawmakers attempt to secure justice: the first to give juveniles second chances, the second to keep the public safe.<sup>2</sup> This conflict becomes even more acute when the juveniles involved are guilty of especially heinous or violent crimes. Adults guilty of these crimes could be subject to capital punishment, yet many people have ethical reservations against applying such a sentence to juveniles. Over the past 25 years, the Supreme Court has addressed this issue through a series of cases, notably *Thompson v. Oklahoma* and *Stanford v. Kentucky*. These cases, applying the Eighth Amendment to the states through the Due Process Clause of the Fourteenth Amendment, have sought to determine exactly what “cruel and unusual punishment” means. Influenced by cases addressing capital punishment and the mentally impaired, including *Penry v. Lynaugh* and *Atkins v. California*, the Court established its final decision on juvenile offenders in 2005 with *Roper v. Simmons*. This case affirmed that capital punishment of juveniles *is* cruel and unusual, based on the moral consensus of the nation and the Court’s independent evaluation of proportionality. However, the Court’s flawed insistence on an evolutionary standard of morality compromises the nation’s historical basis of positive law on an objective natural law, thus threatening the stability of the entire legal system. Good laws require a foundation more stable than the turbulent and subjective

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2 Lisa Ells, *Juvenile Psychopathy: The Hollow Promise of Prediction*, 105 *COLUM. L. REV.* 158, 158-170 (2005).

whims of the majority.

#### PRECEDENT FOR *ROPER V. SIMMONS*

Prior to any analysis of *Roper v. Simmons* and its immediate precedents, it is important to note the basis on which the Supreme Court has made decisions regarding capital punishment. These decisions are part of the larger juridical movement of incorporation, which has broadly established the responsibility of the Court to hold states accountable to a number of the protections found in the Bill of Rights. Early in the nation's history, as in the 1833 case of *Barron v. The Mayor and City Council of Baltimore*, the Court rejected the application of these protections to the states. Even after the creation of the Fourteenth Amendment, which had the potential to extend these rights through its Privileges and Immunities and Due Process Clauses, the Court chose in *The Slaughterhouse Cases* of 1873 not to do so. For more than 50 years after *Slaughterhouse*, the Due Process Clause remained a "general guarantee of procedural fairness in the legal process at the state level," until Justice Cardozo's opinion in *Palko v. Connecticut* radically changed the Court's application of that clause. After the *Palko* decision in 1937, the Court began to incorporate the rights found in the first eight amendments based on whether they were "implicit in the concept of ordered liberty." In 1962, the Court used *Robinson v. California* to incorporate the protection against cruel and unusual punishments as found in the Eighth Amendment, providing the key precedent necessary for the Court

to address the issue of capital punishment.<sup>3</sup>

Additional precedents for *Roper v. Simmons* include *Trop v. Dulles*, *Gregg v. Georgia*, and *Coker v. Georgia*. These cases addressed national consensus and the proportionality of the death penalty, adding to the framework of *Robinson*. *Trop* held in 1958 that the revocation of the citizenship of military deserters is cruel and unusual and thus unconstitutional. Behind this decision was reasoning that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” Such evolving standards reappeared in 1976, when the Court produced a “two-pronged test” in *Gregg* to determine whether a particular death sentence was cruel and unusual. The first test sought a “national consensus” within then-current moral values, which had evolved from the values in place at the time of the Eighth Amendment’s ratification. On this count, because a majority of states provided for the death penalty by law, the Court ruled that national consensus supported such punishment. Second, the Court stated that punishments must “accord with the dignity of man,” that punishments must be proportionate to the associated crimes. In this regard, the Court determined that the death penalty is proportionate with first-degree murder. Finally, in 1977, *Coker* addressed the death penalty as a punishment for rape. Building on the logic of *Trop* and *Gregg*, the Court deemed such a punishment excessive because a vast majority of states did not allow it, and in states that did, juries rarely chose to give such

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3 CRAIG R. DUCAT, CONSTITUTIONAL INTERPRETATION 470-81 (9<sup>th</sup> ed. 2009).

a sentence.<sup>4</sup>

These considerations of national consensus and proportionality took on a new application in the Court's 1988 and 1989 decisions of *Thompson v. Oklahoma* and *Stanford v. Kentucky*. As explained by Justice Stevens's opinion in *Thompson*, the Court determined that the execution of juvenile criminals under the age of 16 is cruel and unusual. This decision was determined for three reasons: one, no states with established minimum ages for the death penalty allowed it for individuals less than 16 years old, two, "respected professional organizations" opposed such executions, and three, the last execution of a youth of this age had been in 1948. Moreover, Justice Stevens quoted *Enmund v. Florida* to claim authority for the Court "ultimately to judge whether the Eighth Amendment permits imposition of the death penalty," regardless of consensus. Concerning proportionality, the Court decided that juveniles were less culpable for their actions than adults and were unlikely to be deterred by the death penalty, making such punishment without cause. Though the petitioners wished to make the line of acceptable capital punishment at the age of 18, the consensus of various state governments, professional organizations, and foreign governments led the court to establish this age at 16. In many ways, *Thompson* would parallel *Roper v. Simmons*, with the only significant difference being the specific consensus ascertained by the Court in each case.<sup>5</sup>

*Stanford v. Kentucky*, decided the year after *Thompson*,

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4 Wayne Myers, *Roper v. Simmons: The Collision of National Consensus and Proportionality Review*, 96 J. CRIM. L. & CRIMINOLOGY, 950, 950-52 (2006).

5 *Thompson v. Oklahoma*, 487 U.S. 815, 818-38 (1988).

discarded the proportionality argument, yet maintained this logic of consensus. Justice Scalia, writing the plurality opinion, argued that the Court's judgment of proportionality could not invalidate a punishment but could only accompany and confirm "the objective indicators of state laws or jury determinations," means by which the Court could ascertain the consensus of the nation.<sup>6</sup>

#### THE FACTS OF *ROPER V. SIMMONS*

With this basic introduction to the constitutional framework found in *Roper v. Simmons*, that case and its narrative become relatively simple, beginning with 17-year-old Christopher Simmons of Missouri, a junior in high school at the time of his crime. For unknown reasons, Simmons wanted to commit a murder, and he plotted to do so with two friends, both of whom were minors. His plan was to "commit burglary and murder by breaking and entering, tying up his victim, and throwing that victim off a bridge."<sup>7</sup> With the aid of one friend, Simmons executed this plan early on the morning of 9 September 1993. The two boys broke into the home of one Shirley Crook, whom Simmons coincidentally recognized from a previous car accident. The two men bound Mrs. Crook before driving her to a nearby river, where they threw her in and drowned her. After fishermen found the body the next day, Simmons was arrested and quickly confessed to the murder.<sup>8</sup>

As indicated by his conversations with friends during the

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6 *Stanford v. Kentucky*, 492 U.S. 361, 379 (1989).

7 *Roper v. Simmons*, 543 U.S. 551, 556–57 (2005).

8 Elizabeth F. Emens, *Aggravating Youth: Roper v. Simmons and Age Discrimination*, SUP. CT. REV. 51-102 (2005).

planning process, Simmons apparently thought they could “get away with” the crime due to their young age. However, in Missouri, Simmons’s age meant that he was not within the jurisdiction of the juvenile court system, and he was thus tried as an adult. During the trial both the prosecutor and defense used Simmons’s age in their closing arguments. The defense stated that Simmons’s age was a mitigating factor, citing a number of legal limitations on the abilities of minors, who “cannot drink, serve on juries, or even see certain movies” due to a lack of responsibility. In contrast, the prosecutor argued that Simmons’s age was actually an aggravating factor, for in the context of the crime it displayed just how “outrageously and wantonly vile, horrible, and inhuman” this man was. The jury reached a verdict of first-degree murder, and recommended the death penalty based on aggravating factors in the crime. The trial judge accepted this recommendation, at which point Simmons obtained new counsel and sought to have his conviction overturned. Simmons claimed that he “had received ineffective assistance at trial” because the trial had not established his youthful immaturity, his susceptibility to bad influence, or his poor home environment. The trial court dismissed the motion for post-conviction relief, which the Missouri Supreme Court affirmed in 1997. Finally, the federal courts denied Simmons’s petition for a writ of *habeas corpus* in 2001, leaving him in prison to await his execution.<sup>9</sup>

#### INTERVENING CASES

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9 543 U.S. 556–59.

However, two subsequent cases had a significant, though perhaps unexpected, impact on the cases of Simmons and others like him: *Penry v. Lynaugh* and *Atkins v. California*. Both cases dealt with capital punishment and the mentally retarded and through a strange turn of events altered the fate of Christopher Simmons. Decided in 1989, *Penry* essentially paralleled *Stanford*, for in it the Court decided that the execution of mentally retarded criminals was not cruel and unusual.<sup>10</sup> The Court did not make a broad statement on the issue because no national consensus against executions of the mentally retarded existed. Instead, it stated that “individualized inquiry” was necessary to determine the accountability of each individual in question, in order to account for differing degrees of mental retardation.<sup>11</sup> While the Court did not make a broad judgment, it nevertheless found *Penry*’s sentence unconstitutional; according to Texas law, the jury could not count *Penry*’s mental condition as a mitigating factor.<sup>12</sup>

In 2002, more than a decade after *Penry*, *Atkins* overturned the previous case, ruling that at this time, the death penalty was cruel and unusual punishment for the mentally retarded. The Court generally structured this decision around the two-pronged principles of *Gregg*. The Court first points to a significantly increased national consensus, for since *Penry* 18 states had created laws preventing the execution of the mentally retarded.<sup>13</sup> Though this number did not yet represent a majority of the states, Justice

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10 Emens, *supra* note 7, at 57.

11 Myers, *supra* note 3, at 955.

12 Emens, *supra* note 7, at 57.

13 Myers, *supra* note 3, at 955–6.

Stevens's opinion notes that "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change," that shows a national consensus in this area.<sup>14</sup> The Court also found that the death penalty failed the standard of proportionality, citing external authorities as in *Thompson*. There could be no legitimate retribution against the mentally retarded, and society could expect no deterrent value from the death penalty because the mentally retarded cannot understand the results of their actions.<sup>15</sup> Thus, in a space of only 13 years, the Court used a shift in national consensus and proportionality arguments to change the definition of "cruel and unusual," tying evolving legal standards with evolving societal norms.

After the *Atkins* ruling, Simmons filed again for state post-conviction relief, arguing that the Court's reasoning concerning the mentally retarded applied to juveniles as well. The Missouri Supreme Court agreed, stating in *State ex rel. Simmons v. Roper* that "a national consensus has developed against the execution of juvenile offenders." This new opposition was indicated by a ban on juvenile executions in 18 states, a total ban on executions in 12 states, and a raised or established minimum age of 18 in 5 states. The Missouri Supreme Court thus resentenced Simmons to "life imprisonment without eligibility for probation, parole, or release except by act of the Governor," upon which the U.S. Supreme Court granted certiorari.<sup>16</sup>

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14 *Atkins v. Virginia*, 536 U.S. 304, 315 (2002).

15 *Myers*, *supra* note 3, at 955–6.

16 543 U.S. 559–60.



## JUSTICE KENNEDY'S OPINION

Making key references to cases such as *Robinson*, *Trop*, *Thompson*, *Stanford*, *Penry*, and *Atkins*, the Court reviewed both the “objective indicia of consensus” as expressed by state laws and the proportionality of the punishment of execution for juveniles. Concerning national consensus, the Court found that, with numbers similar to those in *Atkins*, a wave of states had come to oppose the juvenile death penalty. Many people across the nation believed, like the then-governor of Kentucky, that “[w]e ought not be executing people who, legally, were children.” In his opinion, Kennedy overlooked the “less dramatic” change from *Stanford* to *Roper* compared to *Penry* and *Atkins*, stating that “the same consistency of direction of change has been demonstrated.”<sup>17</sup>

Concerning proportionality, Kennedy referenced *Atkins*, arguing that capital punishment must be limited to individuals who commit “a narrow category of the most serious crimes” and are thus “the most deserving of execution.” Three general differences between minors and adults diminished juvenile culpability below the standard required for the death penalty and lowered the deterrent force of the death penalty on the actions of youths. First, juveniles possessed with a greater frequency than adults a “lack of maturity and an underdeveloped sense of responsibility.” Second, juveniles were more susceptible to “negative influences and outside pressures,” because of their decreased control over their environments. Third, the character of juveniles was less complete than the character of adults. Consequently, the requirement of pro-

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17 *Id.* at 561–67.

portional retribution meant that the death penalty, the worst penalty possible, could not be imposed “on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.” Likewise, due to the above characteristics, youths were less likely to weigh the consequences of an action against its benefits, meaning that the deterrence value of the death penalty would be minimal.

Justice Kennedy stated, moreover, that despite the potential for a juvenile who does not match these descriptions, a “categorical rule” against the death penalty is necessary because juries might too easily count a defendant’s age against him, as happened in the trial of Simmons. While 18 years of age might seem like an arbitrary line, the Court stated that it was “the point where society draws the line for many purposes between childhood and adulthood,” and since “a line must be drawn,” this choice would be the most logical and reasonable one. Justice Kennedy closes the opinion with a discussion of foreign agreement with such treatment of juveniles, particularly highlighting the United Kingdom, which shares historic legal ties with the United States. Though the judgment of the international community does not control American jurisprudence, Justice Kennedy argues that it can confirm the independent conclusions of the Court.<sup>18</sup>

#### DISSENTS: JUSTICES O’CONNOR AND SCALIA

The two dissents to Justice Kennedy’s opinion, penned by Justices O’Connor and Scalia, take very different positions on

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18 *Id.* at 568–79.

this case. Justice O'Connor's dissent did not depart from the principles behind the majority opinion but argued that the evidence of national consensus was not yet sufficient to merit a decision limiting all of the states to the standards created by one legal body. Beyond the issue of consensus, Justice O'Connor also affirmed that the Court's "independent moral judgment" with regard to proportionality was justified. She harshly criticized the Missouri Supreme Court for its choice in *State ex rel. Simmons v. Roper* to proclaim a new national consensus replacing that of *Gregg*. Determining such a consensus was the sole responsibility of the nation's highest court, and the interference of any other body created a dangerous and disruptive precedent. After critiquing the majority's lack of evidence for its opinion and stating that discussion in the international community is constructive in these contexts, Justice O'Connor closed the dissent with an excellent quote from her own concurrence to *Thompson*. She wrote that "this Court should not substitute its own 'inevitably subjective judgment' on how best to resolve this difficult moral question for the judgments of the Nation's democratically elected."<sup>19</sup> Such a decision would overreach the proper authority of the Court and compromise the balance of power between the federal government and the states.

Justice Scalia's dissent was very different; while he maintained some support for the idea of a national consensus, he rejected both the majority's claim to have found that consensus and its proportionality analysis, which he suggested took the "subjective views of five Members of this Court," and used them

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19 *Id.* at 587-607.

alone to interpret the meaning of the Constitution. Justice Scalia first picked apart the majority's 'consensus,' arguing that the logic behind its construction was flawed on a fundamental level. Moreover, he questioned whether state legislators would have changed their juvenile death penalty laws if they had known their decisions would be used to cause a significant permanent change in the nation's legal system. In evaluating the Court's proportionality analysis, Justice Scalia also pointed out the majority's meager evidence and a failure to back up broad generalizations with any kind of fact. He also harshly criticized the choice to cite foreign legal authorities in relation to this case. Finally, Scalia stated that the meaning of the Constitution does not change over time at all, never mind over the course of the 15-year period between *Stanford* and *Roper*. Such constant "updating" was a threat to the stability and reliability of the courts and consequently must not continue.<sup>20</sup>

#### ROPER'S PROBLEMS AND IMPLICATIONS

Even beyond those flaws noted by Justices O'Connor and Scalia, *Roper* and its aforementioned precedents are in error because they share two incorrect premises: that "standards of decency" change over time and that at any given point the "national consensus" should determine what the Constitution means. In his concurrence, Justice Stevens inadvertently pointed out this failure of evolutionary standards and consensus, stating the following:

Perhaps even more important than our specific holding today is our reaffirmation of the basic

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20 *Id.* at 607–30.

principle that informs the Court's interpretation of the Eighth Amendment. If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today. . . . The evolving standards of decency that have driven our construction of this critically important part of the Bill of Rights foreclose any such reading of the Amendment.<sup>21</sup>

The Court ostensibly claims that the consensus of society, at any given time, provides a good and right standard on which to base justice at that time. However, Justice Stevens also implies that the execution of seven-year-olds is, and always has been, objectively wrong. In short, the evolutionary, consensus-based standard existing 300 years ago was *not*, even then, a just standard. This contradiction is not so easily reconciled and poses an ongoing threat to the American legal system by undermining its historical foundation.

The loss of this foundation, then, is the most concerning implication of *Roper v. Simmons*. At one time, the American legal tradition made a firm connection between natural law and positive law. At least in principle, this legal system derived its authority from a higher power; its laws were those "of Nature and of Nature's God." However, with the secularization of American society as a whole and consequently of the legal system, the existence of any kind of natural law was abandoned in favor of a subjective law based upon the whims of individuals. This develop-

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21 *Id.* at 587.

ment is dangerous because it removes any certainty that the law is right. If Justice Stevens can reach back to reprimand the first Americans for their bad laws, what is to prevent future Americans from doing the same to those now living? Consensus changes and today's lawgivers and law keepers may become for future generations a morally repulsive memory. In the interim, individuals struggle to direct their personal behavior in truly good and right ways, threatening the order and stability of the nation such that it may soon become unrecognizable.

#### SUMMARY

Based originally upon the doctrine of incorporation, the Supreme Court's reasoning in *Roper v. Simmons* and its precedents established the principle that criminals under the age of 18 may not receive the death penalty, regardless of any extenuating circumstances. This principle was based upon flawed proportionality analysis and objective indices of national consensus as critiqued by Justices O'Connor and Scalia in their bold dissents. However, the greatest problem with these decisions was their insistence upon evolutionary standards. While government may adapt positive law to fit new social realities, the meaning and essence of the law must not be changed or altered by the whims of a majority, whether within or without the Supreme Court. To do so would be to remove the very foundation of the American legal structure, condemning it to contradiction and confusion.



# SCHENCK V. UNITED STATES: A CLEAR AND PRESENT DANGER TO THE FIRST AMENDMENT

*Bethany M. Dzielski\**

*ABSTRACT: In 1919 when the Supreme Court decided Schenck v. United States, it was the first case in which a federal law was challenged on free speech grounds. For this monumental first ruling about free speech Justice Oliver Wendell Holmes, Jr. wrote the decision, in which he affirmed the Espionage Act of 1917 and established the “clear and present danger” test for determining whether an individual’s actions are protected under the free speech clause of the first amendment. The cases that followed extended this rule beyond the original intent, creating restrictive boundaries on the freedom of speech. Schenck serves as a cautionary tale of how exceptions made to important freedoms can swallow the overall rule.*

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The freedom of speech, as protected by the First Amendment, is one of the most foundational rights recognized by the Bill of Rights.<sup>2</sup> For over a hundred years this right was not examined in the nation's highest court until 1919 when the Supreme Court decided *Schenck v. United States*, the first case in which a federal law was challenged on free speech grounds.<sup>3</sup> Justice Oliver Wendell Holmes, Jr. wrote the decision, in which he affirmed the Espionage Act of 1917 and established the "clear and present danger" test for determining whether an individual's actions are protected under the free speech clause of the First Amendment.<sup>4</sup> Through examining the history leading up to the case, the facts of *Schenck* itself, and the results of the case and following cases, one can develop a clear picture of the devastatingly limiting effect this decision had on America's most valued freedom: the freedom of speech. Holmes's "clear and present danger" restraint was an improper infringement on the first amendment right to free speech.

Before one can examine the case itself and examine its effects, it is necessary to paint the picture of the setting and historical background of the 1919 *Schenck* decision. After the ratification of the Constitution in July 1788, the Federalists, a group of founders led by James Madison, pushed for a bill of rights to protect citizens from dangerous expansion of the federal government.<sup>5</sup> Several states, including Virginia, only agreed to ratify the

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2 U.S. Const. amend. I.

3 9 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 13-14 (Jeffery Lehman & Shirelle Phelps eds., Thompson Gale 2005).

4 *Schenck v. United States*, 249 U.S. 47, 52(1919).

5 GEORGE ANASTAPLO, REFLECTIONS ON FREEDOM OF SPEECH AND THE FIRST AMENDMENT 64 (The University Press of Kentucky, 2007).

Constitution if their representatives would push for a bill of rights to be added. The states ratified the first amendment in 1791 as a part of the Bill of Rights.<sup>6</sup> Clearly, the right to freedom of speech was important to the founders and the citizens of the newly formed United States. As such, it is the duty of the courts to strike down any legislation which violates the freedom of speech.

Over 120 years after the adoption of the Bill of Rights, the next step leading to the *Schenck* case occurred. On April 6, 1917, Congress declared war against Germany and entered World War I.<sup>7</sup> On May 18 of the same year it enacted the Military Conscription Act which raised a national army, establishing the draft.<sup>8</sup> There were serious reservations in the United States about the war. Woodrow Wilson had won re-election in November 1916 on a platform which assured that “He kept us out of the war,” but within a year of his re-election he asked Congress for a declaration of war.<sup>9</sup> Although the threat was not significant, some Americans were concerned about insurrection and resistance to the draft. This fear was not entirely unfounded. More than one-fifth of the American population was of German descent, and 300,000 (the equivalent of one million men in the American population today) evaded the draft.<sup>10</sup>

The government had already enacted several criminal

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6 *Id.*

7 *Clear and Present Danger*, in *LANDMARK DECISIONS OF THE UNITED STATES SUPREME COURT III 19* (Maureen Hartison & Steve Gilbert eds., Excellent Books, 2007).

8 ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 26 (Antheneum, 1969).

9 ANASTAPLO, *supra* note 4, at 102.

10 *Id.*

statutes during the Civil War, under which it could prosecute individuals resisting recruitment by invoking riots, giving speeches, and releasing publications to evade the draft.<sup>11</sup> The Department of Justice felt these statutes were insufficient, however, and proceeded to enact the Espionage Act of 1917,<sup>12</sup> the federal law in question in the *Schenck* case.<sup>13</sup> This act was a major effort to promote national unity at the expense of individual freedom. It prohibited individuals from obstructing military recruiting, hindering enlistment, or promoting insubordination among the armed forces of the United States.<sup>14</sup> The Espionage Act was quickly followed by an amendment (sometimes called the Sedition Act) on May 16, 1918. This amendment added additional offenses, making it a crime to interfere with the sale of war bonds. The Sedition Act also prohibited saying or publishing anything disrespectful to the government of the United States.<sup>15</sup>

Next, one must examine the defendants and the details of the *Schenck* case. Charles Schenck was the General Secretary of the Socialist Party of America, which was opposed to America's entry into the war and to the instatement of the draft.<sup>16</sup> He, along with the other defendants, sent 15,000 leaflets to men in Philadelphia, encouraging draftees to "assert their rights" by resisting

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11 CHAFEE, *supra* note 8, at 37.

12 *Id.*

13 249 U.S. at 48.

14 Espionage Act of 1917, 18 U.S.C. §3 (1917).

15 Sedition Act of 1918, ch. 75, 40 Stat. 553 (1918), repealed by Act of Mar. 3, 1921, ch. 136, 41 Stat. 1359 (1921); See 60 CONG. REC. 293-94, 4207-08 (1921).

16 LANDMARK DECISIONS, *supra* at 19.

the draft.<sup>17</sup> Schenck was arrested and charged under the Espionage Act of 1917. He was convicted in federal district court on December 20, 1917. He subsequently appealed his conviction to the Supreme Court, which granted review.<sup>18</sup> Oral arguments were heard by the Court on January 9-10, 1919.<sup>19</sup> Schenck's lawyers made three arguments: the evidence was not sufficient to prove that Schenck was responsible for sending the pamphlets, the information was not admissible because it was obtained without a search warrant, and finally, the pamphlets were covered under the First Amendment free speech clause which prohibits Congress from creating legislation to abridge the freedom of speech.<sup>20</sup> The Court quickly dismissed the first two objections and confronted the third.<sup>21</sup>

The Supreme Court's main decision was whether or not the Espionage Act was actually constitutional. The Court decided that the Espionage Act of 1917 was legitimate. The Court announced the unanimous opinion on March 3, 1919, which was written by Justice Oliver Wendell Holmes Jr.<sup>22</sup> He admitted that "in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights."<sup>23</sup> However, he also noted that the constitutionality of all speech depends on the circumstances in which it is spoken.

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17 249 U.S. at 51.

18 WEST'S ENCYCLOPEDIA, *supra* note 2 at 13.

19 LANDMARK DECISIONS, *supra* note 6 at 19.

20 249 U.S. at 48-50.

21 *Id.*

22 LANDMARK DECISIONS, *supra* note 6 at 19.

23 249 U.S. at 51.

For example, the freedom of speech does not permit a person to falsely yell fire in a crowded theatre. Holmes noted that in every case one must consider “whether the words are used in such circumstances that are of such a nature as to create a clear and present danger that they will bring about substantive evils that Congress has a right to prevent.”<sup>24</sup> By writing this opinion, Holmes established the influential, and now idiomatic, expression – “clear and present danger” as a test for what kind of speech is covered under the First Amendment free speech clause.

*Schenck v. United States* created a drastic and unnecessary limitation to the previously expansive rights of free speech. Sending political dissenters to jail simply for voicing their opinions is something one associates with tyranny, not with a constitutional republic. Moreover, the *Schenck* opinion lacks any indication to why Americans should value freedom of speech. Holmes admits that in other places and times the defendants would have been within their political rights, but this statement only adds insult to injury. Holmes tells the defendants they have a constitutional right to dissent only some of the time. In fact, the ideas expressed in the leaflets disseminated by Schenck could have been published at that time in any of the country’s larger newspapers without any risk.<sup>25</sup> The attempt by the administration to have a press censorship provision included in the Espionage Act had failed.<sup>26</sup> Thus, vigorous criticism of the government by media organizations continued. The only real effect of the *Schenck* decision was to set an

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24 *Id.*

25 ANASTAPLO, *supra* note 4, at 104.

26 *Id.*

unfortunate precedent in First Amendment law at the expense of individual dissenters.

Proponents of the decision in *Schenck v. United States* argue that Holmes's "clear and present danger" restraint on the freedom of speech was necessary to ensure national security. They would agree with Harvard Law Professor Zechariah Chafee, Jr. who wrote in reference to the decision in *Schenck* that "the concept of freedom of speech received for the first time an authoritative judicial interpretation in accord with the purpose of the framers of the Constitution."<sup>27</sup> However, this opinion is difficult to support considering the history of free speech, as well as the events which followed the case. As previously mentioned, freedom of speech was very important to the founders. Many forefathers were afraid the new government would transform into a monarchy and wanted to prevent individuals in power from stifling the freedoms of citizens.

The *Schenck* decision set a precedent that led to further Court decisions which continued to deteriorate Americans' right to free speech. Two of these cases occurred in 1919, the same year the *Schenck* case was decided. The restrictive nature of the "clear and present danger" clause was first expanded in *Debs v. United States*, decided only one week after *Schenck*. In *Debs*, the defendant, Eugene V. Debs, a famous Socialist leader and five-time candidate for the U.S. presidency, gave a speech to a crowd in which he advocated socialism and expressed anti-war beliefs.<sup>28</sup>

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27 CHAFEE, *supra* note 8, at 82.

28 *Debs v. United States*, 249 U.S. 211, 212-213 (1919).

The defendant was indicted under the Espionage Act. The Court upheld the conviction, further restricting free speech based merely upon the presumed purpose of the speech.<sup>29</sup>

Later that same year, the Court uncovered the difficulty in applying the “clear and present danger test” when it decided *Abrams v. United States*.<sup>30</sup> In *Abrams*, the defendants were charged with publishing disloyal materials while the United States was at war with Germany, intending to cause resistance to the war in the United States.<sup>31</sup> The Court affirmed the defendants’ convictions.<sup>32</sup> In this case, however, Holmes famously dissented because the court extended his “clear and present danger” test too far.<sup>33</sup> He tried to salvage this misuse of the Constitution by stating “the ultimate good desired is better reached by free trade in ideas... That at any rate is the theory of our Constitution.” He continued with “we should be eternally vigilant against attempts to check the expression of opinions that we loathe” unless “an immediate check is required to save the country.”<sup>34</sup> Thus, even Holmes recognized that this limitation of free speech as established by the *Abrams* case had been extended beyond its original purpose.

*Gitlow v. New York* (1925) further complicated the freedom of speech precedent. The defendants in this case were convicted in violation of N.Y. Penal Law §§ 160 and 161 for helping

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29 *Id.* at 217.

30 *Abrams et al. v. United States*, 250 U.S. 616, 616 (1919).

31 *Id.* at 616-617.

32 *Id.* at 624.

33 *Id.* at 627-629.

34 *Id.* at 630.

publish a manifesto for the Socialist party.<sup>35</sup> In this decision, Justice Sanford wrote that the “clear and present danger” test could be applied only to a statute prohibiting a particular type of action, rather than prohibiting a particular type of utterance.<sup>36</sup> Thus, if a legislative body determined that a specific type of speech threatened to cause enough harm to justify legislative action, then the Court would defer to its judgment.<sup>37</sup> If the law was determined not to be arbitrary, and if a specific utterance actually fell within the type prohibited by law, then the courts could not intervene further. Holmes dissented in this case as well, because “there was no present danger of an attempt to overthrow the government by force on the part of the admittedly small minority who shared the defendant’s views.”<sup>38</sup> The test Holmes created had become a tool for expansive restrictions on the free speech clause against his own wishes.

The freedom of speech was also addressed in *Whitney v. California*, in which Anita Whitney appealed a judgment of the District Court of Appeal of California that affirmed her conviction under the California Criminal Syndicalism Act, based on her membership in and organization of the Communist Labor Party of California.<sup>39</sup> The Court further affirmed her conviction, and it found that the Act was not an unreasonable or arbitrary exercise of police power or unwarrantably infringing any right of free speech,

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35 *Gitlow v. New York*, 268 U.S. 652, 654 (1925).

36 *Clear and Present Danger Re-Examined*, 51 COLUM. L. REV. 102 (1951).

37 *Id.*

38 1925 U.S. at 673.

39 *Whitney v. California*, 274 U.S. 357, 359 (1927).



assembly, or association.<sup>40</sup> Justice Sanford, who wrote the majority opinion, relied on *Schenck* for this decision, stating “the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent.”<sup>41</sup> Hence, once again, the court used *Schenck* to further restrict freedom of speech in America.

Eventually, the Court recognized that the “clear and present danger” test was not sufficient. In fact, the old test was replaced with the “not improbable” test via the decision in *Dennis v. United States* (1951). In *Dennis*, the defendants, members of the Communist Party, were convicted of violating the Smith Act (18 U.S.C.S. § 11) by conspiring to advocate the overthrow of the United States.<sup>42</sup> Judge Learned Hand renounced the majority opinion’s distinction in the *Gitlow* decision, but achieved its result by a more radical approach. He wrote: “In each case [courts] must ask whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.”<sup>43</sup> Hence, he eliminated the independent requirement of imminence and indicated the importance of probability in calculating the severity of the evil. Thus, he concluded it is unnecessary that a danger be imminent for it to be a highly probable effect of an utterance. Although the Supreme Court adopted this new “not improbable” test, it would not remain in use for long.

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40 *Id.* at 371.

41 *Id.* at 373.

42 *Dennis v United States*, 341 U.S. 494, 295 (1951).

43 *Id.* at 510.

In *Brandenburg v. Ohio* (1969), the Court was once again faced with a case concerning the First Amendment, and its decision created a new test, the “imminent lawless action” test. Brandenburg, the petitioner, was a leader of the Ku Klux Klan. After a television news report aired, which broadcasted speeches made by Brandenburg, he was charged with violating Ohio’s criminal syndicalism statute, Ohio Rev. Code Ann. § 2923.13.<sup>44</sup> The code made it illegal to advocate crime or terrorism or to assemble with any group to teach or to advocate doctrines of syndicalism.<sup>45</sup> Thus, the Ohio courts arrested and convicted Brandenburg. After the conviction was upheld by the Ohio Supreme Court, the case was heard on appeal by the Supreme Court. The Court found that Ohio’s criminal syndicalism statute unconstitutionally intruded on the rights guaranteed by the First Amendment, made applicable to the states by the Fourteenth Amendment, because the statute did not draw a distinction between teaching the need for force or violence and preparing a group for violent action. Thus, the Court reversed the petitioner’s conviction because the statute upon which his conviction was based was unconstitutional. The author of the *per curiam* decision wrote “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing *imminent lawless action* and is likely to incite or produce such action” (emphasis added).<sup>46</sup> Additionally, Justice Douglas writes

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44 *Brandenburg v Ohio*, 395 U.S. 444, 445 (1969).

45 *Id.*

46 *Id.* at 447.

in the concurring opinion, “I see no place in the regime of the First Amendment for any ‘clear and present danger’ test, whether strict and tight as some would make it, or free-wheeling as the Court in *Dennis* rephrased it.”<sup>47</sup> Hence, the “clear and present danger” test and the “not improbable” test were discredited and replaced with the “imminent lawless action” test.

The Supreme Court sometimes arrives at the wrong conclusion in a case. In this event, the country must live with the consequences. Based on the rights granted by the First Amendment of the United States Constitution, Holmes and the rest of the Supreme Court wrongly decided *Schenck v. United States*. The “clear and present danger” test which Holmes created was used as a tool to violate the Founders’ original intention for the freedom of speech. Holmes quickly discovered the difficulties of his test in cases such as *Abrams* and *Gitlow*. As time passed after the *Schenck* decision, the Court recognized the problems with Holmes’s original test. Thus, the Supreme Court as a whole rejected and replaced the test in *Dennis v. United States* and *Brandenburg v. Ohio*. In retrospect, it appears the *Schenck* decision and the decisions that followed closely after it were a result of the distress caused by war. Even today, the consequences of *Schenck* are being played out with the expansion of government power in the wake of the War on Terror, as seen through the Patriot Act and the alleged electronic eavesdropping by the United States government.

The many freedoms which Americans enjoy constitute America’s greatness. The freedom of speech is a precious right

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47 *Id.* at 454.

granted to the American people through the Constitution. Restrictions of this right should be established only when it is absolutely necessary, and *Schenck v. United States* resulted in an unnecessary and dangerous restriction. *Schenck* serves as a cautionary tale for the next generation of political figures and judges that exceptions made to important freedoms can eventually swallow the overall rule. Justices, legislators, and citizens of the United States need to work within their power to prevent similar unnecessary restrictions and to remove needless limitations already established.



# JUS COGENS: THEORY, CASE STUDIES, JUSTIFICATIONS AND PROBLEMS OF INTERNATIONAL PEREMPTORY NORMS

*Samuel J. Johnson\**

*ABSTRACT: The concept of sovereignty in international law entails that states are only limited by international law with their consent; if states do not consent to a rule, they are not bound by it. The theory of jus cogens, or peremptory norms, seeks to carve out an exception to this general requirement, binding states regardless of their consent. Despite the popularity of the goals of jus cogens, no consensus yet exists about how to identify or justify peremptory norms. This article employs three case studies – the alleged jus cogens norms against genocide and juvenile capital punishment – to illustrate some of the issues typical to the debate. It then addresses several major theories of jus cogens and examines the advantages and failings of each.*

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The concept of peremptory norms, or binding higher law, is hardly a novel notion in the legal realm. However, the theory of *jus cogens* in international law is deeply debated, with its foundations uncertain and its substance unclear. *Jus cogens* norms have the potential to serve as a vital minimum standard in the realm of international law, providing legal warrant for intervention to prevent atrocities. Yet until the justifications, criteria, content, and mechanisms of international peremptory norms are far more settled than at present, they cannot fulfill their purpose effectively. Despite widespread acceptance of the concept of *jus cogens*,<sup>2</sup> no consensus exists about how to justify or to determine these peremptory norms, leaving some scholars to remark that “*jus cogens* remains a popular concept in search of a viable theory.”<sup>3</sup> The examination of three case studies – the asserted *jus cogens* prohibitions on genocide, the threat or use of nuclear weapons, and juvenile capital punishment – clarifies the contours of the modern debate and reveals the outworking of several conflicting theories of *jus cogens* norms.

The intended goal of *jus cogens* norms is straightforward: peremptory norms invalidate any contrary treaties or agreements. Article 53 of the Vienna Convention on the Law of Treaties (VCLT) declares any treaty which violates a peremptory norm “at the time of its conclusion” void *ab initio*,<sup>4</sup> while Article 64 of the

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2 Gordon A. Christenson, *The World Court and Jus Cogens*, 81 AM. J. INT’L L., 95 (1987).

3 Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT’L L., 345 (2009).

4 Vienna Convention on the Law of Treaties art. 53, Jan. 27, 1980, 1155 UNTS 331, 8 ILM 679 (1969), 63 AJIL 875.

VCLT states that any provisions of a treaty which conflict with a subsequently emergent peremptory norm “become void and terminate.”<sup>5</sup> Thus, in theory, rules of *jus cogens* serve as limitations on the freedom of states to conduct their international affairs: nations may only create contractual obligations through the use of treaties and other international agreements within the framework of peremptory norms.

The prohibition on genocide is one of the most foundational and accepted peremptory norms.<sup>6</sup> Even the Convention on the Prevention and Punishment of the Crime of Genocide says that it exists only to “confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law” (emphasis added).<sup>7</sup> The prohibition on acts of genocide illustrates the potential of *jus cogens* norms to create a baseline for international actors and to provide a legal justification for international actions to counter violations.

Still, the practical utility of a *jus cogens* prohibition on

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5 *Id.* at 64

6 See e.g. International Law Commission, *Report on the work of its fifty-eighth session (1 May to 9 June and 3 July to 11 August 2006)*, ¶188 (2006); Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 *LAW AND CONTEMPORARY PROBLEMS* 68 (1996); Kamrul Hossain, *The Concept of Jus Cogens and the Obligation under the U.N. Charter*, 3 *SANTA CLARA JOURNAL OF INTERNATIONAL LAW* 3, 84-85 (2005). Mary Ellen O’Connell, *Jus Cogens: International Law’s Higher Ethical Norms*, 11 *NOTRE DAME LEGAL STUDIES PAPER*, 84-86 (2012); Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 82 *AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW*, 95 (1988).

7 Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9 1948, S. Exec. Doc. O, 81-1 (1949), 78 U.N.T.S. 277, art 1.



genocide has been critiqued.<sup>8</sup> Schwelb argues that such a prohibition would only be meaningful if several states concluded a treaty agreeing to commit genocide, one of the parties subsequently refused to fulfill their obligations under the treaty, and one of the other parties to the treaty sued the refusing state for non-performance. In such a situation, *jus cogens* would render the agreement void. Obviously, this type of hypothetical situation seems far-fetched at best. Schwelb also points out that any treaty that violated a peremptory norm forbidding genocide would already have run afoul of Articles 55 and 56 of the UN Charter, making it invalid under Article 103 of the Charter, which invalidates any treaty that conflicts with an Article of the UN Charter.<sup>9</sup> Thus, the invocation of *jus cogens* would be redundant.<sup>10</sup> Naturally, if *jus cogens* norms were applied to states' *internal* affairs, Schwelb's objection would be answered,<sup>11</sup> although this approach renders the *international* law character of *jus cogens* even more tenuous. The International Law Commission has also noted that *jus cogens* norms place substantive limitations on resolutions of the UN Security Council which would otherwise be absent. Chapter

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8 Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AMERICAN SOCIETY OF INTERNATIONAL LAW, 955 (1967).

9 U.N. Charter art. 55, para. C.

10 Schwelb, *supra* note 7, at 955.

11 Kha Q. Nguyen, *In Defense of the Child: A Jus Cogens Approach to the Capital Punishment of Juveniles in the United States*, 28 GEORGE WASHINGTON JOURNAL OF INTERNATIONAL LAW & ECONOMICS, 420 (1995). See Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?*, 101 AMERICAN SOCIETY OF INTERNATIONAL LAW, 100-101 (January 2007). *But see* Criddle & Fox-Decent, *supra* note 2, at 345; Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT'L L., 297-298 (2006).

VII actions of the Security Council are normally preeminent under Article 103 of the UN Charter, so if the UN Security Council were to pass a resolution that implicitly or explicitly violated the prohibition on genocide, or any other peremptory norm, it would be void under *jus cogens* theory.<sup>12</sup>

The debate over the existence of a *jus cogens* prohibition on the threat or use of nuclear weapons reveals the difficulties in determining the substance of specific *jus cogens* norms. The central authority on this topic is an advisory opinion provided by the International Court of Justice (ICJ) in response to a request by the U.N. General Assembly.<sup>13</sup> In 1996, a number of non-nuclear states asserted that any threat or use of nuclear weapons would violate international law, which would also make the possession of such weapons illegal.<sup>14</sup> The ICJ first dealt with two preliminary questions, holding that neither treaty obligations nor a rule of customary international law rendered nuclear weapons per se illegal under international law,<sup>15</sup> leaving the opposing states to argue that the nature of nuclear weapons violated a norm of *jus cogens*.<sup>16</sup>

Two arguments were advanced to justify invoking *jus cogens*. First, nuclear weapons are inherently non-discriminating

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12 International Law Commission, *supra* note 5, at 176; see Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, II-3544, para. 281.

13 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 228 (July 8).

14 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 246, para. 47 (July 8).

15 *Id.*, at 252-253, para. 60-62, 67.

16 *Id.*, at 254, para. 67.

and therefore violate the peremptory norm requiring distinction between combatants and civilians.<sup>17</sup> Second, nuclear weapons have effects well beyond the territory of the belligerents, affecting third parties and violating the principle of neutrality.<sup>18</sup> The ICJ held that the use of nuclear weapons in practice seemed “scarcely reconcilable” with the principle of discrimination, and it could not “conclude with certainty” that the use of nuclear weapons would *always* be impermissible.<sup>19</sup> Notably, while the nuclear states ceded that most uses envisioned for nuclear weapons, such as targeting enemy cities as a matter of deterrence, would be clearly illegal, they instead relied upon hypothetical situations where smaller, low yield, tactical nuclear weapons were employed specifically against enemy combatants.<sup>20</sup> Finally, the Court also declined to hold that the effects on third parties, although certainly troubling, were enough to create a *jus cogens* prohibition on all nuclear weapons.<sup>21</sup>

While the ICJ ultimately held that the use or threat of nuclear weapons was not *always* illegal, and thus responded in the negative to the question posed, its ruling raises serious questions about the legality of most conceivable uses of nuclear weapons. Significantly, the ICJ was evenly split, 7-7, and the President’s vote served as the tiebreaker.<sup>22</sup> In its concluding remarks, the ICJ unanimously declared the fulfillment of the “long promised com-

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17 *Id.*, at 257, para. 78; 262.

18 *Id.*, at 261, para. 89-90.

19 *Id.*, at 262-263, para. 95.

20 *Id.*, at 262, para. 92-94.

21 *Id.*, at 261, para. 89-90.

22 *Id.*, at 266, para. 105(2)(E).

plete nuclear disarmament” as “the most appropriate means” of settling such divisive issues.<sup>23</sup> The ICJ’s decision implicates serious quandaries of ethics and public policy regarding the threat or use of nuclear weapons, but it also calls attention to the potential disconnect between international law jurisprudence and actual state practice by declaring all threats of nuclear retaliation upon cities for the purpose of deterring enemy attacks to be *per se* illegal.

Capital punishment, particularly for juveniles, has caused significant opposition and sparked claims that it violates a rule of *jus cogens*. The decision of the Inter-American Commission on Human Rights (Inter-American Commission) in the case of *Michael Domingues v. United States* is one of the most notable discussions of this alleged norm of *jus cogens*. The Inter-American Commission was unequivocal in its assertion that “the [United States] has acted contrary to an international norm of *jus cogens* by sentencing Michael Domingues to the death penalty for a crime that he committed when he was 16 years of age.”<sup>24</sup> Michael Domingues committed two homicides, for which he was sentenced to death by a jury in Nevada in 1993.<sup>25</sup>

The Inter-American Commission discussed the treaty obligations of the United States in depth during its decision. It noted that the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party, prohibits juvenile

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23 *Id.* at 263, para. 99.

24 *Michael Domingues v. U.S.*, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, ¶ 5 (2002).

25 *Id.* at ¶ 3.

executions.<sup>26</sup> While the United States had taken a reservation to that provision of the ICCPR<sup>27</sup> and no domestic U.S. court even discussed the potential that that reservation was invalid,<sup>28</sup> the Inter-American Commission ignored the reservation.<sup>29</sup> Eleven European States Parties to the ICCPR had filed objections declaring the United States' reservation invalid, and the 1995 U.N. Human Rights Committee declared the reservation to be contrary to the object and purpose of the ICCPR and urged the United States to withdraw its reservation.<sup>30</sup> Thus, even though the U.S. ratified the ICCPR with the specific understanding that it did not preclude the application of capital punishment to juveniles, its status as a party to the ICCPR was employed to justify holding that a binding norm of *jus cogens* was violated by the execution of any juvenile.

The Inter-American Commission also relied on Article 68 of the Fourth Geneva Convention of 1949, to which the United States is also a party, which prohibits juvenile capital punishment during times of armed conflict or occupation.<sup>31</sup> The United States took no reservation against Article 68 of that treaty. Thus, the Inter-American Commission reasoned that if the United States' international treaty obligations prohibited it from imposing capital punishment on juveniles during times of occupation, it hardly made sense to permit such a punishment to be inflicted on US

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26 *Id.* at ¶ 13.

27 *Id.*

28 *Id.*, ¶ 31, 32.

29 *Id.*, ¶ 85.

30 *Id.*, ¶ 62.

31 *Id.*, ¶ 19.

citizens during times of peace.<sup>32</sup> While the intent of the United States in ratifying the Fourth Geneva Convention was clearly not to render domestic capital punishment of juveniles illegal given its subsequent reservations to treaties such as the ICCPR, the Inter-American Commission's line of logic is at least plausible. However, even despite accepting the Inter-American Commission's treaty analysis *arguendo*, it does nothing to establish the existence of a rule of *jus cogens* forbidding juvenile capital punishment. The explicit purpose of *jus cogens* theory is that peremptory norms exist independent of voluntary obligations, such as treaties.

Beyond the Inter-American Commission's ruling in *Domingues v. United States*, various scholars have asserted the existence of *jus cogens* norms prohibiting, at minimum, the execution of juveniles.<sup>33</sup> The justifications advanced by Nguyen to demonstrate a *jus cogens* prohibition against juvenile capital punishment are revealing. She asserts that "most nations have outlawed the capital punishment of children either by law or by practice," noting that 34 countries have abolished the death penalty for all crimes and another 84, by signing the ICCPR, are presumed to have limited the application of capital punishment to only those aged 18 or older.<sup>34</sup> Yet, as Nguyen admits, this statistic leaves roughly 100 nations which still may legally execute juveniles.<sup>35</sup> However, she asserts that since only seven states are known to have executed juveniles in the prior decade, a common practice

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32 *Id.* ¶ 67.

33 Nguyen, *supra* note 10, at 402.

34 *Id.* 423-424.

35 *Id.*

against juvenile capital punishment existed, and the “nearly universal character of this opposition indicates that this prohibition is a *jus cogens* norm.”<sup>36</sup> But Nguyen never shows how this absence of executions, even assuming that the reporting is reliable, evinces the necessary *opinio juris* requisite to render the norm customary international law, much less a peremptory norm. Critically, to constitute the necessary *opinio juris*, the state practice must stem from a feeling of obligation from *international law*; Nguyen fails to offer any evidence that these states are eliminating juvenile executions out of a sense of international legal obligation rather than domestic policy.

Yet, at the same time as Nguyen claims that a rule of *jus cogens* prohibits all juvenile executions, for any reason, at any time, in any place, she admits, “This rule is arguably unenforceable in U.S. courts.”<sup>37</sup> The existence of “unenforceable” peremptory norms seems self-contradictory and reveals the potential dangers of extending *jus cogens* to cover highly contested norms such as those prohibiting juvenile capital punishment. Shelton warns that when human rights institutions assert supremacy over state practice, wholly apart from the actual state practice, it weakens the entire system.<sup>38</sup> Employing a “conventional constructivist” theory of social-structural constraints on state actors and decision-making agents, Shannon asserts that such ambiguity undermines

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36 *Id.* 423-424.

37 *Id.* 402.

38 Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L., 292 (2006).

the efficacy of *all* norms.<sup>39</sup> When human rights institutions attempt to assert binding authority over the actions of states in contested realms of public policy, they threaten their own legitimacy, with scholars expressing “considerable misgivings about the means used” even when they fully agree with the end result.<sup>40</sup>

At the end of the day, it appears that fears of international institutions losing legitimacy through overstretch have significant warrant. As the United States Supreme Court held in *Graham v. Florida* concerning life sentences without parole for juvenile offenders convicted of non-homicide offenses:

The debate between petitioner’s and respondent’s *amici* over whether there is a binding *jus cogens* norm against this sentencing practice is likewise of no import . . . . The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world’s nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court’s rationale has respected reasoning to support it.<sup>41</sup>

According to international *jus cogens* theory, the Supreme Court’s

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39 Vaughn P. Shannon, *Norms Are What States Make Of Them: The Political Psychology of Norm Violation*, 44 INTERNATIONAL STUDIES QUARTERLY, 304 (2000).

40 Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 82 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW, 85 (1988).

41 *Graham v. Florida*, 130 U.S. 2011, 2034 (2010).



reasoning is simply wrong; *jus cogens* norms are binding and may not be set aside by any nation for any reason. Yet as O'Connell has noted, "With the rise of litigation in international law, especially in the area of human rights, expansive claims are being made respecting *jus cogens* norms that have little support."<sup>42</sup> The perceived authority of international law is weakened even when states reach the same conclusion as international institutions; for instance, in *Roper v. Simmons*, the U.S. Supreme Court held that juvenile executions violate the Eighth Amendment, but explicitly stated that the "international opinion against the juvenile death penalty" was "not controlling."<sup>43</sup> When international institutions overstep the bounds of their powers, such as by declaring the existence of *jus cogens* norms prohibiting juvenile capital punishment, their theoretical authority remains actualized only in theory.

Thus, the debate over the possibility of a peremptory norm prohibiting capital punishment of juveniles displays the necessity of clearly defining the hierarchy of international norms and their interaction with domestic law systems. As Friedmann remarks in his influential *The Changing Structure of International Law*, "In due course the international legal order will no doubt either have to be equipped with a more clearly established hierarchy of norms, and more powerful sanctions, or decline and perish."<sup>44</sup> The need for theoretical clarity and crystallization, especially for rules of *jus cogens*, has been echoed among numerous interna-

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42 Mary Ellen O'Connell, *Jus Cogens: International Law's Higher Ethical Norms*, 11 NOTRE DAME LEGAL STUDIES PAPER, 79-80 (2012).

43 *Roper v. Simmons*, 543 U.S. 551, 579 (2005).

44 WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, 88 (Columbia University Press, 1964).

tional law scholars. As Hossain warns, “There is a growing danger that in the absence of clearly defined procedures for the creation of peremptory norms, their emergence and subsequent identification may become a matter of conflicting assertions reflecting political preference of different groups or states.”<sup>45</sup> This fear has already been at least partially realized; Simma and Alston note that many American lawyers and experts have simply premised that “internationally recognized human rights” are identical to and coextensive to the United States Bill of Rights,<sup>46</sup> and they opine that “it is possible to view [that practice] as an instance of what might be termed normative chauvinism, albeit of an unintentional or subconscious variety.”<sup>47</sup> Reassuring speculations about the intent behind this “normative chauvinism” aside, the absence of a widely agreed upon framework for identifying and defining *jus cogens* norms threatens to embroil and to possibly destroy the theory of peremptory norms in the realm of politics. With experts wondering “whether the *jus cogens* concept is anything other than a club with which academics beat each other,”<sup>48</sup> the importance of finding a viable, comprehensive theory of *jus cogens* cannot be overstated.

Several overarching philosophical and legal theories have been advanced to justify the existence and substance of binding rules of *jus cogens*. Any viable theory must discern a coherent

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45 Kamrul Hossain, *The Concept of Jus Cogens and the Obligation under the U.N. Charter*, 3 SANTA CLARA JOURNAL OF INTERNATIONAL LAW 3, 85 (2005).

46 Simma & Alston, *supra* note 39, at 94-95.

47 *Id.* at 95.

48 A. Mark Weisburd, *American Judges and International Law*, 36 VANDERBILT JOURNAL OF TRANSNATIONAL LAW, 1502-1503 (2003).

method both to justify that peremptory norms bind states even against their consent and to uncover the precise substance of these peremptory norms. Positivism is currently the general predominant school of thought in international law and arguably so in the sphere of *jus cogens*.<sup>49</sup> The other primary approach relies on natural law theories, which perceive the law as a manifestation of moral principles.<sup>50</sup> Natural law formed the original foundation for conceptions of *jus cogens*<sup>51</sup> and remained central during the early codification of peremptory norms,<sup>52</sup> although natural law justifications have since fallen into general disfavor.<sup>53</sup> Other schools of thought assert that *jus cogens* norms may be justified by considerations of public order<sup>54</sup> or by fiduciary theories of governmental legitimacy.<sup>55</sup> In short, the marketplace of ideas is filled with theories attempting to solve the problems facing *jus cogens*, but so far none have managed to obtain a monopoly.

Positivism has many advantages as a foundational theory for *jus cogens*. By holding that all rules of international law derive their authority from sovereign consent, positivism aligns

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49 Criddle & Fox-Decent, *supra* note 2, at 78. See O'Connell, *supra* note 41, at 33. *But see* O'Connell *supra* note 31, at 78.

50 Nguyen, *supra* note 10, at 417.

51 International Law Commission, *Report on the work of its fifty-eighth session (1 May to 9 June and 3 July to 11 August 2006)*, ¶190 (2006).

52 Shelton, *supra* note 37, at 295-297.

53 Criddle & Fox-Decent, *supra* note 2, at 78. See O'Connell, *supra* note 41, at 33. *But see* O'Connell *supra* note 31, at 86.

54 Shelton, *supra* note 37, at 291. *But See* Criddle & Fox-Decent, *supra* note 2, at 78. See O'Connell, *supra* note 41, at 33. *But see* O'Connell *supra* note 31, at 344; Schwelb, *supra* note 7, at 948.

55 Criddle & Fox-Decent, *supra* note 2, at 347.

directly with the Westphalian emphasis on state sovereignty.<sup>56</sup> As the Permanent Court of International Justice held, “The rules of law binding upon States . . . emanate from their own free will.”<sup>57</sup> Positivism also ensures that legal theory and state practice remain closely aligned.<sup>58</sup> Normative views based on sources aside outside of “hard law,” such as natural law theories, lead to “an enormous gap between asserted customs and state practice.”<sup>59</sup> Since positivism derives the content of its norms from state practice and affirmative voluntary agreements,<sup>60</sup> states are more likely to comply with the norms established through such a process.<sup>61</sup>

But perhaps positivism’s greatest asset in the debate over rules of *jus cogens* is its capacity to offer clarity.<sup>62</sup> As Simma and Paulus note, positivism avoids the debate over “international law as it is” versus “international law how it should be.”<sup>63</sup> Weiler and Paulus state that the question which positivism seeks to answer, “*Is there a hierarchy of norms in international law,*” focuses on objective reality, rather than on whether there *ought* to be such a hier-

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56 Shelton, *supra* note 37, at 291.

57 S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7). See also Shelton, *supra* note 37, at 299.

58 Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 92 AM. SOC. INT’L L., 758 (2001).

59 *Id.* at 769.

60 Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT’L L., 303-304 (April 1999).

61 See Christenson, *supra* note 1, at 100.

62 Simma & Paulus, *supra* note 59, at 303.

63 *Id.*

archy.<sup>64</sup> Still, debate remains over whether so-called “soft-law,” such as “the teachings of the most highly qualified publicists,”<sup>65</sup> has a place in positivist views, with some scholars declaring that “classical positivism” rejects all soft law<sup>66</sup> and others arguing that “enlightened positivism” permits the use of soft-law as a subsidiary source beneath state practice and agreements.<sup>67</sup> Nonetheless, positivism’s emphasis on providing answers based on actual state practice and the text of legal agreements enables positivism to provide decision-makers of all types with enhanced clarity.<sup>68</sup>

However, positivism also faces significant objections. The New Haven school of international law rejects positivism’s assertion that law can be value neutral, instead declaring that the purpose of law must be protecting “the inherent and equal value of every human being.”<sup>69</sup> Reliance upon positivism also appears problematic in practice. Simma and Alston characterize treaty law as providing “an ultimately unsatisfactory patchwork quilt of obligations and still continues to leave many states largely untouched.”<sup>70</sup> As Weisburd alleges, “The only examples of state practice apparently embodying the *jus cogens* concept are rhetorical.”<sup>71</sup> Further, the prohibitive nature of most *jus cogens*

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64 J.H.H. Weiler & Andreas L. Paulus, *The Structure of Change in International Law or Is there a Hierarchy of Norms in International Law?*, 8 EUR. J. INT’L L., 549 (1997).

65 Statute of the International Court of Justice art. 38, para. 1(d).

66 Simma & Paulus, *supra* note 59, at 304.

67 *Id.* at 307-308.

68 *Id.* at 304-305.

69 Weiler & Paulus, *supra* note 63, at 549.

70 Simma & Alston, *supra* note 39, at 82.

71 Weisburd, *supra* note 47, at 1491.

norms makes identifying any form of *opinio juris* difficult; how can international institutions distinguish a state that upholds an allegedly *jus cogens* norm for wholly domestic reasons from one that does so because it believes that international law obligates it to act in that particular way? <sup>72</sup> With “the gap between legal expectations and legal reality [remaining] quite wide,”<sup>73</sup> even in subjects covered by positive law agreements, whether positivism works in practice at justifying *jus cogens* norms remains questionable.

But the strongest objection to positivism is its inability to justify the existence of *peremptory* norms. Since positivism is a consensualist theory, how can it warrant overriding states’ consent, claiming that rules of *jus cogens* apply to all states whether they agree? The term *jus cogens* literally means “the compelling law,”<sup>74</sup> so state consent may not be relied upon for justification.<sup>75</sup> In addition, as Hossain explains, rules of *jus cogens* cannot be derived from treaties for two reasons. First, a treaty cannot bind its parties’ ability to modify the treaty terms or remove obligations through subsequent treaties. Second, none of the treaties that codify the various *jus cogens* norms have been universally ratified.<sup>76</sup> Custom is also insufficient, since persistent objection creates an

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72 Mac Darrow & Louise Arbour, *The Pillar of Glass: Human Rights in the Development Operations of the United Nations*, 103 AM. SOC. INT’L L., 446-501 (July 2009).

73 Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW AND CONTEMPORARY PROBLEMS ,66 (1996).

74 *Id.* at 67.

75 *See, e.g.,* O’Connell, *supra* note 31, at 84.

76 Hossain, *supra* note 44, at 77-78.

exception to rules of customary international law.<sup>77</sup>

Some positivist scholars have interpreted Article 53 of the VCLT to require general, rather than unanimous, consent. Since Article 53 of the VCLT describes peremptory norms as “a norm accepted and recognized by the international community of States *as a whole* as a norm from which no derogation is permitted” (emphasis added),<sup>78</sup> *jus cogens* norms may be imposed even if some objectors remain in the international community.<sup>79</sup> However, while consensus theories, based on the agreement of a representative supermajority,<sup>80</sup> may eliminate the need for unanimous individualized state consent, it does not explain why one group (even an extremely large group) may impose obligations on other states against their consent.<sup>81</sup> This objection threatens to render the concept of positivist peremptory norms that override state consent virtually incoherent: either all rules of international law derive from state consent (positivism) or some rules override state consent (non-positivism).<sup>82</sup> Thus, while positivism may offer greater clarity on the content of *jus cogens* norms than do other approaches, it cannot successfully justify why peremptory norms exist at all.

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77 *Id.* at 78.

78 Vienna Convention on the Law of Treaties art. 53, Jan. 27, 1980, 1155 UNTS 331, 8 ILM 679 (1969), 63 AJIL 875.

79 E.g. Hossain, *supra* note 31, at 80-81; Geoffrey Sawyer, *The Death Penalty Is Dead Wrong: Jus Cogens Norms and the Evolving Standard of Decency*, 22 PENN ST. INT'L L. REV., 469-470 (Summer 2004); Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. SOC. INT'L L., 537-538 (1970).

80 Hossain, *supra* note 44, at 80-81.

81 Criddle & Fox-Decent, *supra* note 2, at 341-342.

82 O'Connell, *supra* note 31, at 83-84.

Unlike positivism, natural law offers the ability to clearly justify the existence of *jus cogens* norms. O'Connell asserts that "positivism-plus" is the currently the primary theory of *jus cogens*, and since positivism cannot succeed, it is necessary to rely upon natural law.<sup>83</sup> Natural law offers a straightforward answer to the question of the origin of *jus cogens* norms: higher law.<sup>84</sup> The International Military Tribunal in Nuremberg after World War II is generally agreed to have derived its justification from natural law theories.<sup>85</sup> If law truly is a manifestation of moral principles,<sup>86</sup> the binding nature of *jus cogens* rules upon all states irrespective of consent seems logically consistent.

However, natural law faces the precise difficulty that positivism avoids: how is the exact content of *jus cogens* norms determined? Without a clear authority to decide what constitutes a valid rule derived from natural law, or to determine which rules amount to peremptory norms, natural law faces a dangerous slide into subjectivism. As O'Connell explains:

The bigger challenge lies in understanding what natural law theory says about identifying particular *jus cogens* norms (or general principles). Because natural law scholars failed to develop answers as to how natural law functions in a secular age, study and discussion of natural law theory has almost disappeared from the work of legal theorists. The classic problem associ-

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83 *Id.* at 83-84.

84 *Id.* at 86.

85 *Id.* at 87-88.

86 Nguyen, *supra* note 10, at 417.



ated with natural law is this: Who decides? At one time, natural law answers provided by the Church were respected. The rise of secularism and scientific method in the eighteenth and nineteenth centuries meant that, by the end of the nineteenth century, natural law theory was largely dismissed because it was viewed as hopelessly subjective.<sup>87</sup>

The difficulties involved in trying to justify that a particular natural law rule is genuinely an objective, universal principle have caused the number of adherents to natural law theories to dwindle.<sup>88</sup> Separating the idea of binding norms from treaty frameworks poses destabilizing risks to the international institutions, with some commentators fearing that states will simply refuse jurisdiction to courts relying on such approaches.<sup>89</sup> Even if it largely mirrors the modern state of *jus cogens* theory in actuality,<sup>90</sup> natural law's ability to justify that some peremptory norms exist, but inability to define them, constitutes a terminal deficiency.

The public order theory offers a third alternative for justifying *jus cogens* norms. Public order theories have attained a measure of prominence in scholarly circles, even if their number of adherents is limited.<sup>91</sup> Public order theory says that all peremptory norms serve one of two functions: "They either safeguard the peaceful coexistence of states as a community or honor the inter-

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87 O'Connell, *supra* note 31, at 86.

88 Criddle & Fox-Decent, *supra* note 2, at 343.

89 Christenson, *supra* note 1, at 100.

90 E.g. Hossain, *supra* note 44, at 74; Bassiouni, *supra* note 72, at 67.

91 Shelton, *supra* note 37, at 291.

national system's core normative commitments."<sup>92</sup> Christenson argues that an "ordering function lies at the heart of the conceptual development of *jus cogens*."<sup>93</sup> Other scholars assert that if *jus cogens* norms are derived from conceptions of public order, they may legitimately be applied to intra-state actions as well as international agreements.<sup>94</sup> Thus, public order theory seeks to ground peremptory norms in the necessary principles required to preserve the international system as a functioning entity.

However, public order theory faces strong criticism on several fronts. Schwelb asserts that "The concepts of *ordre public* or *public policy*, which are known to the civil law and to the common law systems, do not entirely coincide with the concept of *jus cogens*."<sup>95</sup> In national legal systems, public order justifications may invalidate an agreement between citizens because a clear hierarchy exists within the domestic judicial system. The state is empowered by the citizens to ensure the well-being of the society, justifying the placement of restrictions on the freedom to contract. However, no analogous supranational entity exists in the international sphere. Thus, the public order theory conflicts with the traditional views of state sovereignty.<sup>96</sup> Public order theory also faces difficulty explaining why prohibited actions, such as systematic racial discrimination, harms the community of states as to render

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92 Evan J. Criddle and Evan Fox-Decent, "A Fiduciary Theory of *Jus Cogens*," 344.

93 Christenson, *supra* note 1, at 94.

94 Kha Q. Nguyen, "In Defense of the Child: A *Jus Cogens* Approach to the Capital Punishment of Juveniles in the United States," 420.

95 Schwelb, *supra* note 7, at 948.

96 S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

the offending states' internal actions a violation of international law.<sup>97</sup> Public order theory further struggles to justify why rules of *jus cogens* are binding on all nations and detailing the criteria to objectively determine which constitutive principles amount to peremptory norms.<sup>98</sup> This situation leads to a heightened danger that *jus cogens* theory will simply be transformed into a ploy for power politics.<sup>99</sup>

The theory of *jus cogens* norms as derived from fiduciary obligations constitutes a novel approach to resolving the dilemma facing theorists. The fiduciary theory seeks to resolve the twin difficulties of justifying the existence of *jus cogens* norms and defining their precise content by examining the moral duties intrinsic to state sovereignty.<sup>100</sup> As Criddle and Fox-Decent posit, the fiduciary theory argues that “*jus cogens* norms are constitutive of a state’s authority to exercise sovereign powers domestically and to claim sovereign status as an international legal actor.”<sup>101</sup> By deriving *jus cogens* rules from the relationship between the state and subject, the fiduciary theory wholly avoids the difficulty which plagues positivism of justifying why peremptory norms are binding even when states do not consent.

To explain their theory, Criddle and Fox-Decent analogize the state to a parent. Fiduciary relations arise from circumstances in which one party holds discretionary power of an administrative

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97 Criddle & Fox-Decent, *supra* note 2, at 345.

98 *Id.*

99 Hossain, *supra* note 44, at 74; Bassiouni, *supra* note 72, at 85.

100 Criddle & Fox-Decent, *supra* note 2, at 347.

101 *Id.*

nature over the legal or practical interests of another party.<sup>102</sup> Any such discretionary authority is to be other-regarding, purposive, and institutional; the authority must be vested in an institutionally legitimate party who intentionally undertakes to employ this discretionary authority solely for the good of the party for whom the fiduciary relationship was established.<sup>103</sup> With reference to Kant's theories of fiduciary obligation, Criddle and Fox-Decent argue that states are fiduciary entities whose purpose is to ensure well-being.<sup>104</sup> They contend that "the minimal substantive content of the state's fiduciary obligation is compliance with *jus cogens*, an obligation that remains in place whether or not the state has ratified a convention that signals a commitment to such norms."<sup>105</sup> Disregard of fiduciary obligations de-legitimizes the entrusted party's authority, permitting fiduciary theory to assert that "the ultimate basis of *jus cogens* rests within the very concept that tends to be pitted against it: sovereignty."<sup>106</sup> States may only be legitimately sovereign if they fulfill their fiduciary duties to respect *jus cogens* norms. Fiduciary theory thus places substantive limitations upon state actors in both the international and domestic spheres.

Several objections may be raised to the fiduciary theory of *jus cogens*. First, its justifications clearly constitute a break from the methodology for recognizing peremptory norms listed in

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102 *Id.* at 349-350.

103 *Id.*

104 *Id.* at 352.

105 *Id.*

106 Criddle & Fox-Decent, *supra* note 2, at 356.

the VCLT.<sup>107</sup> Criddle and Fox-Decent embrace this, arguing that Article 53 of the VCLT is superfluous since states are bound by *jus cogens* whether they have ratified the VCLT or not.<sup>108</sup> Another potential critique arising from positivists is that fiduciary theory removes the state's primary role.<sup>109</sup> However, states do retain the primary role in *operationalizing* peremptory norms, although fiduciary theory separates the consensus that certain acts are wrongful and illegal from the normative basis for declaring them to be so.<sup>110</sup>

Since fiduciary theory relies on a transcendent ethical framework and a particular view of state-citizen relations to derive its legal conclusions, it seems potentially susceptible to the same objections as natural law. However, this attack is not necessarily valid. While Criddle and Fox-Decent admit that the fiduciary theory "relies explicitly on a moral idea of dignity" and the legal significance of that dignity,<sup>111</sup> it appears impossible to justify any meaningful form of morality or peremptory norm if *all* human dignity is denied. Further, fiduciary theory attempts to avoid invalidity through overextension by affirmatively accepting that many objectionable actions, ranging from corporate abuses to domestic violence, are outside its purview; its sole purpose is to provide a viable framework to shape rules of *jus cogens* placing non-derogable limitations on states.<sup>112</sup> The theory so far remains

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107 Vienna Convention on the Law of Treaties art. 53, Jan. 27, 1980, 1155 UNTS 331, 8 ILM 679 (1969), 63 AJIL 875.

108 Criddle & Fox-Decent, *supra* note 2, at 355.

109 *Id.* at 377-378.

110 *Id.*

111 *Id.* at 348.

112 *Id.* at 377-378.

largely untested, since Criddle and Fox-Decent only published their article in 2009,<sup>113</sup> and the theory does not yet appear to have sparked a significant scholarly response, either positive or negative. Nonetheless, fiduciary theory offers a unique and potentially compelling mechanism to justify and define the role and scope of preemptory norms in international law.

The current state of *jus cogens* is hardly reassuring. Virtually every aspect of *jus cogens* theory is debated.<sup>114</sup> Unsurprisingly, the disputes over the theory of *jus cogens* have harmed its practical effectiveness. While many scholars argue that egregious violations of *jus cogens* rules of human rights ought to remove state immunity,<sup>115</sup> the actual practice of the courts is “decidedly in favor of the immunity rule.”<sup>116</sup> Thus, in current international law, state officials may lose immunity for criminal prosecutions of *jus cogens* violations, but states themselves remain immune from such suits.<sup>117</sup> Yet, a comparison to treaty law reveals the potential for improvement. According to Kearney and Dalton, as late as 1935, eminent scholars were arguing “that there is no clear and well-defined law of treaties,” and a 1948 study prepared by the

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113 *Id.* at 331.

114 *See, e.g.,* Bassiouni, *supra* note 72, at 67.

115 Carlo Focarelli, *Federal Republic of Germany v. Giovanni Mantelli and Others*. Order No. 14201, 103 AM. J. INT’L L., 125-126 (2009).

116 *Id.* at 127.

117 International Law Commission, *supra* note 11. *See* Al-Adsani v. United Kingdom, 2001-XI Eur. Ct. H.R. Case C-402/05 and C-415/05, Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, 2008 E.C.R. I-06351. *See also* O’Connell, *supra* note 31, at 90-92. Criddle & Fox-Decent, *supra* note 2, at 346-347. Shelton, *supra* note 37, at 309-310. *But see* Focarelli, *supra* note 114, at 112-123.

UN Secretariat to assist the ILC “found that there was scarcely a topic in the entire field [of treaties] that was ‘free from doubt, and, in some cases, from confusion.’”<sup>118</sup> Nonetheless, while the VCLT has not solved all debates, it has served to significantly clarify the realm of treaty law. The potential remains for *jus cogens* to develop far greater import if a clear theory can be presented and the contours of peremptory norms clearly marked.

The modern international community is extraordinarily diverse. Given pressing transnational and global issues, ranging from terrorism to environmental problems, the importance of international cooperation has never been higher. The horrors of past human rights abuses also urge the necessity of establishing a minimum framework to limit the actions of states. *Jus cogens* possess the potential to serve a critical role in the international sphere. Still, since rules of *jus cogens* explicitly do not rely upon consent, their validity must derive from universally binding philosophical justifications. Formulating a theory of peremptory norms in the modern multicultural international realm thus requires the universal acceptance of at least some minimum ethical norms. *Jus cogens* may be reconcilable with cultural pluralism, but it seems unlikely to coexist with the emergence of radical ethical pluralism.

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118 Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. SOC. INT'L L., 496 (1970).