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GROVE CITY COLLEGE

JOURNAL OF LAW & PUBLIC POLICY

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CONTENTS

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The editors strongly prefer articles under 15,000 words in length, the equivalent of 50 *Journal* pages, including text and footnotes. The *Journal* will not publish articles exceeding 20,000 words, the equivalent of 60 *Journal* pages, except in extraordinary circumstances.

To facilitate our anonymous review process, please confine your name, affiliation, biographical information, and acknowledgements to a separate cover page. Please include the manuscript's title on the first text page.

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

Selection takes place on a per-volume basis; thus, a piece is selected for a particular volume, but not necessarily a particular edition. Submissions are reviewed on a rolling basis, beginning in February and concluding when the volume is filled, typically around mid-October.

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GROVE CITY COLLEGE

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 value. 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."

THE GROVE CITY COLLEGE *JOURNAL OF LAW & PUBLIC POLICY*

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, Duquesne University, Pittsburgh University, 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

It is with great pleasure that we bring you the second edition of the Grove City College *Journal of Law & Public Policy*, which is published to bring a new and distinct voice to the discourse about the legal and policymaking traditions in America.

Since the *Journal*'s inception in the spring of 2010, many individuals have worked hard to improve the publication. We have expanded our staff, improved the efficiency of our production process, enlarged our readership, and provided more of the quality scholarship we attempted to deliver in the first publication.

As we continue our efforts to establish the *Journal* as a leading source of academic scholarship, we have researched the history of law-related publications. It is interesting to note that student-run publications (at both the graduate and undergraduate levels) have developed only recently, and continue to be the subject of vigorous debate.

Although there is a lack of student-edited law publications in most places around the world, the United States has remained a seedbed of student scholarship. Nonetheless, several prominent legal scholars have recently spoken out against such "disconcerting" trends. In a scathing article entitled *Against the Law Reviews*, Seventh Circuit U.S. Court of Appeals Judge Robert Merton argues, "The law reviews are numerous, are published bimonthly or at more frequent intervals, are edited without peer review, and are seemingly unconstrained in length. Their staffs are large, but the members, being students, are inexperienced both in law and in editing." Merton continues, "The system of student-edited law reviews, with all its built-in weaknesses, has persisted despite a change in the character of legal scholarship that has made those weaknesses both more conspicuous and more harmful to legal scholarship."

And so the question must be asked: what is the value of student-led publications? Is the Grove City College *Journal of Law & Public Policy* an example of the work that Merton and others criticize?

This *Journal* does include contributions from esteemed scholars and practitioners in the legal and policy worlds. We are privileged to acknowledge this and are grateful for the collaborations with alumni and friends who make this possible. We also are committed to providing a perspective that is unique on the landscape of law and policy reviews.

However, to the central point of the critics of journals such as this, we are grateful for the student-led management of this publication. In order to become competent legal professionals, students of law and policy must undergo requisite training. Thus, to say that established professionals and academics should be solely responsible for editing legal and policy publications eliminates critical training and experience for students who will eventually become those venerable professionals referenced by Merton. Furthermore, nothing in the status quo prevents professionals and academics from forming their own respective legal publications. In fact, such publications exist, including the *Administrative Law Review* and the *International Lawyer,* both of which are sponsored by the American Bar Association. Despite being founded as professionally-edited publications, both the *Administrative Law Review* and the *International Lawyer* have been transferred to the hands of student editors and have since become the most widely distributed United States international law reviews in the world.

On behalf of the Grove City College *Journal of Law & Public Policy* editorial staff,* I sincerely hope that you enjoy the variety and quality of scholarship provided in the work you now hold. It is our privilege to contribute to the nation's tapestry of student-led scholarly publications – a tradition that we believe is an important feature of American higher education.

James Van Eerden

Sincerely,
James R. R. Van Eerden
Editor-in-Chief

* The *Journal* could not have been made possible without the support of many individuals who were either directly or indirectly involved. The *Journal* staff would like to thank President Jewell '67, who supported our efforts from the very beginning and continues to be a mentor to Grove City College students. We would also like to thank our faculty advisor Dr. Sparks '66, who has imparted knowledge to many of us in the classroom and continues to entertain us with his wit and humor. We would like to extend thanks to Mr. Prokovich for his accessibility, assistance with identifying alumni, and advice regarding improving our distribution and publication process. Among others on the *Journal* staff, I would like to specifically thank Lisa Herman for her indefatigable spirit and tireless work as Executive Managing Editor. Lisa has devoted countless hours to this publication and continues to display enthusiasm, professionalism, and intelligence as a friend and colleague who has earned my utmost respect. I would also like to thank our Executive Administrative Editor Steve Irwin for his work in developing the vision for the *Journal* website and facilitating the day-to-day operations of our publication. The entire *Journal* staff – from copy-editors to lay-out editors to content editors – deserves recognition for the hard work they dedicated to this second edition. In addition, we are very grateful to the alumni and faculty who dedicated their time and effort to this project. Among others, Mrs. Melody Briand-Runkle '04, Mr. John Schwab '98, Mr. Scott Bullock '84, and Mrs. Gemma Descoteaux '86 were particularly supportive. Above all, *Soli Deo Gloria!*

FOREWORD FROM THE PRESIDENT

Dear Reader,

Welcome to the second edition of the Grove City College *Journal of Law & Public Policy*. Few undergraduate institutions in our nation publish such a compendium of thinking in these areas. The two areas, in fact, are often intertwined, and our editors do their best to provide a provocative variety of thinking. Most importantly, this *Journal* is student-inspired and student-directed. From our students you will see: Kevin Hoffman ’11 analyzes cases arising out of New Jersey citing a conflict between the 1st and 14th Amendment, and Elizabeth Oklevitch ’11 examines and comments on the disenfranchisement of felons with exposition of legislative remediation.

Two faculty members weigh in: Dr. Michael Coulter ’91 traces case law regarding Article IV of the Constitution’s full faith and credit clause as it applies to marriage and family law, and Dr. Sam Stanton, with recent alumnus Jared Walczak ’08, comments on the illegal immigration debate, specifically the historical and religious roots of the sanctuary-city movement.

Finally, our alumni provide commentary: Scott Bullock ’84, senior attorney at the Institute for Justice and one of the lawyers who argued the Kelo case in the Supreme Court, explores the recent backlash in public opinion and state action that has actually enhanced rather than diminished private property rights. Finally, Grove City College alumna Esther Winne ’10, a 1L at the University of Virginia School of Law, takes on *District of Columbia v. Heller* as she compares and contrasts the opinions of Justice Scalia and Stevens and also finds historic underpinning for the rights espoused.

So there it is – intellectual variety and thoughtful commentary – just the recipe for a late fall’s evening of reading.

Please enjoy.

Richard G. Jewell, ’67 J.D.
President, Grove City College

FIVE YEARS AFTER *KELO*:

THE SWEEPING BACKLASH AGAINST ONE OF THE SUPREME COURT'S MOST-DESPISED DECISIONS

*Scott G. Bullock**

Introduction

On June 23, 2005, the U.S. Supreme Court ruled that private economic development is a public use under the Fifth Amendment and that the government could take people's homes, small businesses, and other property and give them to private developers with the hope of raising more tax revenue and creating more jobs in a 5-4 decision called *Kelo v. City of New London*, 545 U.S. 469 (2005).[1]

As a result of the Court's decision, Justice Sandra Day O'Connor warned in her compelling and passionate dissent, one of the last she authored on the Court: "The specter of condemna-

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* Scott G. Bullock ('88) is a senior attorney at the Institute for Justice, a non-profit, public interest law firm located in Arlington, VA, which represented the property owners in Kelo v. New London. The Institute and Bullock have represented scores of other home and small business owners in eminent domain disputes throughout the country. Bullock argued the *Kelo* case before the U.S. Supreme Court.

1 Kelo v. City of New London, 545 U.S. 469 (2005).

tion hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[2]

The U.S. Supreme Court should have ruled in favor of the *Kelo* homeowners and established a federal baseline that would protect home and business owners throughout the nation. Instead, it passed the issue on to the states, abdicating its role as guardian of Americans' rights under the U.S. Constitution.

Less than one week after the decision was handed down, the Institute for Justice ("IJ"), which litigated the case, launched a national campaign called "Hands Off My Home." IJ was determined to focus the outrage over Kelo into meaningful reform. In the five years since the decision, there has been an unprecedented backlash against the Kelo ruling in terms of public opinion, citizen activism, legislative changes and state court decisions, and lessons learned from the New London case. These dramatic reactions are addressed in this article.

The Change in Public Opinion

Kelo brought massive public awareness to the issue of eminent domain for private gain. Although there was growing concern about eminent domain abuse and some awareness before *Kelo*, after the decision many well-informed people in the nation knew about the issue. More importantly, according to numerous surveys, the vast majority of people overwhelmingly oppose emi-

2 *Id*. at 503.

nent domain for private development. Polls consistently show that well over 80 percent of the public oppose *Kelo*.[3]

This significant public opposition to eminent domain abuse led to a complete change in the zeitgeist on this issue. Although public officials, planners and developers in the past could keep condemnations for private gain under the public's radar screen and thus usually get away with the seizure of homes and small businesses, this is no longer the case. Property law expert Dwight Merriam notes: "The reaction to *Kelo* has chilled the will of government to use eminent domain for private economic development." Eminent domain supporter John Echeverria laments: "There are an awful lot of developers shying away because they don't want to get involved in a time-consuming, political mess." And as Susan Pruett, general counsel for the Georgia Municipal Association, confesses: "I describe *Kelo* as the worst case we ever won."

Grassroots Activists Fight Back Against Eminent Domain Abuse—and Win

Before the *Kelo* decision, many property owners faced with eminent domain abuse did not think they could fight City Hall and win. *Kelo* changed that. As the polls mentioned above reflect, this issue resonated with Americans in a way few U.S. Supreme Court decisions do. The decision awakened threatened property owners with a new-found confidence that they really could challenge

3 *See* Castle Coalition, Public Opinion Polls, *available at* http://castlecoalition.org/index.php?option=com_content&task=view&id=43&Itemid=143.

politically powerful and well-funded adversaries.

The Institute for Justice's Castle Coalition took its message on the road immediately following the decision and held training sessions from coast to coast to educate property owners and activists on how to organize, mobilize and publicize their opposition to eminent domain abuse. The Coalition held 67 workshops at the local, regional, state and national levels, training more than 1,000 community leaders to fight these land grabs.

Forty-four projects and proposals that threatened the use of eminent domain for private gain have been defeated by grassroots opposition in just the five years since *Kelo*. Among the examples are:

> *Ed Osborne, who owns an auto body shop in Wilmington, Del., heard about an urban renewal plan that threatened his business. He invited the Castle Coalition to speak to his community. After countless media appearances and events, the city *still* refused to listen—so Osborne took his fight to the statehouse where, after a grueling two-year battle, he was instrumental in securing eminent domain reform that not only protected his business, but other properties across Delaware.

> *A woman named Princess Wells stepped out of her comfort zone and learned to be her own best advocate, leading her predominantly African-American neighborhood to victory over a project that threatened nearly 2,000 homes and businesses in Riviera Beach, Fla.

> *Small groups of leaders started local revolutions, like the one in San Pablo, Calif., where a handful of home and business owners banded together to fight the city's proposal to reauthorize the use of eminent domain on properties that constituted over 90 percent of the predominantly Latino city. They invited the Castle Coalition to speak at a community forum. In the following weeks, the small group protested at public hearings, drawing hundreds of supporters. When the city could not take the pressure anymore, it tried to postpone the vote indefinitely, but these activists would not stand for it, and that night, the city council voted instead to ban eminent domain for private development.

Across the country, property owners and activists have testified before crowded public hearings and state legislatures. They have formed groups and started websites. They have stood tall on the steps of City Hall and held press conferences demanding officials keep their hands off their property. They have held neighborhood meetings, which have turned into citywide meetings. Their rallies and protests have been heard and heeded.

Eminent Domain Law is Changed Through Legislation and Initiatives

There probably has never been as sweeping a legislative response to a U.S. Supreme Court decision as the response to *Kelo*. Following the public outcry against *Kelo*, constitutional amendments and legislation at the federal, state and local levels were introduced in legislative bodies nationwide. In the five years since the decision, forty-three states have passed either constitutional amendments or statutes that have reformed eminent domain law to better protect private property rights.

The type and quality of legislation varies from state to state, but some states (such as Florida, South Dakota, Michigan and Arizona) have provided very strong protections against eminent domain abuse. Other states (such as Minnesota, Colorado and Wisconsin) strengthened their laws, but still permit some wiggle-room for ambitious politicians and business interests to engage in some forms of eminent domain abuse. Still other states (such as Maryland and Kentucky) passed only minor reforms. Although the quality and type of reform varies, virtually the entirety of the reforms produced net increases in protection for property owners faced with eminent domain abuse.[4]

Ideally legislation should contain two essential elements to comprehensively reform eminent domain legislation. First, it should ban "economic development" takings—using eminent domain for the possibility of creating more tax revenue and jobs. Second, it should stop blight statutes from being used as a back-door method of taking property for private development because vague definitions of blight could be used to take perfectly good and functional properties. At least 35 of the 43 states that changed their laws no longer allow condemnations for economic development. And more than half of the 43 states (22 states) went even

4 For a full report card that grades all the state reform efforts, see Castle Coalition, 50 State Report Card, *available at* http://castlecoalition.org/index.php?option=com_content&task=view&id=2412&Itemid=129.

further by reforming their laws involving condemnations to eliminate supposed "blight."

There are exceptions, of course. New York has remained steadfast in its determination to take private property for politically connected developers and to resist any attempt or demand by the public to limit this practice. Moreover, after three attempts to change its eminent domain laws, Mississippi finally passed solid reform in 2009 only to have Gov. Haley Barbour veto the legislation. When the legislature narrowly failed to override the veto, an effort was started to place an initiative on the ballot to change Mississippi law to protect property owners. In October 2010, the Mississippi Secretary of State declared that enough valid signatures had been gathered for the initiative to appear on the November 2011 ballot.[5]

Some academics—most notably, Professor Ilya Somin of George Mason Law School—argue that the backlash against eminent domain abuse has failed to produce significant nationwide changes in the legislative arena.[6] Although Somin, to his credit, is a staunch opponent of eminent domain abuse, he and other critics are misguided about eminent domain reform legislation.

The fundamental problem with the critics' analyses is that they lack historical perspective and real-world analysis. The proper starting point is the state of the law the day before the Court's

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5 *Signatures Verified; Eminent Domain Ban on Ballot*, SUN-HERALD, October 23, 2010.

6 Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100 (2009).

decision in *Kelo*. At that point, eminent domain laws in virtually every state were skewed against property owners. *Kelo* reinforced this near total deference to the eminent domain power and could have easily become the law of the land in almost all states. Since the decision, however, as this paper documents, dramatic changes for the better have occurred in a variety of contexts.

As noted, there are two primary ways eminent domain can be abused for private development. First, a government, like New London's, can simply declare that a new project will produce more economic benefits—tax revenue, jobs and an overall improved economy—and thus these "higher and better" uses of property justify the takings. This was the issue in *Kelo*. At least 35 of the states that have passed reform now prohibit these types of takings. So, at a minimum, most states have protected property owners at least to the extent of the protection they would have received in *Kelo*. But many states have done more.

The second way the government can abuse eminent domain is to rely on bogus blight designations, whereby neighborhoods are declared blighted through vague and expansive definitions that permit the government to proclaim virtually any poorer or even middle class neighborhood blighted. Governments do this because of the precedent in *Berman v. Parker,* 348 U.S. 26 (1954), which held that the power of eminent domain can be established by a blight declaration.

The critics' main complaint about the legislative changes is that many of the states that have reformed their eminent domain laws have not changed their blight laws, so blight can still be used as a subterfuge to gain property for private development. What they ignore, however, is that *Kelo* was *not* a blight case; thus, even a favorable decision in *Kelo* would not have changed state blight laws. (Only Justice Thomas was willing to revisit the 1954 *Berman* decision, which upheld the use of eminent domain for so-called blight removal.) In those states that have changed their blight laws—and at least 22 have—property owners are actually better protected than they would have been even if *Kelo* had come out the right way.

Despite the overwhelming public opposition to *Kelo*, the cards were stacked against eminent domain reform. In their seminal work on public choice, James Buchanan and Gordon Tullock noted that "it is the opportunity to secure differential benefits from collective activity that attracts the political 'profit-seeking' group."[7] They also noted that "[m]any collective projects are undertaken in whole or in part primarily because they do provide benefits to one group of the people at the expense of the other groups."[8]

Eminent domain abuse provides a classic example of public choice at work. Developers and private businesses gain highly concentrated benefits in the form of greater profits when they receive property through eminent domain. Likewise, city officials

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7 James Buchanan & Gordon Tullock, The Calculus of Consent: Legal Foundations of Constitutional Democracy 277 (1965).

8 *Id*. at 279.

gain from the possible extra tax revenue generated by the new projects and the political support that could come from improving the local economic climate. The individuals who pay the highest costs—home and small business owners who stand to lose their property—are small in numbers compared to the overall population. Moreover, projects that abuse eminent domain are typically funded either by the developers themselves or through general tax revenue so the costs to individual taxpayers are either non-existent or widely diffused among the population. Apart from those receiving direct benefits and those small number of home and small business owners paying the highest cost, most in a particular community remain "rationally ignorant" of the process since it does not directly affect their property or lives.

As public choice demonstrates, the parties who gain from eminent domain abuse—in particular, local officials and business interests—have disproportionate influence in the political arena. Not surprisingly, those groups have fought hard against eminent domain reform in virtually every state where it has been proposed. Given their tremendous influence, as well as the fact that ordinary home and business owners do not have lobbyists or special access, the question the critics should be asking is: "How on earth did the *Kelo* backlash meet with such success?" And, to gain some broader historical perspective, they should also ask, "What other national reform movement has achieved so much in just a five-year period of time?"

State Courts Step Up to Curtail Eminent Domain Abuse

The response of state courts to *Kelo* has been another arena in which there has been a fundamental shift in eminent domain policy. When the U.S. Supreme Court decided not to correctly interpret the U.S. Constitution, the states' high courts began to fill that void. Three states' supreme courts—Ohio, Oklahoma and South Dakota—explicitly rejected the *Kelo* decision.[9] Ohio cities had frequently abused eminent domain and Oklahoma cities had occasionally abused the power, but we have heard of no new abuses in either state since their respective court decisions.[10]

Moreover, the New Jersey Supreme Court implicitly rejected *Kelo* while also curtailing the use of redevelopment and blight as an excuse for private development. New Jersey has historically been one of the worst states in the country for eminent domain abuse. Its municipalities all seem to be addicted to eminent domain for private projects. But the New Jersey Supreme Court decision in *Gallenthin* ruled that local governments could not declare areas blighted simply because they are "stagnant or not fully productive," which was essentially the argument for taking the land in *Kelo,* in the hope of improving the local economy. *Gallenthin*, along with appeals court decisions emphasizing the importance of real evidence and procedural due process in challenging rede-

9 Norwood v. Horney, 853 N.E.2d 1115 (Ohio 2006), *and* Muskogee County v. Lowery*,* 136 P.3d 639 (Okla. 2006), *and* Benson v. State, 710 N.W.2d 131 (S.D. 2006).

10 *See* Dana Berliner, Public Power, Private Gain 159-70 (Castle Coalition 2003), *available at* http://www.castle coalition.org/pdf/report/ED_report.pdf (showing pre-Kelo abuses).

velopment designations, has totally changed the eminent domain landscape for home and small business owners in New Jersey.[11]

The Hawaii, Pennsylvania, Rhode Island and Missouri supreme courts have begun examining the use of eminent domain for private development with a more jaundiced eye, requiring that the government produce real evidence substantiating its claims and pay close attention to evidence that the claimed purpose of the taking is a pretext for the real purpose of benefitting a private party.[12] Moreover, the Maryland Court of Appeals began imposing stricter procedural and evidentiary scrutiny to so-called "quick-take" condemnations, in which the government can quickly take and bulldoze someone's home or other structures, even before an ultimate judicial ruling is made on the legality of the taking.[13]

There is one significant exception to this good news for property owners in state courts—New York. The Court of Appeals, New York's highest court, routinely ignores evidence of eminent domain abuse, refusing to give the facts any real scrutiny at all. A recent ruling from the court, which denied the fundamental role of the courts in properly interpreting essential constitutional rights,

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11 *See* Gallenthin Realty Dev., Inc. v. Borough of Paulsboro, 924 A.2d 447 (N.J. 2007).

12 *See* County of Hawaii v. C&J Coupe Family Ltd. Partnership, 198 P.3d 615 (Haw. 2008), *and* Middletown Township v. Lands of Stone, 939 A.2d 331 (Penn. 2007), *and* Rhode Island Economic Development Corporation v. The Parking Company, 892 A.2d 87 (R.I. 2006), *and* Centene Plaza Redev. Corp. v. Mint Props., 225 S.W.3d 431 (Mo. 2007).

13 Mayor and City Council of Baltimore v. Valsamaki, 916 A.2d 324 (Md. 2007), *and* Sapero v. Mayor and City Council of Baltimore, 920 A.2d 1061 (Md. 2007).

tells the whole story:

> It may be that the bar has now been set too low—that what will now pass as "blight," as that expression has come to be understood and used by political appointees to public corporations relying upon studies paid for by developers, should not be permitted to constitute a predicate for the invasion of property rights and the razing of homes and businesses. But any such limitation upon the sovereign power of eminent domain as it has come to be defined in the urban renewal context is a matter for the Legislature, not the courts.[14]

The Court of Appeals had a chance to redeem itself in another challenge to a trumped-up claim of blight, combined with concealment of relevant evidence, in a case involving eminent domain abuse by Columbia University. But once again, the Court of Appeals upheld the use of eminent domain to benefit a private party.[15]

When the U.S. Supreme Court hands down a major constitutional ruling, often state courts follow the Court's lead and interpret state constitutional provisions in the same or in a similar manner. For instance, when the Court decided *Berman v. Parker*, which upheld the use of eminent domain to engage in so-called urban renewal or slum clearance projects, 34 state supreme courts

14 Matter of Goldstein v. N.Y. State Urban Dev. Corp., 921 N.E.2d 164, 172 (N.Y. 2009).

15 *See* Kaur v. New York State Urban Dev. Corp., 892 N.Y.S.2d 8 (N.Y. App. Div. 2009), *rev'd*, 15 N.Y.3d 235 (N.Y. 2010).

followed suit. After *Kelo*, state courts have gone in exactly the opposite direction. This encouraging trend is expected to continue.

The Aftermath of *Kelo* in New London

In New London, the Fort Trumbull project at the heart of the *Kelo* case has been an unmitigated failure.[16] Under the original plan, New London provided land adjacent to Fort Trumbull to the pharmaceutical giant Pfizer at a nominal cost and also provided environmental cleanup to the site, which had previously been an old mill. Part of the package of incentives offered to Pfizer to encourage them to come to New London was the redevelopment of the neighboring Fort Trumbull area. Fort Trumbull was a working-class neighborhood. It housed approximately 75 homes, as well as a few smaller businesses and an abandoned Navy base. The plan called for this area to be replaced by an upscale hotel, office buildings and new housing. According to the plan, this redeveloped area would take advantage of the opportunities presented by the new Pfizer facility and would complement that facility, leading to job growth and increased taxes for New London. The state of Connecticut agreed to provide $78 million for the project. Pfizer received 80 percent tax abatement for 10 years. The state agreed to pay 40 percent of the abated taxes to New London.

Now, five years after the *Kelo* ruling, there has been no new construction on any of the land that was acquired in Fort Trumbull.

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16 For a compelling account of the history and back-story of the New London controversy, see Jeff Benedict, Little Pink House: A True Story of Defiance and Courage (2009).

After the decision, the remaining residents who had fought to save their homes, including Susette Kelo, were forced out. The Fort Trumbull site was completely razed. And it has remained empty ever since—brown, barren fields no longer home to people but rather to feral cats and migratory birds.[17] After much controversy and many extensions of time given to the chosen developer, the city terminated the development agreement. The proposed Coast Guard museum for the area has been put on indefinite hold.[18] Now, ten years after its initial plan was approved, the city has commissioned another study to see what might work in the area.[19] Ironically, given that a majority of the area used to be filled with owner-occupied and residential rental property, the city is considering a proposal to build some rental property on a portion of the project area.[20] Ten years have been lost and more than $80 million in taxpayer money spent to perhaps one day build a lesser version of what used to exist on the peninsula.

The city and the New London Development Corporation blame the economy for the failed project, but the redevelopment

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17 David Collins, *Feral Cats Ignore Eminent Domain*, THE DAY, Dec. 10, 2008, *and* Katie Nelson, *Conn. Land Vacant 4 Years After Court OK'd Seizure*, ASSOCIATED PRESS, Sep. 25, 2009.

18 Kathleen Edgecomb & Jennifer Grogan, *Coast Guard museum plan on hold*, THE DAY, July 24, 2009.

19 Stephen Chupaska, *NL Council panel supports hiring group for study of Fort Trumbull*, THE DAY, Apr. 13, 2010.

20 Kathleen Edgecomb & Stephen Chupaska, *NLDC to explore developer's plan for village theme at Fort Trumbull*, THE DAY, Feb. 20, 2010.

plan was floundering well before the real estate downturn.[21] The plan was never market driven, given that it used massive taxpayer subsidies and catered to one large corporation. Even if the economy alone were to blame, it merely stands as another reason why taxpayer dollars should not be put at risk in speculative development schemes.

Just before its 80 percent tax abatement expired, Pfizer announced that it too is moving out. On November, 9, 2009, Pfizer announced that it would close its research and development headquarters and leave New London.[22] For years, the disastrous Fort Trumbull project will be Exhibit A in demonstrating the folly of government plans involving corporate welfare and abusing eminent domain for private development. Hopefully, city officials, planners and developers will take the Fort Trumbull experience to heart and pursue revitalization efforts only though voluntary, not coercive, means.[23]

Even though the Fort Trumbull neighborhood was lost, Susette Kelo's little pink house, where this fight all began, still stands. Kelo's home was disassembled and moved piece-by-

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21 William Yardley, *After Eminent Domain Victory, Disputed Project Goes Nowhere*, N.Y. Times, Nov. 21, 2005, at A1.

22 Patrick McGeehan, *Pfizer to Leave City That Won Land-Use Suit*, N.Y. Times, Nov. 13, 2009, at A1.

23 *See* Curt Pringle, Development Without Eminent Domain (Castle Coalition 2007), *available at* http://www.castlecoalition.org/pdf/publications/Perspectives-Pringle.pdf; Dick M. Carpenter II & John K. Ross, Doomsday, No Way (Castle Coalition 2008), *available at* http://www.ij.org/images/pdf_folder/othe r_pubs/doomsday-no-way.pdf (documenting that eminent domain reforms have had no negative effect on development).

piece to its new location in downtown New London, about one mile away from Fort Trumbull. It is once again a home for a new owner, local preservationist Avner Gregory. The beauty of the restored home reflects the love Gregory has for the house and its historic importance. Like Betsy Ross' house in Philadelphia and Paul Revere's home in Boston, Susette Kelo's pink cottage stands as a monument to her and her neighbors' struggle, one that has changed this nation for the better.

Conclusion

The results of the *Kelo* backlash have been striking. The Institute for Justice used to get continual requests for assistance in fighting eminent domain for private gain. Now, the Institute receives far fewer. Of those, many attempts to abuse eminent domain are defeated by activism in the court of public opinion before they ever reach a court of law. Eminent domain abuse used to be a nationwide epidemic with more than 10,000 instances reported in a five-year period, an epidemic that affected property owners in most states.[24] Now, it is largely confined to certain reform-resistant states, like New York, that refuse to change their laws or listen to their own citizens. The Institute is focusing its efforts in litigation and advocacy in those states.

To be sure, challenging work remains to be done in fighting eminent domain abuse. Weak state reform must be strengthened. Moreover, property owners must be vigilant in making sure that

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24 *See* Dana Berliner, Public Power, Private Gain 159-70 (Castle Coalition 2003), *available at* http://www.castlecoalition.org/pdf/report/ED_report.pdf.

reforms are not repealed or watered down either through legislation or judicial opinion. Already, for instance, Detroit's mayor has mentioned that Michigan's strong constitutional protection against eminent domain abuse, passed in 2006, might need to be changed so that he can re-make the city along the lines central planners envision.[25] When the economy strengthens and the real estate market comes back, there will also likely be renewed efforts to take homes and small business for private gain.

Ultimately, the Institute for Justice's goal is to have the Supreme Court overturn *Kelo*. Until then, more battles remain to be fought. Property owners must remain vigilantly aware of any efforts to repeal or undercut good judicial opinions, legislation or constitutional amendments. For property owners nationwide, *Kelo* remains the classic example of losing the battle but winning the war.

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25 Christine MacDonald, *Bing: I'll move some residents*, DETROIT NEWS, Feb. 25, 2010, at A4.

EQUAL PROTECTION OR FIRST AMENDMENT FREEDOMS:

WHICH WOULD NEW JERSEY RATHER LOSE?

Boy Scouts of America v. Dale
and
Bernstein v. OGCMA

*Kevin A. Hoffman**

TABLE OF CONTENTS

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I. Introduction

The American legal system relies on the equitable resolution of conflicts and on finding a proper balance between competing rights. Circumstances often arise under this system in which two parties assert conflicting yet equal rights. When this happens, the courts must craft an interaction of the rights that best adheres to the applicable laws and precedent, while at the same time defending the natural and procedural rights of both parties to the fullest extent possible. One such circumstance is pending within the dispute of *Bernstein v. Ocean Grove Camp Meeting Association*. This case exemplifies the need for a newly defined balance between a First Amendment right to the freedom of expressive association and the Fourteenth Amendment right to freedom from discrimination within places of public accommodation.[1]

The purpose of this article is to compare rulings from state and federal courts on the balance of protecting expressive action versus the duty to ensure equal protection and protect against discrimination. The State of New Jersey has consistently been thrust to the forefront of this delicate balance due to the actions of its legislature and the subsequent cases that have been brought before its courts. For the purposes of this article, New Jersey will be used as a microcosm to examine potentially similar conflicts across the country on the state level and for assisting in drawing conclusions that may be applicable on a national level.

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1 *See* David M. Estes, *The Ocean Grove Boardwalk Pavilion: A Public Accommodation?*, 11 Rutgers Journal of Law and Religion 252, 252-53 (2009).

II. *Boy Scouts of America v. Dale*

The dichotomy of private expressive association and public accommodation laws was brought to a head in New Jersey by the case *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). James Dale joined the Boy Scouts of America ("BSA") in 1978 at the age of eight. He served as a distinguished member, and in 1988 achieved the rank of Eagle Scout, the highest honor BSA bestows upon its members.[2] In 1989, Dale applied for adult membership in the organization as he prepared to attend college at Rutgers University. After his acceptance, he began serving as an assistant scoutmaster for his local Monmouth County troop.[3]

The controversy arose due to some of Dale's actions while attending Rutgers. Soon after publicly revealing that he was gay, Dale became involved with the University's Lesbian/Gay Alliance and in 1990 was elected co-president. In July of 1990, Dale was featured in an interview for a newspaper that was covering an event sponsored by the Lesbian/Gay Alliance.[4] Within the month, Dale received a letter from James Kay, BSA's Monmouth Council Executive, revoking his adult membership in BSA and terminating his leadership position as assistant scoutmaster. When Dale requested the reason for this decision, Kay responded by stating that BSA "specifically forbid membership to homosexuals."[5]

In 1992, Dale filed a six-count complaint against BSA in

2 Boy Scouts of America v. Dale, 530 U.S. 640, 644 (2000).
3 *Id*. at 644.
4 *Id*. at 645.
5 *Id*.

the New Jersey Superior Court, Chancery Division, and the court ruled in favor of BSA on the grounds of protecting the freedom of expressive association. The Appellate Division of the Superior Court, however, reversed and remanded the majority of the case for further legal proceedings.[6] Eventually, the New Jersey Supreme Court upheld the decision of the Superior Court and BSA was determined to be subject to public accommodation laws. As such, they were held to be in violation of those laws for revoking Dale's membership on the basis of his homosexuality.[7] In addition to various other arguments, BSA claimed an exception to those laws on the basis of its right to expressive association. This right offers protection to private organizations for their own expressive actions, but in *Roberts v. United States Jaycees*, 468 US 609 (1984) the Supreme Court noted that "[t]he right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[8]

In *Dale*, the New Jersey Supreme Court rejected BSA's First Amendment argument on the grounds that the court was "not persuaded . . . that a shared goal of Boy Scout members is to associ-

6 Dale v. Boy Scouts of America, 308 NJ Super. 516, 529 (1998), *rev'd*, 530 U.S. 640 (2000).
7 Dale v. BSA, 160 N.J. 734 A. 2d 1199, 1230 (N.J. Sup. Ct. 1999), *rev'd*, 530 U.S. 640 (2000).
8 Roberts v. United States Jaycees, 468 US 609, 623 (1984).

ate in order to preserve the view that homosexuality is immoral."[9] Consequently, the court stated that admitting Dale into membership would not hamper the other members' ability to carry out the overarching mission of the organization "in any significant way."[10] Finally, the court concluded that New Jersey did indeed possess a compelling interest in eliminating discrimination to justify this intrusion on BSA's expressive action.[11]

The United States Supreme Court disagreed. Chief Justice Rehnquist, writing for the majority, began his opinion by quoting from *Roberts*:

> [W]e observed that implicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas.[12]

Citing *Roberts*, the Court established a two-part test for determining a proper abridgement of the right to associate for expressive purposes. First, the Court must determine if the group, in this case BSA, engages in "expressive action."[13] If not, then

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9 *Dale*, 160 N.J at 1223-24.
10 *Id*. at 1206-1207.
11 *Id*. at 1227.
12 *Boy Scouts of America*, *supra* note 2, at 648 (internal quotation marks omitted).
13 *Id*. at 648.

the argument is moot and the public accommodation law should be applied. If the group does participate in such action however, then it must be determined whether or not the forced action (i.e. the re-admittance of Dale into membership) significantly affects the group's ability to advocate public or private viewpoints.[14]

To determine that BSA was in fact engaged in expressive action, Rehnquist cited several of their mission and purpose statements including the Scout Oath. BSA contends that the phrase "morally straight," found within their oath, is the foundational basis for their exclusion of James Dale and any other openly homosexual individual from leadership. Given that several such statements exist, the Court concluded that BSA actively engages in acceptable expressive action.[15] The Court also rejected the argument that BSA's expressive action was nullified by the fact that it was self-contradictory. The apparent soundness, or lack thereof, in a group's position is irrelevant to the courts; the fact that it does espouse the position at all is enough to count as expressive activity.[16]

Having made that determination, the Court then addressed the second prong of the test: does the re-admittance of Dale into membership significantly affect or burden BSA's desire to not promote homosexual conduct as a legitimate form of behavior? On this issue, the New Jersey Supreme Court found that "Boy Scout

14 *Id*. at 650.
15 *Id*. at 651.
16 1 SCOTT A. MERRIMAN, RELIGION AND THE LAW IN AMERICA: AN ENCYCLOPEDIA OF PERSONAL BELIEF AND PUBLIC POLICY 160 (2007).

members do not associate for the purpose of disseminating the belief that homosexuality is immoral; Boy Scouts discourages its leaders from disseminating *any* views on sexual issues; and Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality."[17]

On this crucial point, the Court could not disagree more. It refutes the lower court's arguments in three respects: First, it states that an associative group need not associate for the express purpose of disseminating a particular message in order to qualify for First Amendment protections. Second, the method of expression is left to the discretion of the organization and should not be second-guessed by the courts. Finally, for a group's actions to be considered "expressive action" it is not necessary for every member of the group to agree on the policy in question.[18] In other words, the toleration of dissention is not equivalent to the surrender of a publicly or privately held position. Utilizing the three arguments above, the Court concluded that BSA's desire not to promote homosexuality would be significantly burdened by the admission of Mr. Dale as an openly homosexual assistant scoutmaster.

Finding that BSA falls under the protection of the First Amendment, and that the inclusion of Mr. Dale would significantly burden the organization's ability to espouse that protected expression, the Court ruled that New Jersey did not have an

17 *Dale*, 160 N.J at 1223.
18 *Boy Scouts of America*, 530 U.S. at 654-55.

appropriately compelling interest with which to override BSA's First Amendment rights.[19] In this instance, the First Amendment freedom of expressive association ultimately preempted the application of New Jersey's public accommodation law, as well as any potential state interest in dispelling discrimination against homosexuals on the basis of their sexual orientation.

III. Recent New Jersey Legislative and Judicial Action

"The statutory and decisional laws of this State protect individuals from discrimination based on sexual orientation."[20] This quotation by Justice Albin of the New Jersey Supreme Court, from *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006), highlights the fact that New Jersey views itself at the national forefront of the advancement of civil rights, especially in regards to sexual orientation. The laws referenced by Justice Albin have been in effect since 1991, when New Jersey's state legislature added the phrase "affectional or sexual orientation" to the Law Against Discrimination ("LAD").[21] The addition of that phrase to the LAD was the legal basis on which Mr. Dale brought his suit against BSA, which became the first major judicial test of the new legislation and how it would interact with the First Amendment protection of expressive association.

The flexible and ever-changing LAD has been both aggressive and reactive in legislating civil rights in New Jersey. Pursuant

19 *Id*. at 659.
20 Lewis v. Harris, 908 A.2d 196, 200 (N.J. Sup. Ct. 2006).
21 *Boy Scouts of America*, 530 U.S. at 663-64.

to that law, New Jersey created a Division on Civil Rights ("Division"), a branch of the state Attorney General's office, and imbued it with the "power to prevent and eliminate discrimination in the manner prohibited by this act [LAD] against persons because of race, creed…sexual orientation, etc."[22] The Division thus has both the enforcement and judicial power to ensure compliance with the LAD as well as any of its subsequent legislation. According to the Division's own website, its mandate is to "enforce [ ] the New Jersey Law Against Discrimination."[23]

A recent ruling from the New Jersey Supreme Court in *Lewis v. Harris* made another alteration to LAD. In *Lewis*, the court was asked whether or not same-sex couples possess a fundamental right to marry, or regardless of that, whether they should receive equal benefits as heterosexual couples, based upon Article 1, Paragraph 1 of the New Jersey Constitution. The court's ruling strongly dictated to the legislature that it "must either amend the marriage statutes to include same-sex couples or create a parallel statutory structure," to comply with the sentiment of equality extended to same-sex couples within Article 1, Paragraph 1.[24]

Several legislative reactions flowed from *Lewis*. The first was the New Jersey Domestic Partnership Act. This act established the state's recognition of the importance of domestic partnerships of all kinds, regardless of sexual orientation, and stated

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22 N.J. Stat. § 10:5-6 (2010).

23 New Jersey Division on Civil Rights, Frequently Asked Questions, *available at* http://www.nj.gov/oag/dcr/faq.html#faq1.

24 *Lewis*, 908 A.2d at 201.

that all relationships should be granted the same benefits as traditional marriage relationships.[25] In 2006, the LAD was amended yet again, this time to include "gender identity and expression."[26] The process continued in December of 2006 with the passage of the New Jersey Civil Unions Act, which officially established civil unions as state approved institutions and stated that "[c]ivil union couples shall have all the same benefits, protections and responsibilities under law… as are granted to spouses in a marriage."[27]

Despite these amendments to New Jersey's civil rights laws, until recently, there has been little ongoing conflict between these laws and the First Amendment since the *Boy Scouts* case. Though *Boy Scouts* remains good law, the updated statutory law will provide a different context the next time that a public accommodation application of LAD is challenged on the basis of First Amendment protection. One potential challenge, reflecting much of the recent legislation, is currently pending within Division.

IV. *Bernstein v. OGCMA*

On June 19, 2007, several months after the Civil Unions Act went into effect, Harriet Bernstein and Luisa Paster ("Complainants") filed a complaint with the New Jersey Division on Civil Rights. The women were a lesbian couple who resided together within the borders of Ocean Grove, a community within

25 Thomas Hoff Prol, *New Jersey's Civil Union Law: A Constitutional "Equal" Creates Inequality*, 52 NY Law School L. Rev. 169, 175 (2008).
26 *Id*. at 174.
27 N.J. Stat. Ann. § 37:1-31(a).

Neptune Township. The Ocean Grove Camp Meeting Association ("OGCMA") is a non-profit ministry organization, governed by a Board of Trustees, which owns and operates all of the land, beach, and sea within the traditional borders of Ocean Grove.[28] The Complainants alleged that OGCMA had discriminated against them in an area of public accommodation by denying the couple's request to hold their civil union ceremony on OGCMA property.[29]

In December of 2008, the Division issued a finding of probable cause in *Bernstein*. The Division's standard for issuing such a finding under LAD is "a reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person to believe that the law was violated and the matter should proceed to a hearing."[30] Having determined that there was probable cause to support the complaint, the Division forwarded the case for a hearing before an Administrative Law Judge, and that proceeding is still pending. If the Judge determines that unlawful discrimination has occurred, then the Director of the Division can grant relief by ordering the OGCMA to take affirmative remedial action. At that point, either party could appeal the Judge's determination to the Superior Court of New Jersey.[31]

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28 David M. Estes, *The Ocean Grove Boardwalk Pavilion: A Public Accommodation?*, 11 Rutgers Journal of Law and Religion 252, 256 (2009).

29 Bernstein v. Ocean Grove Camp Meeting Association, DCR Docket No. PN34XB-03008 (Division on Civil Rights, Dec. 29, 2008), *available at* http://www.nj.gov/oag/newsreleases08/pr20081229a-Bernstein-v-OGCMA.pdf.

30 Estes, *supra* note 28, at 258. (citing Frank v. Ivy Club, 548 A.2d 1142, 1150 (App. Div. 1988), *rev'd on other grounds*, 120 N.J. 73 (1990), *cert. denied*, 498 U.S. 1073 (1991)).

31 Estes, *supra* note 28, at 258-59.

Within the original complaint, the Complainants argue that the property in question, entitled the "Boardwalk Pavilion" ("Pavilion") qualifies under state law as a place of public accommodation for multiple reasons. First, it is located on Ocean Grove's boardwalk, which is a type of location specifically cited within New Jersey's public accommodation statute.[32] Second, the OGCMA had routinely rented the building out for weddings in the past and left it open for general public access a majority of the time.[33] Finally, the Complainants pointed to the OGCMA's 1989 application for a Green Acres real property tax exemption, in which it certified that the Pavilion would be "open to the public on an equal basis."[34]

OGCMA has counter-arguments to each of those claims, and as such the classification of the Pavilion as a place of public accommodation remains a heavily disputed aspect of the case.[35] If the Pavilion were ruled not to be a place of public accommodation, then the complaint would be dismissed and any remaining arguments would be moot.[36] The purpose of this article however, is not to determine whether or not the Pavilion should be considered a place of public accommodation. Instead, I wish to consider the intersection of public accommodation applications of civil rights' law and the freedom of expressive association. For purposes of

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32 N.J. Stat. § 10:5-5 (2010).
33 *Bernstein*, at 3-4.
34 Estes, *supra* note 28, at 261.
35 *See id*. at 259.
36 *See id*.

this discussion, I will assume that the Pavilion is a place of public accommodation.

What remains is the dichotomy between the Complainants' rights not to be discriminated against and OGCMA's First Amendment right of expressive association. Though the facts are different, the basic legal issues at stake are sufficiently similar to those of *Boy Scouts* for it to be reasonably argued that if this issue in *Bernstein* were brought before the Supreme Court, that the same level and method of scrutiny would be applied.

Under the Supreme Court's two part test, the first question is whether OGCMA engages in "expressive action."[37] If so, then it must be determined whether or not the forced action (allowing Bernstein and Paster to hold their civil union ceremony in the Pavilion) significantly affects the group's ability to advocate public or private viewpoints.[38]

As the Court did in *Boy Scouts*, it is important to examine the foundational documents and statements of OGCMA in order to determine whether or not the group engages in "expressive action."[39] Both sides accept that OGCMA is a private, non-profit organization.[40] According to its website, "the mission of the Ocean Grove Camp Meeting Association, rooted in its Methodist Heritage, is to provide opportunities for spiritual birth, growth and renewal through worship, education, cultural and recreational

37 Boy Scouts of America v. Dale, 530 U.S. 640, 648 (2000).
38 *Id*. at 650.
39 *Id*. at 648-49.
40 *Bernstein*, at 2.

activities in a Christian seaside setting."[41]

From their mission statement, the general purpose of OGCMA seems to be clear. Through the use of its facilities and programs OGCMA seeks to advocate a traditional Christian message as reflected by the United Methodist Church. As the Court said in *Boy Scouts*, "[i]t seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity."[42] If any doubt remains however, Justice O'Connor's opinion in *Roberts* confirms that the Court's definition of expressive action includes "a broad range of activities" and should not be limited to "expressive words or conduct that are strident, contentious, or divisive," but can also "take the form of quiet persuasion, *inculcation of traditional values*, instruction of the young, and community service."[43]

Utilizing the reasoning above, OGCMA clearly engages in expressive activity. Given this, the question becomes whether forcing OGCMA to allow Bernstein and Paster to hold their civil union ceremony at the Pavilion would significantly affect OGCMA's ability to advocate public or private viewpoints.[44] An examination into the OGCMA's views on homosexuality is required in order to make this determination.

From its beginning, the OGCMA has retained close ties to

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41 Ocean Grove Camp Meeting Association Home Page, *available at* http://www.ogcma.org/ (last visited Oct. 3, 2010).

42 *Boy Scouts of America*, 530 U.S. at 649-50.

43 Roberts v. United States Jaycees, 468 US 609, 637 (1984) (emphasis added).

44 *Boy Scouts of America*, 530 U.S. at 650.

the United Methodist Church ("UMC"). The denomination is still mentioned within the OGCMA mission statement, and all voting members of the organization's Board of Trustees must be active Methodist church members.[45] This allows for the reasonability of OGCMA's claims that the basis for rejecting the Complainant's request is that it "does not permit its facilities to be used for purposes that conflict with the clearly established policies of the United Methodist Church."[46] Rehnquist's arguments from *Boy Scouts* regarding proper deference are important to note here; especially the point that OGCMA's claim to adhere to established Methodist policies should be regarded as accurate, for "it is not the role of the courts to reject a group's expressed values because they disagree with those values or find them internally inconsistent."[47]

Given that OGCMA espouses Methodist principles, and does so in order to identify its own positions, an examination of the stance taken on homosexuality by the UMC is essential. According to the United Methodist Book of Discipline, the UMC views marriage as a "…shared fidelity between a man and a woman" and stipulates that "[c]eremonies that celebrate homosexual unions shall not be conducted by our ministers and shall not be conducted in our churches." More broadly stated, "[t]he United Methodist Church does not condone the practice of homosexuality and considers this practice incompatible with Christian

45 *Bernstein*, at 2.
46 *Id*. at 5.
47 *Boy Scouts of America*, 530 U.S. at 651.

teaching."[48] According to the Supreme Court, this written expression is instructive with respect to the UMC's, and subsequently OGCMA's viewpoint on the issue of homosexuality. Having shown that OGCMA has a particular viewpoint on the issues of homosexuality and civil unions, it must now be determined whether or not being forced to allow Bernstein and Paster's civil union ceremony at the Pavilion would significantly burden OGCMA's ability to advocate these views. On this point in the reasoning from *Boy Scouts*, the Court looks to an example from an earlier case, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc*., 515 U.S. 557 (1995).[49]

Hurley centered on the organizer of a privately operated St. Patrick's Day parade who denied a request made to march in the parade by an Irish-American, Gay, Lesbian and Bisexual ("GLIB") group. The group argued that the parade was a place of public accommodation and so they could not be denied access merely on the basis of their sexual orientation.[50] In reaching its conclusion however, the Court made a very interesting and determinative distinction. That distinction was "that the parade organizers did not wish to exclude the GLIB members because of their sexual orientations, but because they wanted to march behind a GLIB banner."[51]

48 *From* The Book of Discipline of The United Methodist Church (2008).
49 *Boy Scouts of America*, 530 U.S. at 653.
50 Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 559-62 (1995).
51 *Boy Scouts of America*, 530 U.S. at 653-54.

Applied to *Bernstein*, this distinction has great significance. In fact, the same argument can be made that OGCMA is not denying Bernstein and Paster their civil union ceremony because of the couple's sexual orientation, but instead because of the message that is conveyed by the ceremony itself. "As the presence of GLIB in Boston's St. Patrick's Day parade would have interfered with the parade organizers' choice not to propound a particular point of view," so the presence of a civil union ceremony in a prominent OGCMA facility would interfere with the organization's choice not to support a point of view contrary to its own beliefs.[52] In many ways, the proposed civil union ceremony in *Bernstein* is analogous to the parade banner that would have been carried by GLIB members in *Hurley*.

The Supreme Court's rebuke of the New Jersey Supreme Court in *Boy Scouts* also helps to strengthen OGCMA's case. Firstly, it is not necessary that OGCMA exists for the sole purpose of denouncing civil unions in order to be entitled to First Amendment protection when speaking on the issue.[53] Secondly, the method of expression that the OGCMA chooses for disseminating its views on homosexuality is not a matter of importance to the courts.[54] Finally, not every person involved with OGCMA must agree in order for the group's policies to be considered "expressive association."[55] This is crucial in this scenario, for it nullifies

52 *See id*. at 654.
53 *See id*. at 655.
54 *See id*.
55 *See id*. at 655-56.

the effect of members of the Board of Trustees and other community members who have publically disagreed with the Board's decision to continue its policy regarding civil unions. In short, "[t]he fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection."[56]

Based upon the facts and precedent of cases such as *Boy Scouts* and *Hurley*, the final outcome of the administrative proceeding, or any subsequent litigation, regarding *Bernstein v. Ocean Grove Camp Meeting Association* should be resolved in favor of OGCMA. This conclusion does not turn on the issue of whether or not the Pavilion is a place of public accommodation, due to the over-arching need to protect OGCMA's freedom of expressive association with respect to the use of its own property, regardless of the extent of the public's freedom to utilize the building.

V. Conclusion

New Jersey remains at the front of the battle over this conflict between public accommodation laws and the protection of expressive action relative to other states across the country and is likely to remain so for many years. Private organizations with publicly accessible property and civil rights advocacy groups alike should take notice of cases such as *Bernstein*. With a large amount of recent legislation still waiting for a legitimate test, much remains to be determined as to whether the courts will follow the conser-

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56 *Id*. at 656.

vative trend set by *Boy Scouts* or continue the push to extend civil rights further, and into even more demographic classifications.

Despite past trends, a recent ruling indicates the possibility of a departure from the reasoning used in *Boy Scouts* and *Hurley*. Writing for the majority in *Christian Legal Society v. Martinez*, 561 U.S. ___ (2010), Justice Ginsberg references the landmark sodomy case *Lawrence v. Texas*, 539 U.S. 558 (2003), and argues that policies against homosexual conduct are analogous to discrimination against homosexual persons.[57] If applied to *Bernstein*, this reasoning would spell certain defeat for OGCMA. And yet, several key differences between these two cases, most notably that OGCMA is not a public entity, ensure that doubt remains as to whether this application would be made if the issue were brought before the Court. Interpreted properly, and in accordance with the precedent of *Boy Scouts*, the fundamental Constitutional protection of freedom of association will remain in place and serve as the appropriate counter-balance to equal protection.[58]

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57 Christian Legal Society v. Martinez, 561 U.S. ___ (2010).

58 **Author's Note:** As a resident of Ocean Grove and the son of OGCMA Chief Administrative Officers Scott and Nancy Hoffman, the Bernstein case first came to my attention in a very personal way. It resurfaced again when a fellow student in Dr. Sparks' Constitutional History class brought it up as a current example of a case we were discussing at the time, not surprisingly, Boy Scouts of America v. Dale. I would like to thank my professors for instilling in me the importance of being able to analyze any situation based on its merits alone and also my parents for their amazing support and for faithfully keeping me up to date on Bernstein. It was an honor and a privilege to put my scholarly ambitions to work on a subject that hits so close to home.

DO UNTO OTHERS, OR WATCH OVER YOUR SHOULDER?

TRACING SANCTUARY AND ILLEGAL IMMIGRATION AS A CHURCH AND STATE ISSUE

*Samuel S. Stanton, Jr.**

&

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Table of Contents***

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I. INTRODUCTION

On August 16, 2006, Elvira Arellano refused to comply with an order from the U.S. Office of Immigration and Customs Enforcement directing her to return to her home country of Mexico. Instead, she took sanctuary in Adalberto United Methodist Church in Chicago, Illinois, resurrecting memories of the sanctuary movement of the 1980s when churches sheltered undocumented aliens who they claimed should have been protected refugees from civil wars in El Salvador and Guatemala. Ms. Arellano, by her own admission, came to this country from Mexico to make a better life for herself.[1] She entered the country illegally in 1997 using false documents and was caught and returned to Mexico, return-

1 Notes from speech by Elvira Arellano given at the University of Wisconsin—Stevens Point on May 3, 2006. Ms. Arellano spoke in Spanish throughout the presentation and the notes are based on interpretation by an unnamed associate at the event.

ing shortly thereafter to the U.S. with new, and equally fraudulent, documents. She found work in Washington State where, in 1999, she gave birth to her son, Saul. Ms. Arellano moved to Chicago in 2000, took a job at O'Hare International Airport, again using false documents, and was arrested in 2002.

Senators Richard Durbin and Barack Obama had previously secured stays of deportation for Ms. Arellano, but they have expired, and both senators went on record saying that Ms. Arellano was obliged to obey current immigration laws.[2] In 2007, she was repatriated to Mexico despite the efforts of several members of Congress, including Illinois Democrat Bobby Rush, to forestall her deportation, and over the protestations of those who insisted that Adalberto United Methodist Church had a legal right to offer sanctuary. The case of Ms. Arellano, however, has little in common with the provision of sanctuary for Central Americans fleeing violence in their countries of origin, and the U.S. government continues to hold that no claim to sanctuary exists in federal law.

In the late 1970s and early 1980s, members of churches, primarily in the southwestern United States, but supported by congregations in every region of the country, provided sanctuary to people from Central America and South America who entered the United States illegally. Unlike Elvira Arellano, the majority of these sanctuary claimants came to the United States seeking asylum as political refugees from the civil wars and violence that

2 P.J. Huffstutter, *Sanctuary Movement Still Has a Heartbeat*, Los Angeles Times, Nov. 24, 2006, at Home Edition, A25.

engulfed Central and South American countries during that time period. As in the case of Elvira Arellano, however, the provision of sanctuary to illegal entrants to the country, hereinafter referred to as illegal immigrants, occurred unbeknownst to the general population, which remains largely unfamiliar with the practice, the role of churches in immigration questions, and the rationale behind the sanctuary movement.

What is this practice which Ms. Arellano's situation returned to the headlines, and what place does it hold in the relations of church and state? Our research attempts to answer these questions in three parts. First, the definition and evolution of the current understanding of sanctuary is developed. We examine the Judeo-Christian tradition regarding sanctuary by tracing the practice of sanctuary from its biblical inception to the present day. Particular attention is given in this section to understanding the current status of sanctuary as the provision of asylum. Second, consideration is given to theories regarding how asylum/sanctuary and immigration in general should be applied by states. Third, we examine how the practice and theory of sanctuary bring church and state into confrontation.

II. Sanctuary

A. Biblical Roots

The biblical basis for sanctuary is found in the Pentateuch. In the book of Numbers there are two passages in the 35th chapter that delineate the Jewish legal creation of sanctuary:

> Then you shall appoint cities to be cities of refuge for you; that the manslayer who kills any person accidentally may flee there. They shall be cities of refuge for you from the avenger, that the manslayer may not die until he stands before the congregation in judgment. And of the cities, which you give, you hall have six cities of refuge. You shall appoint three cities on this side of the Jordan, and three cities you shall appoint in the land of Canaan, which will be cities of refuge. These six cities shall be fore refuge for the children of Israel, for the stranger, and for the sojourner among them, that anyone who a person accidentally may flee there.[3]

Sanctuary, in its biblical context, is God's command to Moses to create safe havens for people fleeing from the commission of manslaughter. There were specific limits on the location and number of havens to be provided for those who "killeth any person at unawares." Traditional Judeo-Christian theological

3 *Numbers* 35:11-15 (New King James).

writing suggests that sanctuary as established in Numbers was to provide protection against vigilante justice.[4] The safety of these places was provided both for the citizens of Israel and for visitors. No distinction is made in the biblical idea of sanctuary between legal visitors and illegal visitors. The contextual suggestion is that visitors were family and relatives of people living in the country as subjects of the king or were present at the request of the king or his ministers. Anyone else in the country who did not declare his presence to the local authorities would be considered a spy—an offense punishable by death if uncovered. The implication of such a policy is that a person entered a country by invitation from family or the government and all others who entered the country were spies; this implication is consistent with the use of spies during the time period.

Sanctuary is not, however, in its biblical roots, protection from trial. A person found guilty of murder was still condemned to death. Also, any person found guilty of manslaughter was forced to remain inside the boundaries of the city of refuge until the death of the current high priest, at which time the individual may return to his original home. If the guilty person left the city of refuge before the high priest's death, a blood relative of the slain could kill the person without being guilty of murder.[5]

4 One such theological discussion can be found in the Matthew Henry Complete Commentaries. The commentaries are available on-line and this particular passage of the *Bible* is archived at: http://bible.crosswalk.com/Commentaries/
MatthewHenryComplete/mhc-com.cgi?book=nu&chapter=035.

5 *Numbers* 35:24-28 (King James).

Sanctuary, in biblical practice, does provide punishment for a manslayer; it is a form of house arrest. It is a punishment from which there is no reprieve and to which there is no end other than the death of the high priest. This form of punishment for the sanctuary seeker is repeated in historical legal uses of sanctuary. At no time prior to the last few decades in the United States has there been a belief that the recipient of sanctuary might one day walk free among the population of the country without the death of a high priest, pope, or king. A brief examination of sanctuary and the laws of sanctuary in historical context will bear out this last assertion.

B. Sanctuary in Historical Context

Sanctuary, as understood in the modern context, is devoid of the scriptural references of Mosaic times. Instead, sanctuary refers to the inviolability of all things sacred in the Roman Catholic Church. While there is little record of sanctuary during the first three centuries of the church, the practice of sanctuary found favor within Latin Christianity, and was applied by bishops of the Church. The problematic way in which the right of sanctuary was meted out by local bishops led Theodosius the Great to outlaw the practice in the late 390s, but the practice was resurrected in the first decade of the 5th century.[6]

At the First Council of Orleans (A.D. 511), Clovis I decreed

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6 *The Sanctuary*, Luminarium Encyclopedia, *available at* http://www.luminarium.org (last visited Jan. 5, 2007).

that adulterers, murderers, and thieves could claim refuge (sanctuary) in a church or the ecclesiastical residences. The right of sanctuary was also to be extended to fugitive slaves, with the stipulation that a slave be returned to his master if the latter swore on the Bible not to treat the slave cruelly.[7] The conditions in which sanctuary could be claimed under this decree exceeded the narrow grant of sanctuary accorded by Jewish law.

The earliest mentions of the practice of sanctuary in England are in the A.D. 600 codifications of King Ethelbert. The practice was very limited and highly structured; the code demanded that the offender be within the sanctuary zone surrounding the church building prior to declaring sanctuary. Ethelbert's codifications required that a claimant declare, in detail, the guilt of the crime for which sanctuary was sought within forty days of entering sanctuary. A claimant paid a fee to the church for sanctuary, and, after admitting guilt, the claimant had to enter exile by traveling a prescribed route within a given (and brief) period of time to the nearest port city, never to return to England. Those who did not confess to their crime within forty days were remanded to the civil authorities.[8] Henry VIII limited the number of sanctuary cities in England to seven in 1540, and in the same decree, limited coverage of sanctuary to murderers and those guilty of felony-level thievery. James I formally abolished sanctuary in England and English Common Law in 1623, an act pertinent to contemporary

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7 *Councils of Orleans*, Catholic Encyclopedias, *available at* http://www.newadvent.org (last visited Jan 5, 2007).

8 *See* note 5.

American jurisprudence, as most of the laws and legal practices in the United States today trace their roots to English Common Law (with the notable exception of the state of Louisiana, which owes its distinct legal system to the Napoleonic Codes).[9]

C. Sanctuary in United States History

In the United States, sanctuary as an organized practice prior to the twentieth century was rooted in the Abolitionist Movement. It was a means of smuggling escaped slaves into free states or out of the U.S. entirely. The religious aspect of this practice was exemplified by the involvement of the Society of Friends, more commonly known as Quakers. Pennsylvania, as a colony, was chartered to provide a sanctuary (safe haven) for Quakers, and Quakers are still deeply involved in every sanctuary movement in the United States. This participation by members of a church represents a direct link between the practice of religion by members of a church and violation of laws of this country. With the passage of the 13th Amendment to the U.S. Constitution in 1865, slavery was abolished and the organized practice of sanctuary as a means of protecting and promoting the freedom of slaves was no longer necessary.

The earliest forms of sanctuary in the United States, then, were not to protect adulterers, murderers, and thieves, as they were in England, but rather to protect the freedom and liberty of

9 *Id*.

individuals.[10] Sanctuary also became synonymous with opposition to the legal system of the country and not a surrogate for the legal system through common practice. Sanctuary previously meant harboring fugitives with justice to be applied by trial in the church or by admission of guilt by the fugitive with punishment meted by the church. In the United States, however, sanctuary has taken the form of harboring fugitives from legal sanctions, or, as argued by the defendants in the most renowned case dealing with sanctuary in the United States in the last thirty years, *U.S. v. Aguilar*, sanctuary has become the enforcement of laws by the people when the state has failed in its duty.[11] Clearly sanctuary in the United States, as currently practiced, is tied to the idea of the status of individuals seeking asylum.

Before examining the specifics of the sanctuary movement in the United States and its current resurrection in connection with illegal immigration issues (primarily through investigation of cases arising in the southwestern United States), it is necessary to look at how the practice of sanctuary came to be tied to the question of political asylum. To this end, we must establish what constitutes political asylum. We also address theoretically how states make determinations about the application of political asylum, which, in turn, allows us to better understand the decision

10 We use the terms freedom and liberty instead of simply using the term freedom because liberty represents something ideologically different than freedom and hermeneutically different in social science.

11 Susan Bibler Coutin, *Smugglers of Samaritans in Tuscon, AZ: Producing and Contesting Legal Truth*, 22 Am. Ethnologist 549, 549-71 (1995). *See also* pre-trial motions in U.S. v. Aguilar, No. CR-85-008-PHX-EHC (D. Ariz. 1986).

of churches and their members to offer sanctuary in violation of the laws of the United States.[12]

D. Sanctuary and Asylum, International Law

In the 19th century, international law only required that states provide protection to their own citizens. During the inter-war years of 1919-1939, violent conflicts and political issues that arose in many regions of the world caused mass displacement. The League of Nations did what it could to provide *ad hoc* solutions and negotiate the resolution of specific crises, but no general definition of refugee was created, nor was a standardized procedure adopted for handling refugees. Sanctuary as pertains to asylum originated in the post-World War II development of the Cold War. It is not a far leap to move from the term "refuge" to the term "sanctuary," so it is a natural continuation of the language to apply the idea of hosting refugees as providing a sanctuary for them.

In July 1951, a special United Nations Conference adopted the Convention Relating to the Status of Refugees.[13] It was drafted between 1948 and 1951 and involved the participation of twenty-six states. The convention produced the first general definition

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12 A quick note here on the use of the term "state" is needed for our readers. State refers to the legitimate government of a country, this is common usage in the study of international relations and political science in general. It is a shortened variant of the term sovereign state, which represents a government with a defined territory on which it exercises internal and external sovereignty, a permanent population, a government, independence from other states and powers, and the capacity to enter into relations with other sovereign states. For reference see MALCOLM NATHAN SHAW, INTERNATIONAL LAW (2003).

13 JOHN VRACHNAS ET AL., MIGRATION AND REFUGEE LAW 173 (2005).

of refugee, listing five characteristics—race, religion, nationality, social group membership, and political opinion—that were adequate for the provision of asylum if they were the source of a well-grounded fear of being subject to serious harm were the asylum-seeker to return to his state of origin.[14] The 1951 Convention also provides a guarantee against repatriating refugees to their country of origin if doing so would subject them to persecution.[15] One shortcoming of the 1951 Convention is that it limited the status of refugees to persons who feared persecution based on the five categories because of events which transpired prior to January 1, 1951. A 1967 Protocol was adopted affirming the primary details of the 1951 Convention, but made refugee status universally applicable regardless of the date of the event. As of 2005, over 140 states have signed the Convention and Protocol.[16]

Serious limitations exist pursuant to the Convention and Protocol. First, the fact is that refugee status is limited to civil and political status of an individual caused by race, religious affiliation, national origin, membership in a social group, or expressed political views. No concern is expressed for the quality of life expressed in the legal definition of a refugee. What if events simply overtake a person, forcing this person to flee their country of origin, not because of some classification, but because of natural or man-made disaster? By the language of the Convention and Protocol, this person has no claim to refugee status. What this

14 Article 1A (2), *Convention Relating to the Status of Refugees* (1951).
15 Article 33, *Convention Relating to the Status of Refugees* (1951).
16 Vrachnas, *supra* note 13, at 174.

means is that a person fleeing a civil war does not have right of refugee status unless he can demonstrate successfully that he will be persecuted if returned to his country of origin because of one of the five categories, which is rarely possible to demonstrate. What the terms of the Convention and Protocol also mean is that desiring a better life is insufficient reason for granting refugee status.

The second limitation is that the Convention and Protocol make individual states responsible for determining if a person qualifies as a refugee under the provisions of the Convention. There is no international right to immigrate or attain refugee status; it is determined by states in keeping with the idea that no supra-national government exists that can dictate behavior to states. According to realist theories of international relations, states themselves are responsible for maintaining the international system.[17] Many competing theories attribute equal or partial responsibility to non-state actors (such as churches, interest groups, and other non-governmental organizations) alongside states for maintaining the international system.

Despite significant limitations, the Convention and Protocol remain the source for most states' determinations of refugee status, and it is these definitions that are employed in U.S. laws

17 Again we use a commonly understood assumption of realist and neostructural realist theories of international relations. The assumption is that states are unitary actors that exist in a self-help environment because there is no higher authority in the international system than states themselves. Discussions of this are common to general textbooks on international relations and so numerous that we do not list them. A good singular work on international relations theory is KENNETH WALTZ, THEORY OF INTERNATIONAL POLITICS (1979).

regarding the status of refugees and immigration.[18] Opposition to the manner in which the 1980 U.S. Refugee Act was applied led many people—especially in the southwestern United States—to participate in the sanctuary movement of the 1980s, bringing the issue into the public consciousness.[19]

As a signatory to the Convention and Protocol, the United States obligated itself to recognize valid claims for asylum (refugee status). This commitment was codified by the passage of the Refugee Act of 1980 and further affirmed and developed in the U.S. Immigration and Nationality Act (1996). No fewer than three U.S. offices in three different departments take part in determining refugee status, proper procedure in application, and the resettlement of refugees in the United States.[20] Figures available through the United Nations High Commissioner for Refugees (UNHCR) office show that the U.S. not only accepts more refugees seeking asylum than any other country in the world and is the foremost destination for general immigration as well but also that the U.S.

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18 I say most states because in 1969 the Organization of African Unity (OAU) adopted a broader definition of refugee applicable to its member states. Also, the 1984 Cartagena Declaration incorporates a definition similar to that of the OAU signed by many Latin American states. *See also* VRACHNAS, *supra* note 13.

19 The 1980 Act and the 1996 Act discussed in later paragraphs were the result of political response to the fears of many U.S. citizens that we accepted immigrants in a hodgepodge fashion and that we accepted too many refugees. This is discussed in CARL J. BON TEMPO, AMERICANS AT THE GATE: THE UNITED STATES AND REFUGEES DURING THE COLD WAR (2008).

20 The Office of Refugee Resettlement (Department of Health and Human Services), Bureau of Population, refugees, and Migration (Department of State), and Citizenship and Immigration Services (Department of Homeland Security).

accepts more refugees and immigrants than all of the other countries in the world combined.[21]

III. Theories

A. Security and Economics

There are two primary theoretical sides to the issue of admitting immigrants and refugees into a country. One side argues that a country's government must consider the general welfare of its own population as its foremost priority. The other side emphasizes the primary duty of all mankind to be humanitarian to all people, and that, by extension, states should act in as charitable a manner as possible.

Myron Weiner correctly points out that migration creates security and policy issues for states.[22] Consider the fact that Palestinian immigrants in Kuwait collaborated with Iraqi forces in 1990, or that the United Kingdom feared that an influx of Vietnamese refugees in the mid to late 1970s would jeopardize the security of Hong Kong, prompting the British government to order these refugees to return to Vietnam despite international protest. In a global geopolitical climate informed by fears of international terrorism, it should be recognized that when a state's security is at stake it is easily justifiable to create preferences in admissions policies for immigrants and refugees.

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21 United Nations High Commissioner for Refugees, *available at* http://www.unhcr.org (last visited Nov. 23, 2006).

22 Myron Weiner, *Security, Stability and International Migration*, *in* International Migration and Security (1993).

Not all admissions policies should be predicated on fear of security, however. Most states are unlikely to serve as progenitors for future terrorists, and most immigration continues to be based on economic concerns. Concern for the less fortunate and for the employment needs of U.S.-based firms both affect government decision-making regarding target immigration numbers; these concerns also affect the type of immigrant that is targeted. Most immigrant visas granted today are issued for people seeking to work in technologically advanced fields of industry and in the public healthcare sector.

Scholars increasingly recognize that globalization and free trade are not beneficial to all people.[23] While these scholars do not doubt that globalization increases the total economic gain of the world's population, some people gain, while others lose, and the losers are often disadvantaged minorities within their country of origin. The losers are compelled by economic conditions to seek a better situation, often only available to them in another country.

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23 Paul Collier, The Bottom Billion (2007), *and* Joseph J. St. Marie, Samuel S. Stanton, Jr. & Shahdad Naghshpour, *The Colonial Origins of Human Security***,** 36 Politics and Policy (2008), and Samuel S. Stanton, Jr, Joseph J. St. Marie & Shahdad Naghshpour, *Globalization and Discontent: Decomposing the Effects of Globalization on Ethnic Conflict, American Political Science Association Annual Meeting, Aug 30 to Sep 02, Chicago, IL., and David* Dollar, *Globalization, Poverty, and Inequality since 1980* (World Bank Policy Research Working Paper No. 3333, 2004), *and* Axel Dreher, *Does Globalization Affect Growth? Evidence from a New Index of Globalization*, 38 Applied Economics 1091, 1091-110 (2006), *and* Axel Dreher, *Index of Globalization* (2006) *available at* http://www.globalization-index.org, *and* William Easterly, *Globalization, Poverty and All That: Factor Endowments versus Productivity Views* (NBER Globalization Workshop, 2005), *and* J.D. Fearon, *Primary Commodity Exports and Civil War*, 49 J. Conflict Resolution 483, 483–507 (2005).

Can the receiving country support the influx of migrants socially and economically?

The economic costs of accepting immigrants into a country in which the government takes responsibility for the provision of certain services and resources to all or portions of the population must be recognized. By accepting refugees in the United States, we accept them into a society that provides more service and infrastructure at no cost or reduced cost to individual users than most other states in the international system. To what extent can states afford to keep offering these benefits when increasingly large parts of populations may not be providing revenue for state action? One reason states impose limits upon immigration is the high cost of assimilating immigrants into the society.

Any state that opens its borders readily to immigration "might soon find other states taking advantage of its beneficent policy."[24] Many states are perfectly willing to allow residents to leave creating financial savings for the state. If a state is lax in immigration control or readily admits large numbers of immigrants, it is not unheard of for a neighboring state to encourage its citizens to consider migrating. Not all decisions are based on bureaucratic and economic judgment, however; it is necessary to consider the interplay of political and moral forces as well.

A state granting refugee status to individuals or to groups is making a moral and political judgment. When the U.S. govern-

24 Myron Weiner, *Ethics, National Sovereignty and the Control of Immigration*, 30 International Migration Review, 173 (1996) (Special Issue: Ethics, Migration, and Global Stewardship).

ment grants asylum to a Cuban, it is saying the person in question can reasonably expect to be persecuted for political opinion if they return to Cuba. Issuing such a judgment is making a statement about the political situation in Cuba on behalf of all citizens of the U.S. On our behalf, the government is saying that another sovereign state is mistreating its own citizens. This is a strong statement to make, and it implies strong criticism of the state in the refugees' country of origin.

When State A declares asylum for citizens of State B, State B will most often see this as interference in the internal matters of State B by State A. State A is, after all, stating that State B has mistreated or might mistreat these citizens if they are returned to State B. The long term effects of such blatant statements about the moral, ethical, and sovereign behavior of State B by State A can be politically taxing. Consider too that most refugees receive asylum in democratic states that allow them to speak out openly against the government of their country of origin. Do citizens of state A really support the overthrow of the government of State B? This will appear to State B to be affirmed when refugees from State B granted asylum in State A speak out openly and loudly against State B.

Considered in this light, immigration and asylum policy is an inherently political decision. To those who maintain that the state acts, or should act, purely in their own citizens' rational interests, such policy is not made out of concern for all people in the world, but instead out of concern for the quality of life of citizens in the country represented by the particular state. A government that represents its citizens must first and foremost make decisions about how best to protect those citizens. Secondly, this government must make decisions about how to promote the economic wellbeing of the greatest number of its citizens. All decisions of immigration and asylum must take into account how the security and economic health of the country will be affected, as these are commonly understood as the primary responsibilities of modern states.

In a globalized world, a great deal of the security and economic prosperity of the country is tied to foreign trade, investment, and security arrangements. This constraint on security requires a country to be extremely cautious in making moral and political judgments regarding any other country. This constraint also means asylum and immigration policies are tied to foreign policy goals, affecting both regions and individual states, from which states will accept people who are seeking temporary or permanent immigration and asylum status.

B. Equality and Human Rights

Opposed to the idea that states must be concerned about implications for the quality of other states is a position that favors open borders for unrestricted immigration as a means of providing the best quality of life for the most people. The fact that some people lose and others gain from globalization and free trade shows the inequalities of life. When we ask how to deal with inequality a good starting point is John Rawls, whose work is accepted as one of the classic starting points for discussions of fairness, equality, and justice in contemporary discussions of human rights. According to the Rawls' difference principle, these inequalities should be acceptable only if they ultimately benefit those who are least well off.[25] Joseph Carens stresses this principle by pointing out it is only a matter of chance that people are born in democratic, peaceful, prosperous countries rather than in poor, authoritarian, conflict torn countries.[26] The great necessity addressed by immigration is providing a better quality of life to a maximum number of people. Framed in this theoretical perspective, the question becomes is it more moral to preserve a particular status quo of life quality, or to promote the welfare of every individual of the human race?

Andrew Shacknove argues that a claim to refugee status exists whenever a state does not protect the basic needs of citizens.[27] Shacknove's claim is a moralistic and exceedingly broad claim, which is hard to support as it leaves many questions unanswered. What are the basic needs of citizens? Does this include a job?

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25 This idea emanates from Rawls' "difference principle", which is the primary basis for much of the social justice theory among human rights scholars. The difference principle postulates that each member of society has an equal claim on their society's goods that is unaffected by personal attributes, so the basic right of any individual in the society is an equal share of the goods. Rawls argues that inequality in distribution of the goods is acceptable only if it is to the advantage of those who are worst-off. *See also* JOHN RAWLS, A THEORY OF SOCIAL JUSTICE CAMBRIDGE (1971).

26 Jospeh Carens, *Aliens and Citizens, the Case for Open Borders*, 49 THE REVIEW OF POLITICS 251, 261 (1987).

27 Andrew Shacknove, *Who is a Refugee?*, 95 ETHICS 274, 274-84 (1985).

Does a government owe a person protection of his employment? Does this mean protection of access to fresh water (a necessity for life) and arable land (needed to grow food or raise livestock)? Some human rights activists claim that any discrimination against human rights is grounds for asylum. Liberal democracies ought to admit all individuals whose human rights are violated by their own governments. But what are human rights? Does government have a right to put limitations on things that are generally considered rights by most people? For instance, does a government have a right to impose a one child per family limit? Should states give asylum to any family asking for protection on grounds of desiring to have two or more children? Should a country grant asylum to an openly homosexual Brazilian—an orientation largely rejected by Brazilian society—because his government does not protect people from social derision? In the end it would still be a government's decision as to what human rights are basic and to justify granting asylum if infringed.

Egalitarian arguments dismiss nations and sovereignty as impediments to a just world. The predominant idea is distributive justice, which requires abrogation of sovereignty. Proponents of this idea argue that we should not consider immigration's impact on welfare, employment, educational benefits, healthcare, the environment, and community relations. Instead, we must ensure the highest possible quality of life for the most possible people regardless of political and economic costs to individual states. To the egalitarian, this is not just a humanitarian act—it is a moral imperative.

Further complicating understanding state-centric versus open border arguments surrounding asylum is the question of whether or not sovereignty resides on more than one level. Previously we discussed sovereignty in relation to the actions of the state in pursuit of a range of policies that are designed to maximize the outcomes for the population represented while protecting the right of a government to determine what is best in dealing with its own citizens free from encroachment by foreign powers. Another matter to be decided, however, is whether sovereignty exists at multiple levels within a single country.

C. Federalism

A final theoretical consideration is based on federalism. Federalism is a system by which more than one level of government shares power in a country. In the United States this refers to cities and counties (local government), the fifty states, and the federal or U.S. national government. Which of these is sovereign? Based on the U.S. Constitution and the numerous court decisions interpreting this document, the Constitution and other federal laws are the supreme law of the land. State and local laws may add to federal law, but cannot take away or negate sections of federal law. In this legalistic sense, sovereignty ultimately rests with the federal government.

Recent scholarship challenges this idea. Randy Lippert examines sanctuary cases in Canada and applies a definition of sovereignty involving multiple spheres.[28] He defines sovereignty as the ability to coerce and to make and suspend laws, writing that "[i]t is not the outcome of a decision but the capacity to make the decision and to have it obeyed that renders the decision sovereign."[29] Lippert argues that this is exactly what churches did in Canada and in the United States by offering sanctuary, because the churches did not have to offer sanctuary and could remove sanctuary at any time of their choosing. Moreover, the churches were seeking to coerce the government into taking action.[30]

Lippert's argument leads to the question of who determines the sovereignty of the government and/or other actors within a country. As the source of ultimate authority for the Constitution and for the government that it creates, are U.S. citizens the last arbiters in determining where sovereignty resides? An argument can be made to favor this position. As previously noted, however, legal and historical precedent challenges this argument. Nevertheless, this line of reasoning is alive and well for some Christians in the United States. The next section of this article will explore in more detail the sanctuary movement of the 1980s and the modern progeny of this movement—namely the offering of sanctuary to illegal immigrants who are facing expulsion after legal decisions have been rendered.

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28 RANDY K. LIPPERT, SANCTUARY, SOVEREIGNTY, SACRIFICE: CANADIAN SANCTUARY INCIDENTS, POWER AND LAW (2005).
29 *Id*. 69.
30 *Id*. 69-74.

IV. Sanctuary, Redux

A. The 1980s Sanctuary Movement

In 1980 the U.S. government enacted a policy regarding refugees and their resettlement within the U.S. that centered on compliance with the principles of the Convention and Protocol. The act was designed to create a process by which a target number of refugees as recognized by the Convention and Protocol would be admitted into the U.S. and be given official asylum or sanctuary. In November 1980, however, Ronald Reagan was elected President of the United States, bringing to the office a conservative who promised tougher measures to defeat communism throughout the world. One area of the globe where the growth of communism was of particular concern to President Reagan was Central America. The decision was made to support right-leaning and conservative governments in Central America economically and militarily where they were engaged in often violent conflict with portions of their populations that advocated socialist and communist ideals.

As a political matter, this decision meant the U.S. government could not make negative statements about these governments' treatment of their populations. Adherents of realist theories of international relations would argue that if the U.S. government had made a negative statement about one of the fragile Central American states, the weight of that statement could have caused a nascent democratic government to fall and be replaced with a socialist or communist government. In this vein of reasoning, a decision was made to deny most asylum applications from this region. In truth, some of the asylum seekers were true refugees as defined by the Convention and Protocol. They had well-founded fears of persecution if they returned to their countries of origin due to their race, religion, nationality, social group membership, or political opinion.

In the early 1980s, several congregations and individuals began to create an underground network to bring people from Central American countries illegally across the U.S.-Mexico border and provide them with "sanctuary" in their churches and in their homes in a sharp public criticism of Reagan administration policies. The effort became a classic clash between church and state over "who and what interests defined U.S. sovereignty."[31] James A. Corbett, a Harvard-educated rancher, and Rev. John Fife, then pastor of Southside Presbyterian Church (U.S.A.) in Tucson, Arizona, were the co-founders of the sanctuary movement of the 1980s in the southwestern United States. Corbett, who died in early August 2001, is credited with having personally guided hundreds of Salvadorans and Guatemalans from Mexico to Tucson.[32] Fife called Corbett "the intellectual and spiritual architect of the sanctuary movement."[33] Both Corbett and Fife stated that they believed their actions ethically justified by the failure of

31 Hillary Cunningham, *Sanctuary and Sovereignty: Church and State Along the U.S.-Mexico Border*, 40 JOURNAL OF CHURCH AND STATE 370, 370 (1998).
32 *Sanctuary Movement Co-Founder Dies*, ASSOCIATED PRESS STATE AND LOCAL WIRE, Aug. 7, 2001.
33 *Id.*

the United States to accept Central American refugees.

The sanctuary movement was contested among churches and church leaders. Obvious questions arose about liberation theology, as well as the proper role for churches in contesting civil laws.[34] Liberation theology emphasizes Christ's redemptive character and envisions Him as the liberator or emancipator of the oppressed. In its inception, this theology arose in the Roman Catholic Church and primarily in Central America and South America. Pope John Paul II admonished such teaching as antithetical to scriptural teaching of Christian liberty and rebuked the teaching for allowing Marxism to creep into the Church, curtailing the movement's growth.[35] The message of liberation theology maintains its popularity in liberal theological circles, where the Bible is regularly interpreted as a text on social justice. Theologically, liberation ideology remains a major point of dispute among Christians, which makes it less than persuasive as a reason for breaking the laws of the state which governs the location where a Christian lives.

34 Renny Golden and Michael McConnel discuss the contest and the eventual size and scope of the Sanctuary Movement in *Sanctuary: The New Underground Railroad* (1986). Eventually the movement involved approximately 70,000 members. WILLIAM K. TABB CHURCHES IN STRUGGLE: LIBERATION THEOLOGIES AND SOCIAL CHANGE IN NORTH AMERICA (1986) discusses the ideas of liberation theology and its impact on the Sanctuary Movement.

35 Pope John Paul II made this clear in his 5000 word speech at Palafox Seminary in Puebla, Mexico in February 1979. A story regarding this event is *available at* http://www.time.com/time/magazine/article/0,9171,920117,00.html.

On March 24, 1982, a dozen congregations—primarily in Southern Arizona—declared themselves open sanctuaries for illegal immigrants seeking asylum in the United States. While the fact that the movement was church-based receives most of the attention, the political motivations behind the sanctuary movement should not be ignored. Robert Tomsho, whose work is a defense of the movement, writes that the "political goals of sanctuary were never clandestine. The movement was not smuggling refugees merely to satisfy religious commandments or provide the press with a few good headlines. … [T]he movement hoped to persuade Americans to reconsider their government's support of regimes the refugees were fleeing."[36]

Tomsho's assessment is echoed in statements Fife made in 2002; he told a reporter that it was gratifying to see that the movement "seems to have been a significant moment in the whole history of human rights and refugee rights."[37] More than forty churches in the U.S. gave sanctuary to illegal aliens from Central America during the height of the movement. Among those churches that extended sanctuary to refugees were congregations from a wide range of denominations, including American Baptist, Episcopalian, Lutheran (ELCA), Mennonite, Methodist,

36 Robert Tomsho. The American Sanctuary Movement 94 (1987).

37 Arthur Rotstein, *Sanctuary Movement Marks 20th Anniversary of Aiding Refugees*, Associated Press State and Local Wires, Mar. 22, 2002.

Presbyterian (PCUSA), Quaker, and Roman Catholic.[38] Some of those involved in the movement even reasoned that they were actually enforcing U.S. law, which the government was unwilling to enforce, therefore, their actions should not be considered as a violation of the law. According to one report, "some church leaders say the churches are taking a humanitarian stand and calling attention to what they consider the unfair application of the Refugee Act of 1980."[39] Indeed, the term civil initiative was used by the movement's proponents to describe its actions and inspire members to believe they were carrying out existing law. This differs from civil disobedience, as in the disobeying of law that dissenting individuals determine to be morally reprehensible.[40]

The U.S. government's response was two-fold. First, it issued regular statements emphasizing that no right of sanctuary was recognized in U.S. law. Second, the government began investigating and collecting information regarding the activities of members of the movement. The second part of the response included active infiltration of the churches involved by informants and actual agents of the U.S. government. Reagan administration officials defended the "indictments of American church workers—and the use of infiltrators with concealed tape recorders—as

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38 *Id*. It is not clear whether Missouri Synod Lutherans participated in the movement, but the ELCA issued a denominational level statement in support of the movement. The same may be said of the different variants of Presbyterian Churches, however the PCUSA did issue a denominational statement in support of the movement.

39 George Volcky, *U.S. Churches Offer Sanctuary to Aliens Facing Deportation*, N.Y. Times, April 8, 1983, at A1.

40 Coutin, *supra* note 11, at 553.

part of their obligation to pursue people suspected of breaking laws concerning illegal aliens."[41]

Does the infiltration of a church by government agents represent a violation of the legal doctrine of separation of church and state? Do individuals have the right to contest the source of sovereignty or the right to carry out law for the government? The Ninth Circuit Court of Appeals answered all of these questions in the negative in *U.S. v. Aguilar*, 883 F.2d 662 (9th Cir. 1989), with the U.S. Supreme Court declining to grant *certiorari*, effectively affirming the ruling of the appellate court.[42] The *Aguilar* decision was part of a gradual shift away from an earlier legal presumption in favor of the plaintiff in cases where religiously-inspired practices were alleged to conflict with state and federal law, a shift we examine in the following paragraphs through examination of *Sherbert v. Verner*, 374 U.S. 398 (1963).

Associate Justice William J. Brennan, Jr., writing for a 7-2 majority on the U.S. Supreme Court in the case of *Sherbert v. Verner*, held that the Free Exercise Clause of the First Amendment required that the government demonstrate a compelling governmental interest and act in the least religiously burdensome manner possible wherever such action imposes a substantial burden on an

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41 *Sanctuary Leaders Assail U.S. for Ousting Central American Refugees* L.A. Times, Mar. 2, 1985, at Home Edition, 5.

42 *Certiorari* ("to be more fully informed") is the present passive infinitive of the Latin *certiorare* ("to show, prove, or ascertain"). In the U.S. federal legal system A writ of certiorari currently means an order by a higher court directing a lower court (or other designated authority) to send the records of a case to the higher court for review.

individual's ability to act upon sincere religious beliefs. Under this formulation, known as the Sherbert Test, the burden of proof rested upon the state, and a mere "religion-blind" approach to legislation was held insufficient to meet the new strict scrutiny standard.[43] Inasmuch as advocates of sanctuary might reasonably argue that theirs was "a sincerely held religious belief" which "conflict[ed] with, and [was] thus burdened by, the state requirement," they would have succeeded, at least, in forcing the government to demonstrate a compelling state interest for enforcing immigration policy in sanctuary cases under the Sherbert Test. By the time the courts heard the *Aguilar* case, however, the burden of proof had begun to shift, and in *U.S. v. Lee*, 455 U.S. 252 (1982) and subsequent cases, "the size of the requested exemption, not the magnitude of the burden on the claimant," became the paramount jurisprudential concern.[44]

In *U.S. v. Aguilar*, the Ninth Circuit Court held that the religious motivations of the defendants were irrelevant "[s]o long as appellants intended to directly or substantially further the alien's illegal presence."[45] According to the court, the appellants had confused intent with motive. The appellate court also raised questions about the centrality of the sanctuary movement to the defendants' religious practices, noting that no members of the

43 Victoria J. Avalon, The Lazarus Effect: Could Florida's Religious Freedom Restoration Act Resurrect Ecclesiastical Sanctuary?, 30 STETSON L. REV. 664, 680 (2000)
44 *Id*. at 686.
45 United States v. Aguilar, 883 F.2d 662, 688 (9th Cir. 1989).

Catholic or Methodist clergy testifying before a lower court suggested that "devout Christian belief mandates participation in the 'Sanctuary Movement.'"[46] The manner in which federal agents obtained evidence against participating congregations, moreover, was upheld under the "invited informer" doctrine, which permits the warrantless use of undercover agents and informers operating as part of a good faith government investigation where the communication monitored is voluntarily made to a third party, such as in the case of a church service or function open to the general public.[47] According to the court, the participation of a government representative in church activities for the purpose of reporting on them does not constitute an infringement of the church's rights.[48]

Unsurprisingly, the defendants felt otherwise. Stephen Cooper, attorney for two church workers who faced trial in Texas for harboring and smuggling illegal aliens, stated:

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46 *Id*. at 699.

47 *Id*. at 703.

48 A year after the *Aguilar* decision was handed down, the Supreme Court affirmed its logic, ruling in Employment Division v. Smith, 494 U.S. 872 (1990) that "facially neutral laws of general applicability that burden the free exercise of religion require no special justification to satisfy free exercise scrutiny," prompting Congress to pass the Religious Freedom Restoration Act (RFRA) in 1993. This legislation reestablished the stricter "compelling interests" standards of the Sherbert Test, but was limited to aspects of belief "compulsory or central" to the claimant's religion. Some states, however, have passed parallel bills, a number of which employ more liberal definitions. Florida's RFRA, for instance, defines the exercise of religion as an act "substantially motivated by a religious belief," a definition which could easily encompass the provision of sanctuary and require state proceedings on such cases to adhere to a strict scrutiny standard, the implications of which have yet to fully play out. See, e.g., Avalon; James E. Ryan, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407-1462 (1987), *and Klemka v. Nichols*, 943 F. Supp. 470 (M.D. Pa. 1996).

> I do see it as church versus state, but in a very much different way than we normally see church versus state. I can't remember any time in the past when the Government has tried to invade the churches, tried to tell the churches they can't do things that have always been recognized as within the province of the churches, tried to turn church people into criminals for nonviolent behavior."[49]

This proposition is intriguing. The church and Christians are to be honest, open, and truthful according to teachings of scripture. Is it dishonest, however, for informants to tell the government what a church is doing? This is one of the many points of disagreement between congregations that were supportive of the sanctuary movement and those who opposed it. A Southern Baptist minister told the authors:

> I could not support such interpretation of scripture and Christian duty that would require me to be dishonest to the authorities. But it remains my dilemma to consider how to serve God and assist those in need as Scripture teaches and not violate the laws of this country, which tell me to report and turn in illegal aliens.[50]

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49 Wayne King, *Leaders of Alien Sanctuary Drive Say Indictments Pose Church-State Issue*, N. Y. Times, Feb. 3, 1985, at A30.

50 Samuel S. Stanton is pastor of First Southern Baptist Church in Fallon, NV. This excerpt is from personal conversation held December 29, 2006.

Nevertheless, the ruling in the *Aguilar* case was that sanctuary was not a matter of fundamental religious practice, particularly since millions of Christians never engage in the practice and many openly oppose it.[51] Since the practice of sanctuary is not a matter of core religious doctrine, but rather one of political practice, defenses predicated on the Free Exercise Clause were rejected.

Interestingly, the insistence of sanctuary movement participants that they were carrying out the law for the state shares certain similarities with vigilante justice, protection from which appears to have been one of the principal reasons for the initial creation of sanctuary. This is the most ironic aspect of the modern movement: it seeks to give sanctuary, which was originally intended to protect people from vigilante justice, by engaging in vigilante justice.

In the sanctuary debate, the sticking point for Christians is that Christianity teaches obedience to authority as well as kindness to strangers and the persecuted. Which of these is to be the guiding principle for behavior? The best answer would depend upon the extent to which a Christian believes in the authority and infallibility of the Bible. Many denominations teach that the Bible is infallible and, therefore, the ultimate source of authority. For the members of these churches, the answer to the question is both obedience to authority and human kindness. Many churches, however, teach that the Bible needs to be interpreted in a more socially relevant manner. For members of these churches and

51 *Aguilar*, 883 F.2d at 662.

adherents of their theological offering, it is more difficult to both obey the law and follow the teachings of social justice—charges which they see as often contradictory. This issue is highlighted in the Court's opinion in *Aguilar* that some denominations' representatives testified that sanctuary was not a principle element or requirement of the faith.

B. The Current Sanctuary Movement

As we examine in this section of our work, the government of the United States remains adamant that no right to sanctuary exists. This position is mentioned in numerous statements regarding sanctuary's latest feature case—Elvira Arellano. The modern version of sanctuary is even more concerned with distributive justice and with humanitarian belief than its predecessors, and eschews the claim that people are deserving of sanctuary because they are true refugees seeking asylum in favor of a much more expansive interpretation. The modern version is exemplified by the story of Elvira Arellano, related in the opening of this article.

The contemporary sanctuary movement does not care that Arellano openly admits she came here to find a better life. In this regard, the modern movement is more tied to the open borders philosophy than the movement was in the 1980s. Ms. Arellano has become a celebrity for the new movement to support—a new face for a movement that is concerned not only with persecution of the illegal alien if the person is forced to return home, but also the economic conditions that individual would face in his or her country of origin. Recognizing her importance to the movement, *Time* named Arellano as one of the "People Who Mattered in 2006."[52]

Arellano's supporters are conspicuously silent about any fear of persecution if she is returned to Mexico. Most of them focus on the fact that her son, Saul, was born in the United States and therefore is guaranteed United States citizenship. Pastor Walter Coleman said his congregation offered Arellano refuge after praying about her plight. Coleman said he does not believe Arellano should have to choose between leaving her son behind and removing him from his home. "She represents the voice of the undocumented, and we think it's our obligation, our responsibility, to make a stage for that voice to be heard," he said.[53]

The government's statements about Ms. Arellano echoed those made regarding Central Americans who were denied their asylum petitions in the 1980s. In fact, a representative of the U.S. Immigration Agency said that an agent has every right to enter the Adalberto United Methodist Church and arrest her and would do so "at a time of [its] choosing," a threat rendered moot by Ms. Arellano's decision to leave the confines of the church to lobby publicly for her cause.[54] In response to the government's position,

52 Wendy Cole, *Elvira Arellano, An Immigrant Who Found Sanctuary*, TIME. Apr. 21, 2007, *available at* http://www.time.com/ time/personoftheyear/2006/ people/3.html.

53 Don Babwin & Karla Johnson, *Immigrant Takes Refuge in Chicago Church*, ASSOCIATED PRESS, Aug. 16, 2006, *available at* http://www.breitbart.com/article.php?id=D8JHRKAO2&show_article=1.

54 *Elvira Arellano and the Law*, CHI. TRIB., Aug. 17, 2006, *available at* http://www.chicagotribune.com/news/local/ chi-0608170087aug17,1,2309585.story?coll=chi-photo-front.

Arellano said, "If Homeland Security chooses to send agents to a holy place, I would know that God wants me to serve as an example of the hatred and hypocrisy of the current administration."[55]

V. Dilemma

This article has focused on sanctuary and illegal immigration as a church and state issue for Christians. Sanctuary may also be an issue for other American religious groups. Given the premises of their belief system, it is highly probable that this could become an issue for Buddhist and Hindus as well. It would be less of an issue for stalwart Muslims for whom there is little or no separation between church and state. Christian churches, however, dominate the religious landscape of the United States and the sanctuary movement in the 1970s and 1980s involved Christian churches. The revived movement in the first decade of the second millennium, where non-governmental actors are involved, also includes Christian churches.

Sanctuary is humanitarian. As human beings we must recognize the sanctity of human life. Christianity recognizes a necessary duty to preserve and defend human life and adherence to a belief system that routinely suggests provision of aid to those who are unable to aid themselves, as well as provision of sustenance to those who cannot provide sustenance for themselves. If people are unable to provide for the protection of their own life,

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55 *Illegal Alien Activist Elvira Arellano Hides out in Church to Avoid Deportation*, *available at* http://www.diggersrealm.com/ mt/archives/001790.html.

sanctuary should be provided for them. This was evidenced in the movement of the 1970s and 1980s, where participants repeatedly voiced justifiable concern for the physical safety of the illegal immigrants in question.

Sanctuary is also political. The sanctuary movement in 1980s was a political confrontation with President Reagan's anti-communist Central American policy. Reagan's policy supported governments with abysmal human rights records because these governments were not communist. Sanctuary providers challenged the legality of supporting human rights abusers in the name of fighting communism. While good humanitarian assistance was offered, would the same assistance have been offered under different political circumstances? Remember that most sanctuary declarations included a statement that the actions were taken because of the illegal and immoral policy of the U.S. government concerning Central America. If it were truly about the moral issues of the preservation and sanctity of life, it would be necessary to include a statement concerning the legality of U.S. policy in Central America only as a convenient justification for their actions. Sanctuary as a political act is certainly evidenced in the case of Elvira Arellano, where no concern exists for her safety, but plenty of concern is voiced over her possible deportation and the status of her son, Saul.

But is the provision of sanctuary really a matter of church and state relations? It is when certain denominations and congregations chose to make it an issue, although the state has shown that it does not recognize it as pertaining to the Establishment Clause, an argument that is legally compelling, but not compelling at all to advocates of the sanctuary movement. Some denominations continue to issue proclamations that they will support sanctuary and disobedience of the U.S. laws in response to a higher calling.[56] Most churches have taken an approach that says illegal immigration is a problem that needs to be dealt with humanely and legally, but not in a manner that penalizes people under the law for acting on Christian value.

We close our consideration of the sanctuary movement with consideration of events of the year 2010 in Arizona. Representatives of the same congregations involved in the sanctuary movement in the 1980's are part of the emerging dispute over Arizona Senate Bill 1070 (AZ SB 1070). AZ SB 1070 would allow state law enforcement and state administrative agencies greater discretion in determining the illegal status of immigrants within the borders of Arizona through traditional law enforcement means and increased requirements of documentary proof of legal status. Interestingly AZ SB 1070 argues essentially the same argument that is made by sanctuary movement activists—the federal government is not enforcing the laws, so they must be enforced by citizens, or, in this case, the law enforcement agencies and courts of the State of Arizona. The injunction of the court against AZ SB 1070 argues that even if the enforcement had the same intent and

56 See for instance the statement of the Presbyterian Church—USA 217th General Assembly (2006) on Advocacy for All Immigrants.

purpose as existing federal law, the State of Arizona should not interfere with execution of federal law.[57] Both the modern sanctuary movement and modern movements to abate illegal immigration are faced with the same logic in the federal courts—you are not the U.S. government, you may not enforce the laws of the U.S. government.

57 "If enforcement of the portions of S.B. 1070 for which the Court finds a likelihood of preemption is not enjoined, the United States is likely to suffer irreparable harm. This is so because the federal government's ability to enforce its policies and achieve its objectives will be undermined by the state's enforcement statutes that interfere with federal law, even if the Court were to conclude that the state statutes have substantially the same goals as federal law." U.S. District Court Judge Walker in issuing injunction against AZ SB 1070.

DISTRICT OF COLUMBIA V. HELLER:

A DISPUTE OVER HISTORICAL FACT

*Esther J. Winne**

"Americans have the right and advantage of being armed- unlike the citizens of other countries whose governments are afraid to trust the people with arms."

James Madison, Federalist Papers 46

There are few rights more fundamental to the spirit of the United States and the self-reliance of its citizenry than the right to bear arms. To deprive a population of this basic right is to prevent it from defending itself against tyranny and crime. The Framers of the Constitution of the United States were conscious of this fact.

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They knew, as George Mason stated ominously in June 1788, "To disarm the people…was the best and most effectual way to enslave them."[1] In order to protect the right of the American people to possess firearms, they enacted the Second Amendment of the Bill of Rights. Over the years, however, advocates of strict gun control have misconstrued and manipulated the vaguely worded amendment and diminished its ability to fulfill its purpose. In the landmark case of *District of Columbia v. Heller*, 554 U.S. ___ (2008), however, the Supreme Court broke with precedent and reasserted the plain truth of the Second Amendment.

The debate in the Supreme Court case *District of Columbia v. Heller* centered on a disagreement over historical data rather than a clash between differing methods of constitutional interpretation. Justices Scalia and Stevens differed on a number of historical points, including their interpretation of the purpose of the Second Amendment, the state constitutions and proposals of the foundational era, and the specific wording of the amendment. Justice Scalia employed an originalist interpretation of the text as the analytical approach and driving force of his opinion, while Stevens reached his dissent through a contextual interpretation of the original text.

Dick Anthony Heller, a D.C. special policeman, applied to register a handgun he wanted to keep at his home, but the District

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1 David Thomas Konig, *The Second Amendment: The Missing Transatlantic Context for the Meaning of the 'The Right of the People to Keep and Bear Arms'*, 22 Law & Hist. Rev. 151 (2004), *available at* http:// www.jstor/org/stable/4141667.

denied his request. Heller filed a lawsuit, challenging the 1976 District of Columbia statute that banned handgun possession by making it a crime to carry an unregistered handgun and prohibiting the registration of handguns. The law also requires residents to keep all firearms they own unloaded and disassembled or bound by something like a trigger lock.[2] The District Court dismissed the suit, but upon appeal, the D.C. Circuit Court reversed the decision and "held that the Second Amendment protects an individual right to possess firearms and that the city's total ban on handguns, as well as its requirement that firearms in the home be kept nonfunctional even when necessary for self-defense, violated that right."[3]

The case arrived at the United States Supreme Court where, in a 5-4 vote, the Justices ruled that the District ban was a violation of the Second Amendment, which states, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[4] This landmark decision was the first ruling the Court had made on the substantive understanding of the Second Amendment in over five decades. Justices Scalia and Stevens drafted the opinions of the Court. In their lengthy statements, both of the justices spent an extensive amount of time examining the historicity of their position and the original intent of the Second Amendment. Although

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2 Heller v. District of Columbia, No. 07-290, 2010 U.S. Dist. LEXIS 29063 (U.S., Mar. 26, 2008).

3 *Id.* (Stevens, J., dissenting).

4 Kenneth Jost, Gun Rights Debate, CQ Researcher, Oct. 31, 2008, http://library.cqpress.com/cqresearcher/cq resrre200 8103100.

they agreed on their approaches to a large extent, Stevens and Scalia disagreed on the meaning of the information they uncovered. First, their differing opinions on the purpose of the Second Amendment created a foundational discrepancy in the reading of history. Justice Stevens, in the dissenting opinion, offers that upon a survey of individual states' constitutions and constitutional proposals, the drafters of the Constitution could have explicitly given any – and all – citizens the right to firearms, without contest or regulation.[5] Justice Scalia, on the other hand, emphasizes the Founders' desire to give citizens the resources for self-defense and the ability to rebel against a tyrannical government if necessary.[6] Writing for the majority, Scalia states that the Second Amendment provided an individual right for "law-abiding, responsible citizens to use arms in defense of hearth and home."[7] Concerns about the creation of a standing army were undoubtedly discussed at the drafting of the Constitution, but a careful historical analysis provides more substantial support for Scalia's argument.

The Framers of the American Constitution were heavily influenced by English law and history. Many of the men who gathered to script the founding document and its amendments were only a few generations removed from the first European immigrants. In England, the right to possess a firearm was commonplace, as it was in early America. In fact, during the 12th century, King Henry II required all citizens to own certain arms because they

5 *Heller*, 2008 U.S. Dist. LEXIS 29063.
6 *Id.* (Stevens, J., dissenting).
7 Jost, *supra* note 4.

did not have a regular army and police force.[8] It was the duty of the people to defend themselves and their king if England was attacked. In 1671, Parliament essentially deprived the people of this right by imposing an extensive property requirement on the right to hunt. The process of disarming the citizenry was continued by King Charles II and his Catholic successor James II, who banned firearms for all Protestants.[9]

These actions by the British monarchy, as Scalia explains, instilled a concern among the Founding Fathers over the concentration of military forces and a desire to protect the right to own arms. After the removal of James II in the Glorious Revolution of 1689, his successor, William of Orange, signed the Declaration of Rights, which included the provision, "That the Subjects which are Protestants, May have Arms for their Defense suitable to their Conditions and as allowed by Law."[10] Heavily drawn upon by the Founders, the English Bill of Rights' inclusion of the right to bear arms stands as a frontrunner to the Second Amendment. In his *Commentaries on the Laws of England,* Sir William Blackstone, a preeminent English scholar, comments on the importance of the right to arms. He writes that the rights of Englishmen are rooted in "the natural right of resistance and self-preservation" when the sanctions of society and laws are found insufficient to "restrain the

8 Leonard W. Levy, *Origins of the Bill of Rights 136* (1999).
9 *Id.* at 137.
10 Gordon Lloyd & Margie Lloyd, The Essential Bill of Rights: Original Arguments and Fundamental Documents 59 (1998).

violence of oppression."[11]

Historically it is evident that the right to keep and bear arms also aligns with the concept of popular sovereignty, which is foundational to the American republic. In addition to the influences of English law, many of the Framers were highly impacted by the writings of philosopher John Locke. In his 1694 *Second Treatise of Government*, Locke outlines the right of the people to change or abolish a tyrannical government if necessary.[12] In order to overthrow an oppressive government, arms would, at times, be vital. The birth of the United States is a testament to this Lockean theory. In the 1700s, among other repressive deeds, King George III attempted to disarm the most rebellious areas of the colonies prior to the American Revolution.[13] Thomas Jefferson wrote in the Declaration of Independence that, "To secure these rights [life, liberty and the pursuit of happiness], Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive to these ends, it is the Right of the People to alter or to abolish it."[14] Unfortunately, there are times, as in the case of the American Revolution, when abolishment of an oppressive government can only occur through the use of violence. The Framers were aware of this fact and therefore enacted the Second Amendment in order

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11 Carl T. Bogus, The Second Amendment in Law and History 188 (2000).

12 Akhil Reed Amar, The Bill of Rights: Creation and Reconstruction 47 (1998).

13 Jost, *supra* note 4.

14 1 Julian P. Boyd, The Papers of Thomas Jefferson 429 (1950).

to protect their means of defense against tyranny.

At the time of the ratification of the Constitution, an English minister wrote, "Rifles, infinitely better than those imported, are daily made in many places in Pennsylvania, and all the gunsmiths everywhere constantly employed. In this country, my lord, boys, as soon as they can discharge a gun, frequently exercise themselves therewith, some a fowling and others a hunting."[15] The use of guns for non-military means was widespread in early America. The people, therefore, would easily understand the right to bear arms in the Second Amendment based upon their experience.

Second, Justices Scalia and Stevens disagreed over the interpretation of the wording used by the Framers in the Second Amendment. One of the most significant disparities is between their views of the phrase to "bear arms." While Stevens argues that to "keep and bear arms" was unequivocally related to a military purpose, Scalia asserts that to "keep arms" was simply a common means of referring to possessing arms for everyone.[16] To bear arms, Scalia continues, refers to carrying a weapon for confrontation. After examining sources from the 18th century, Scalia demonstrates that on numerous occasions, "bear arms" referred to carrying a weapon outside of an organized militia.[17] In the Linguistics Brief prepared for the *Heller* case, "every example given by petitioners' amici for the idiomatic meaning of "bear arms" from the founding period either includes the preposition 'against' or is not

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15 Levy, *supra* note at 8, 140.

16 *Heller*, 2008 U.S. Dist. LEXIS 29063.

17 *Id*.

clearly idiomatic."[18] Scalia quickly dispensed of the examples Stevens provided of the right to "bear arms" referring solely to military purposes because they were all federal legal sources. As Scalia logically pointed out, these sources would have few other occasions to mention bearing arms outside of conversations about the militia and standing army.[19]

Third, Justices Scalia and Stevens differed on their perception of the state conventions and constitutions surrounding the founding of the country. On May 15, 1776, the Second Continental Congress sent a resolution to the assemblies of the thirteen colonies that declared each state should create a separate government that best protected and ensured the happiness of its constituents.[20] Over the next four years, representatives met in each of the colonies across the nation and adopted formal state governments. Eleven of the colonies chose to shape governments that were dedicated to the preservation of rights.[21] That preservation was so essential that the delegates of seven states attached a proposed declaration of right. The declarations of Pennsylvania, Virginia, Delaware, and Massachusetts all included statements referring to the right to bear arms.[22]

In his dissent, Stevens acknowledges the inclusion of the right to bear arms in many of the original state declarations but sug-

18 *Id*.
19 *Id*.
20 Lloyd & Lloyd, *supra* note at 10, 183.
21 *Id.*
22 *Id*. at 184.

gests that because many of them contain qualifiers, they are different from the Second Amendment. For example, the Pennsylvania Declaration of Rights states that since "the people have a right to bear arms *for the defense of themselves and the state*," they are different than the amendment being debated. Stevens contends that if the Second Amendment right "to keep and bear arms" was meant for any non-military purpose, the Framers would have included a qualifier that indicated as much.[23] It is interesting, however, that the "the right to bear arms" first appeared in the state constitution of Pennsylvania in 1776—a state that did not even have a state militia.[24] In this case at least, the expression clearly had a non-military significance. The inclusion of the qualifiers in the state documents was likely for the sake of clarity, rather than inclusive regulation. These statements strengthen the claim that the Second Amendment was intended to defend the individual right of citizens to keep and bear arms for purposes outside of the military because they demonstrate that such purposes were under common consideration among the states.

In the third draft of the Declaration of Rights which was attached to the 1776 Virginia Constitution, Thomas Jefferson stated that, "No freeman shall be debarred the use of arms [within his own lands or tenements]. There shall be no standing army but in time of actual war."[25] Although the review committee changed Jefferson's wording before the final draft of the Constitution, just

23 *Heller*, 2008 U.S. Dist. LEXIS 29063.
24 Levy *supra* note at 8, at 135.
25 Boyd *supra* note at 14, at 363.

the initial inclusion of the phrase shows that Jefferson, one of the more forward-thinkers of his time, believed a constitutional right to the possession of arms was necessary.

In Massachusetts, the delegates emulated the emphasis placed on collective defense by Pennsylvania and Virginia but added the word "keep" to their constitution. "The people have the right to keep and bear arms for the common defense."[26] According to Saul Cornell, an Associate Professor of History at The Ohio State University, the Massachusetts convention included "keep" based on the assumption that many of the state's citizens would purchase their own arms in order to fulfill their duty and serve in the militia.[27] The delegates wanted to ensure that it was clearly permissible for these citizens to then keep their weapons at home. The Massachusetts citizens wanted even further protection; one citizen of Williamsburg wrote in protest that, "we esteem it an essential privilege to keep Arms in our houses for Our Own Defense and while we continue honest and Lawful Subjects of Government we Ought Never to be deprived of them."[28]

In the years preceding the landmark decision of *District of Columbia v. Heller*, relatively few Supreme Court cases dealt with the Second Amendment. In 1876, the Court first confronted the topic in the case of *United States v. Cruikshank*, 92 U.S. 542

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26 SAUL CORNELL, A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA 23 (2006).

27 *Id.* at 24.

28 STEPHEN P. HALBROOK, THE RIGHT TO BEAR ARMS: STATE AND FEDERAL BILLS OF RIGHTS AND CONSTITUTIONAL GUARANTEES 42 (1989).

(1876). As a result of this case, the Supreme Court established two principles. The Second Amendment allows for limited regulation of firearms, and because the amendment is not incorporated it only applies to federal power.[29] Ten years later in *Presser v. Illinois*, 116 U.S. 252 (1886), the Supreme Court reaffirmed that the Second Amendment did not apply to the states when it ruled in favor of an Illinois law that prohibited paramilitary organizations from parading or drilling in cities without a license from the governor.[30] The *Presser* case also substantiated the belief that the right to bear arms was only related to the formation and management of the militia by the government. In the late 19th century the Supreme Court in the cases of *Miller v. Texas*, 153 U.S. 535 (1894), and *Robertson v. Baldwin*, 165 U.S. 275 (1897), affirmed the ruling that the Second Amendment did not apply to the states.[31]

The most significant Supreme Court decision on this issue prior to *District of Columbia v. Heller* was the 1939 case of *United States v. Miller*. Jack Miller and Frank Layton were convicted of transporting firearms across the state border between Oklahoma and Arkansas.[32] The Court unanimously upheld the constitutionality of mandated firearm registrations and the 1934 National Firearms Act, which regulated the interstate transportation of some weapons. In his opinion, Justice Woods wrote:

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29 Robert J. Spitzer, The Right to Bear Arms: Rights and Liberties under the Law 32 (2001).

30 Robert J. Cottrol, Gun Control and the Constitution: Sources and Explorations on the Second Amendment 13-29 (1994).

31 Spitzer, at 35.

32 Cottrol, at 174-83.

> It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserved militia of the United States as well as of the States; and, in view of this prerogative…the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the General Government. But, as already stated, we think it clear that the sections under consideration do not have this effect.[33]

In his dissent, Stevens asserts that the Court's reasoning in *Heller* was not substantial enough to overturn the *Miller* decision. Stevens states that in *Miller* the Court held that "the Second Amendment did not apply to the possession of a firearm that did not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'"[34] Scalia contends that this was not the central holding of *Miller*. More accurately, *Miller* centered upon the type of gun used, not the purpose for which they were using the weapon. The Court stated that Second Amendment does have limits and that this particular weapon did not seem to be part of "ordinary military equipment" or an item that would contribute to the common defense. *Heller* completely shifted the legal discussion by striking down a ban on handguns.

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33 Spitzer, *supra* note at 28, at 34.

34 *Heller*, 2008 U.S. Dist. LEXIS 29063 (Stevens J. dissent).

Furthermore, the *Heller* decision now serves as the foundation for a larger ruling. In 2010, the Supreme Court's ruling in *McDonald v. Chicago*, 561 U.S. ___ (2010), upheld the *Heller* decision and expanded the application of the Second Amendment's right to bear and keep arms for self-defense to include the states, as justified by the Fourteenth Amendment.[35]

Justice Scalia's originalist interpretation of the facts surrounding the framing of the Constitution in the landmark 2008 *District of Columbia v. Heller* case was consistent with the original intent of the Second Amendment. In response to the decision made in the case of *Heller*, Stevens wrote:

> The Court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials wishing to regulate civilians use of weapons, and to authorize this Court…to define the contours of acceptable gun control policy. Absent compelling evidence that is nowhere found in the Court's opinion, I could not possibly conclude that the Framers made such a choice.[36]

It is evident, however, that the Framers made an intentional decision to limit the ability of the federal government to disarm the people. The Framers wanted to avoid the dangers of a government with too much power, and they wanted to permit a means

35 McDonald v. City of Chicago, No. 08-1521, 2010 U.S. LEXIS 5523 (2010).

36 Jost, *supra* note 4.

for self-defense. The Second Amendment guards one of the most fundamental resources for protection—the possession of a firearm. Though dissenters claim its ambiguity, the Supreme Court defended the essential freedom of American citizens and created precedent in the case *District of Columbia v. Heller*.[37]

37 Scalia and Stevens continue to disagree on this issue. Scalia and Stevens split from the majority and dissenting opinions, respectfully, to engage one another further on the differences between their interpretations.

FEDERALISM, FAMILY LAW AND THE SUPREME COURT

*Michael L. Coulter**

Fundamental to politics in the United States is the federal system. It devolves and distributes power to states. As Justice Brandeis famously said, "states are laboratories of democracy."[1] There are, however, limitations to the distribution of power in our federal system. The founders embraced the variation that would come with having states make policy decisions, but they also recognized that states would have some limitations in the power placed upon them.[2] One such limit is Article IV's full faith and credit clause, which reads, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of

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1 New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

2 THOMAS R. HENSLEY, THE REHNQUIST COURT: JUSTICES, RULINGS, AND LEGACY 275-76 (2006).

every other state."[3] This paper seeks to examine the significance of the full faith and credit clause as it relates Supreme Court cases governing marriage and divorce. The U.S. Supreme Court has moved from permitting states the capacity to not recognize some marriages and divorces in other states to requiring that marriages and divorces in any state be fully accepted by all other states.

There is a significant body of law in the United States, known as family law, which determines who can marry, the legal rights of spouses, the circumstances under which a civil divorce can take place, the provision of financial support for spouses and children, and the custody of children in the case of a divorce or separation.[4] Inheritance law is also greatly affected by and related to family law.[5] In the United States, family law traditionally has been determined by states, and thus there has been variation in it. Such differences do not exist in countries with a unitary legal system, such as England and France.[6] Even some countries with a federal system have determined that family law should be uniform.[7]

In the early years of the American republic, marriage was considered more than a contractual agreement between two parties; marriage was a status and this status had a particular effect on a married woman.[8] A married woman's legal status was gen-

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3 U.S. Constitution, Article IV § 1.

4 Mary Ann Glendon, The Transforming of Family Law: State, Law, and the Family in the United States and Western Europe 144 (1989).

5 *Id*. at 295.

6 Daniel J. Elazar, *Contrasting Unitary and Federal Systems*, 18 Int'l Political Science Review 237, 246-48 (1997).

7 Glendon, *supra* note 4, at 190.

8 Lawrence M. Friedman, American Law in the 20th Century 434 (2002).

erally understood to be subsumed in the identity of her husband. This doctrine was known as *feme coverture,* which means that the woman was covered by the male and could not own property or conduct legal actions in her name.[9] Also, for most of the early years of the American republic, states made divorce very difficult. Although several northern states permitted limited divorce, in the south it was extraordinarily difficult to obtain one.[10] Neither Congress nor the Supreme Court changed state laws affecting marriage and divorce during the end of the eighteenth or in the entirety of the nineteenth century.

Preserving State Power in Marriage

The earliest case where the U.S. Supreme Court ruled in a significant way related to a state marriage law was *Barber v. Barber*, 62 U.S. 582 (1859).[11] This case involved the Barbers who were married in 1840; Mrs. Barber obtained a legal separation from her husband and an order for alimony for as long as they remained married.[12] Mr. Barber failed to pay the alimony, so Mrs. Barber sought to recover the money that she believed was owed to her.[13] Mr. Barber said that they were no longer married because he had obtained a divorce in Wisconsin in 1852 on the grounds that

9 Karen Pearlston, *Married Women Bankrupts in the Age of Coverture*, 34 Law & Soc. Inquiry 265, 265-95 (2009).
10 Friedman, *supra* note 8, at 435.
11 Barber v. Barber, 62 U.S. 582 (1858).
12 *Id*. at 585.
13 *Id*. at 586.

his wife had not resided with him.[14] The Supreme Court heard the case because it involved residents of two different states. It is worth noting that the opinion states that Mrs. Barber brought the case "by her next friend," because she could not bring the lawsuit herself.[15] The court's majority opinion said that the Wisconsin divorce "certainly has no effect to release the defendant . . . from his liability to the [alimony] decree" which had been entered into in New York.[16] In other words, Mr. Barber was divorced from Mrs. Barber in Wisconsin but not in New York because New York legal institutions were not required to recognize Wisconsin's judgments regarding a marriage in New York. The majority opinion strongly states that this is not simply a case about alimony, implying that alimony is a matter to be determined by states, but rather that the case is about upholding a contract.[17]

In regards to the understanding of the family that operated in American law at the time, it is particularly instructive to read this case's dissent. Written by Justice Peter Daniel and joined by two other members, the dissent does not state that New York should accept the divorce; on the contrary, the dissenting opinion asserts that the U.S. Supreme Court should never have even entertained the case because of the doctrine of *feme coverture*, which holds that "during the life of the husband and wife the wife cannot be remitted to the position of *feme solo*, and cannot be therefore a cit-

14 *Id*. at 587.
15 *Id*. at 584.
16 *Id*. at 588.
17 *Id*. at 604.

izen of a state or community different from that of her husband."[18]

Another case from this era was *Cheever v. Wilson*, 76 U.S. 108 (1870), which involved a couple who had moved from Washington, D.C. to Indiana and, once there, obtained a divorce.[19] Mr. Wilson initiated litigation in the District of Columbia in order to seek payment from Mr. Cheever because of an obligation made by Mrs. Cheever after the Cheevers divorced. Essential to the holding of the case was the legitimacy of the divorce in Indiana; the court ruled that the divorce had been legally obtained in Indiana because the couple met the Indiana requirements for a divorce. Both spouses participated in the divorce proceedings.[20] The Supreme Court indicated that the Indiana courts had proper jurisdiction to determine the case and that the Washington, DC court offered no evidence to undermine the claim of residency in Indiana.[21] After the *Cheever* case, other state courts used jurisdictional tests to determine whether they would accept a divorce from another state or divorce a couple that had moved from another state. For example, many state courts required that a person have an actual residence in the state in order to obtain a divorce.

There were two other cases from the late 1800s which did not rule on the substance of family law, but rather on procedure for making family law. In *Pennoyer v. Neff*, 95 U.S. 714 (1877), the Court ruled that a defendant could not legally determine the

18 *Id*. at 602 (Daniel, J., dissenting).
19 Cheever v. Wilson, 76 U.S. 108 (1969).
20 *Id*. at 119.
21 *Id*. at 124.

relationship of a resident of one state to a resident of another state.[22] Thus one state could theoretically determine a resident to be divorced from a resident of another state. In *Maynard v. Hill*, 125 U.S. 190 (1888), the Supreme Court ruled that it was permissible for the Oregon territorial legislature to pass an act indicating that a resident was divorced from a non-resident.[23] The court acknowledged that the marriage creates a new status for spouses, but that the status could be changed by law.[24]

A very significant case where the Supreme Court wanted to make divorce decrees at least partially exempt from the full faith and credit clause was *Haddock v. Haddock*, 201 U.S. 562 (1906).[25] This case involved a couple who had secretly married in 1868 but separated immediately after marriage. The husband then settled in Connecticut and obtained a divorce in 1881.[26] In 1891 the husband inherited considerable property and the wife initiated proceedings to obtain financial support in a New York court. She was awarded such a decree, which the husband challenged based on the Connecticut divorce decree.[27] In a 5-4 decision, Justice Edward White, writing for the majority, acknowledged that the full faith and credit clause is generally operative, and he even states that a judicial decision could be binding on someone who,

22 Pennoyer v. Neff, 95 U.S. 714, 732 (1878).
23 Maynard v. Hill, 125 U.S. 190, 216 (1888).
24 *Id.* at 213.
25 Haddock v. Haddock, 201 U.S. 562 (1906)
26 *Id.* at 565.
27 *Id.* at 566.

at the time, is a resident of another state.[28] In the end, however, the Supreme Court did not require that a divorce received in one state be accepted in another. The plaintiff could not obtain the divorce if the plaintiff were considered to be at fault in the divorce and if the other spouse, who was not at fault, were not present in the judicial proceedings where the divorce was granted. The majority opinion stated that "if one government, because of its authority over its own citizens has the right to dissolve the marriage tie as to the citizen of another jurisdiction, it must follow that no government possesses as to its own citizens, power over the marriage relation and its dissolution."[29] The Supreme Court believed it was significant that Mr. Haddock had abandoned his wife, and wanted to enable New York to maintain its strict marriage laws.

Haddock and other related cases did not prevent all out-of-state divorce decrees from being recognized in another state. If spouses married in one state, and then moved and later divorced and moved again, the divorce would be recognized in other states where both the marriage and the divorce did not occur. In general, the U.S. Supreme Court during the nineteenth and early twentieth centuries sought to preserve the autonomy of states in determining marriage law by giving strict attention to the residency of both spouses and the possible fault of one spouse in the dissolution of the marriage. At the same time, there was a realization that the Full Faith and Credit clause prevented states from having com-

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28 *Id.*
29 *Id.* at 573.

plete autonomy.[30]

These cases occurred at a time when there was an attempt to pass uniformly strict divorce laws in the American states.[31] The National Conference of Commissioners on Uniform State Laws and the National Congress on Uniform Divorce Laws each proposed model legislation during this period.[32] During his presidency, Theodore Roosevelt was even part of the campaign for enacting uniformly strict divorce laws. It appears that there was recognition of the rising tension between having states with different divorce laws and increased mobility which enabled people to find a jurisdiction more suitable to one's wishes.

Full Faith and Credit Fully Extended to Divorces

In 1942 and 1945, the Supreme Court issued two rulings, both of which involved the same couple from North Carolina. The first case initiated a shift in Supreme Court decisions where the Full Faith and Credit clause was strictly applied to divorce decrees. The new approach by the Court made it possible to obtain so-called migratory divorces more easily, which had been severely limited under previous court rulings. In *Williams et al. v. State of North Carolina*, 317 U.S. 287 (1942), the Court considered the case of two North Carolina residents, O.B. Williams and Lillie Hendrix, who moved to Nevada in 1940 and lived there

30 Glendon, *supra* note 4, at 190.
31 *Id.*
32 *Id*. at 188.

six weeks, which was enough time to establish legal residence.[33] In the early 1930s Nevada had shortened the time required for residency to attract more people seeking a preferred legal judgment. Other states, adopting a position of legal realism, were also enacting more liberal divorce laws to reflect the actual practices of American life.[34]

On June 26, 1940, Williams and Hendrix both filed for divorce in a Nevada court on the grounds of extreme cruelty. The spouses of those individuals were not in Nevada and did not participate in the court proceedings. The Nevada courts, however, recognized them as residents and granted both of them divorces. The two then married in Nevada and returned to North Carolina in late 1940.[35] Later, they were convicted of "bigamous cohabitation" and sentenced to time in state prison.[36] The Supreme Court stated that North Carolina could have, but did not, make a judgment about whether the petitioners had established a proper residence in Nevada.[37] The Court did say that if their residency was accepted, then the divorce must be accepted as well.

This case effectively overturned *Haddock* as it accepted court decrees from other states on a no-fault basis.[38] The Court did not attempt to assign blame in the marriage. They recognized that this case rejected the holding in *Haddock*. The majority opinion states

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33 Williams et al. v. State of North Carolina, 317 U.S. 287, 289 (1942).
34 Friedman, *supra* note 8, at 436.
35 *Williams*, 317 U.S. at 290.
36 *Id.* at 289.
37 *Id.* at 291.
38 *Id.* at 293, 297, 304.

that "it is pointed out that under such a rule one state's policy of strict control over the institution of marriage could be thwarted by the decree of a more law state. But such an objection goes to the application of the full faith and credit clause in many situations."[39] The continuing acceptance of the *Haddock* case would have led to more situations where people were married in one state and divorced in another. The majority opinion further states that there is "no reason, and none has been advanced, for making the existence of state power depend on an inquiry as to where the fault in each domestic dispute lies."[40] The majority opinion in the case acknowledged that creating tests for exceptions to the full faith and credit clause would turn the Supreme Court "into a divorce and probate court for the United States."[41] Justice Frank Murphy indicated in his dissent that he hoped an "area of flexibility" could be carved out where the full faith and credit clause would not have to be applied so strictly.[42]

In the second Williams case, *Williams et al. v. North Carolina*, 325 U.S. 226 (1945), the North Carolina court rejected that Williams and Hendrix had properly obtained a domicile in Nevada and, therefore, they were still under the jurisdiction of the North Carolina courts.[43] This enabled North Carolina legal authorities to argue that they did not have to accept the divorce

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39 *Id.* at 303.
40 *Id*. at 301.
41 *Id.* at 305 (Frankfurter, J., concurring).
42 *Id.* at 309.
43 Williams et al. v. North Carolina, 325 U.S. 226, 227 (1945).

decrees from Nevada and that they could convict Williams and Hendrix of bigamy.[44] The majority of the Supreme Court accepted the North Carolina determination of residence, but there were dissenters in the case, including Justices Black and Douglas, who argued that the North Carolina legal system did not offer proper evidence against domicile in Nevada; that is, North Carolina authorities simply asserted that Williams and Hendrix did not have a proper residence there.[45]

A similar case was *Eisenwein v. Commonwealth*, 325 U.S. 279 (1945), wherein the Supreme Court ruled that the Commonwealth of Pennsylvania could challenge the claim of residency of a person returning to Pennsylvania who claims to have obtained a divorce in Nevada.[46] The Pennsylvania Supreme Court ruled that the petitioner had no intention to establish a bona fide domicile in Nevada because he only lived there long enough to establish a legal residence at which time he obtained the divorce and then immediately moved to Cleveland, Ohio.[47] The Supreme Court's holding in *Eisenwein* is that states can challenge proceedings in other states' courts if they were deficient in those proceedings, but that states cannot reject the different standards for divorce in another state.[48] There were other cases at the time which permitted residency challenges, but by the late 1950s the Supreme Court

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44 *Id*.
45 *Id.* at 270.
46 Eisenwein v. Commonwealth, 325 U.S. 279 (1945).
47 *Id*. at 280-81.
48 *Id.* at 281.

required that states accept the legal determinations of other states regarding residency status.

There was a further development regarding divorce law as the Court entertained two cases that followed the Williams cases, *Sherrer v. Sherrer*, 334 U.S. 343(1948),[49] and *Johnson v. Muelburger*, 340 U.S. 581 (1951).[50] In these cases, the court used *res judicata* principles, wanting to balance the interests between the parties and to have finality in decisions. In these cases, the US Supreme Court required states to recognize divorces where both spouses cooperated in a divorce in another state.

The Court recognized divorce decrees in several other cases from the late 1940s or 1950s where only one party initiated the divorce proceedings in another state. At the same time, the Court did not recognize the validity of decrees of one state affecting alimony or child support that had been established in another state. In *Cook v. Cook*, 342 U.S. 126 (1951) the court ruled in an 8 to 1 decision that Vermont needed to accept a divorce that was granted in Florida because of the Full Faith and Credit clause.[51] This was another example of a migratory divorce, in that one party sought a divorce in Florida because it provided a more suitable legal environment in which to obtain one. The Vermont legal authorities had to accept that the Florida court properly determined the petitioner's residence.[52]

49 Sherrer v. Sherrer, 334 U.S. 343 (1948).
50 Johnson v. Muelburger, 340 U.S. 581 (1951).
51 Cook v. Cook, 342 U.S. 126 (1951).
52 *Id.* at 129.

In *Sutton v Leib*, 342 U.S. 402 (1952), the Supreme Court ruled once again that the proceedings from one state should be accepted in other states.[53] This complicated case involved a woman who was divorced in Illinois and was awarded alimony until she remarried. The woman remarried in Nevada, but a New York court invalidated the Nevada marriage because the man she married had been married previously in New York. The woman's former husband, who had been paying alimony faithfully, believed that he was entitled to stop paying because she re-married. He wanted the state of Illinois to accept her Nevada marriage but not the New York declaration of nullity regarding the Nevada marriage.[54] The court ruled that the "Full Faith and Credit Clause requires Illinois to recognize the validity of records and [the] judicial proceedings of sister states,"[55] although the court did indicate that Illinois state law could be amended to directly address the situation as to how an annulled marriage could affect the status of an alimony decree.[56]

The U.S. Supreme Court, beginning with the first *Williams* case, moved away from the role of protecting marriage and supporting states with strict marriage laws. The Supreme Court then expressed support for the legal standards of marriage and divorce in states and attempted to resolve matters in the best interest of both parties. The Court also rejected the notion that no one state

53 Sutton v. Leib, 342 U.S. 402 (1952).
54 *Id.* at 405-06.
55 *Id.* at 406.
56 *Id.* at 409.

could determine fault in the case of a divorce. Some have argued that the Court's failure to be concerned with fault led the wholesale changes in family law that occurred in the late 1960s and early 1970s when nearly all states adopted some form of no fault divorce, which undermined the need for migratory divorces.[57] The evidence for such a claim is not conclusive, and other factors contributed to states changing their laws, such as a changing environment of public opinion and a growth of legal realism. Nevertheless, the Supreme Court, through its application of the full faith and credit clause, certainly did make it harder for any one state to have state divorce laws much more strict than others.[58]

Considering these cases, one can see the inherent tension in a federal system; if some states have laws related to marriage and family that are considerably different than others, it creates the possibility that some people might move in order to obtain favorable legal outcomes. Moreover, it creates a situation where there might exist widely different marriage and divorce practices. Nevertheless, maintaining wide variation regarding marriage and divorce laws over a long period while having a full faith and credit clause seems unlikely. Instead, the full faith and credit clause seems to move states, if not toward the "least common denominator," at least toward a "lower common denominator."

57 Gerald C. Wright, Jr. & Dorothy M. Stetson, *The Impact of No-Fault Divorce Law Reform on Divorce in American States*, 40 J. Marriage & Fam. L. 575, 575-80 (1978).

58 Glendon, *supra* note 4, at 190.

POLITICS AND JUSTICE:

A CRITICAL LOOK AT THE DISENFRANCHISEMENT OF FELONS IN AMERICA

*Elizabeth A. Oklevitch**

One can only speculate how a victory for Al Gore in the 2000 presidential election may have affected American life. What would his reaction have been to the terrorist attacks of September 11, 2001? Would the United States be engaged in a war with Iraq? Would the American people still be able to boast their nation's first African American president? The close 2000 election with its infamous "hanging chads" sparked renewed interest in election law, and some scholars pointed to the disenfranchisement of felons in Florida as a determinative issue. A new wave of scholarship emerged as academics began to reevaluate this longstand-

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ing practice. Like their predecessors, recent scholars address the philosophical, political, and racial implications of felon disenfranchisement, and in most cases, they struggle to find justification for this widespread practice.[1] In light of the manipulations of disenfranchisement law for political advantage that mar America's history, this scholarship represents a salient reevaluation of current disenfranchisement law and the ideologies behind it.

The disenfranchisement of criminals for retribution and deterrence is well established in Western legal tradition.[2] Ancient Greek society, which prohibited certain types of convicts from appearing in court, delivering public speeches, and voting, set the precedent of disenfranchisement.[3] Medieval England also deprived felons of many of their political rights, deeming them "civilly dead," and as a consequence of this loss of legal protection, offenders became vulnerable to assaults on their person or property.[4] The United States has continued in the Western tradition of disenfranchisement, but the history of disenfranchisement

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1 Katherine Shaw, *Invoking the Death Penalty*. 100 Nw. U. L. Rev. 1439, 1443 (2006).

2 Angela Behrens, Christopher Uggen & Jeff Manza, *Ballot Manipulation and the "Menace of Negro Domination": Racial Threat and Felon Disenfranchisement in the United States*, 109 The American Journal of Sociology 559, 563 (2003), *accessible at* http://www.jstor.org/stable/3568574.

3 *The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and "The Purity of the Ballot Box"*, 102 Harv. L. Rev. 1300, 1301 (1989), *accessible at* http://www.jstor.org/stable/1341296.

4 Michael J. Cholbi, *A Felon's Right to Vote*. 21 Law & Philosophy 543, 543 (2002), *accessible at* http://www.jstor.org/stable/3505059, *and* Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*. 2 Perspectives on Politics 491, 492 (2004), *accessible at* http://www.jstor.org/stable/3688812.

in the United States suggests that the laws depend less on traditional philosophies such as retribution and deterrence, which are themselves vulnerable to challenge, than on the pursuit of political advantage, which often involves racial discrimination.

Excluding criminals from political participation has been an accepted practice in the United States from its beginning, though the prevalence and scope of felon disenfranchisement laws rose significantly in the 1840s and then again during the Reconstruction period, continuing to rise through the twentieth century.[5] Several of the original colonies disenfranchised their felons, and some state constitutions of the eighteenth century explicitly prohibited felons from voting. Most state constitutions, however, simply permitted legislatures to disenfranchise felons, and a review of disenfranchisement history shows that an increasing number of state legislatures have taken advantage of this authorization.[6]

Prior to 1840, only four of the twenty-six states disenfranchised felons, but by 1850, over one-third of states prohibited even ex-felons from voting.[7] This period saw an expansion not only of the quantity but also of the scope of voting restrictions, which included a wider range of offences and thus a greater number of

5 Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*. 2 Perspectives on Politics 491, 492 (2004), *accessible at* http://www.jstor.org/stable/3688812, *and* Behrens, *supra* note 2, at 564.

6 Behrens, *supra* note 2, at 563.

7 *Id*. at 564.

individuals.[8] On the surface, this first wave of disenfranchisement laws may have been a reaction to the expansion of voting rights to non-propertied and other white males, yet, as researchers Jeff Manza and Christopher Uggen note, "this era has not been systematically investigated by historians or other social scientists and thus relatively little is known about the reasons behind this first upsurge of disenfranchisement laws."[9] While the cause of this wave is uncertain, the reasons for the second wave are straightforward and generally agreed upon.

The Fifteenth Amendment, passed in 1870, extended voting rights to males of all races. Opposition to this amendment was fierce as several Northern, Democratically-controlled states initially refused to ratify.[10] Fearing the political power of newly enfranchised African-Americans, states and municipalities responded with a flurry of Black Codes and Jim Crow laws, and many states passed their first laws restricting felon voting in the decades that followed. Some states responded while African-American enfranchisement was only a threat and disenfranchised felons while the Amendment was still being contested.[11]

The tension over felon disenfranchisement in the twentieth century has been attributed to "the clash between the desire

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8 Jeff Manza & Christopher Uggen, *Punishment and Democracy: Disenfranchisement of Nonincarcerated Felons in the United States*. 2 Perspectives on Politics 491, 492 (2004), *accessible at* http://www.jstor.org/stable/3688812.

9 *Id.*

10 Behrens, supra note 2, at 597.

11 *Id.* at 585-86.

to maintain social and political order versus the desire to extend civil rights and liberties to all citizens" ("Public Attitudes"). Americans have sought to reconcile these competing interests by drawing greater distinctions between felons serving time and ex-felons who have completed their sentences. As a result of another wave of restrictions beginning in 1889, three-fourths of states had disenfranchised ex-felons by 1920, with Hawaii (upon statehood in 1959) being the last state to do so.[12] This trend reversed in the 1960s and 1970s, the height of the civil rights movement, as seventeen states repealed voting restrictions on ex-felons.[13] By 2002 five more states had followed in liberalization, though nation-wide suffrage was denied to ex-felons that same year with the defeat of a U.S. Senate measure that would have guaranteed their right to vote in federal elections.[14] In contrast to the ballot rights afforded ex-felons in the twentieth century and as a result of efforts by politicians on both sides of the aisle to gain votes by keeping up a punitive image, every state except for Maine and Vermont had a broad felon disenfranchisement law in 2002, representing the highest percentage of states in United States history.[15]

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12 *Id.* at 564.

13 Manza, *supra* note 8, at 493.

14 Antoine Yoshinaka & Christian R. Grose, *Partisan Politics and Electoral Design: The Enfranchisement of Felons and Ex-Felons in the United States*, 37 State & Local Gov't Rev. 49, 50 (2005), *accessible at* http://www.jstor.org/stable/4355386, *and* Behrens, *supra* note 2, at 573.

15 Behrens, *supra* note 2, at 564, *and* Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 American Sociological Review 777, 795 (2002), *accessible at* http://www.jstor.org/stable/3088970.

Disenfranchisement of felons can be approached from several perspectives, including philosophical, political, and racial. The philosophical rationale rests on conceptions of justice derived from the liberal legal model and on perceived beneficial social consequences.[16] These arguments rely heavily on the Lockean social contract and tend to lend stronger support for the disenfranchisement of current inmates than for those who have completed their sentences.[17]

The argument from justice, or desert, is represented by the intuitive view that because criminals have broken a community's laws, they no longer deserve to help shape the laws through voting.[18] This intuition is theoretically justified through retributivism and forfeiture. According to retributivism, breaking laws is a political act and therefore demands a political consequence.[19] Further, such retribution is seen as proportional since it is applied only to felonies, the most serious acts.[20] To counter these claims of retributivism, opponents of felon disenfranchisement argue that though criminal behavior breaks laws, the offence may not be political in nature and that proportionality can be, and in fact is, achieved by other means (variable severity of punishments) apart

16 Michael J. Cholbi, *A Felon's Right to Vote*. 21 LAW & PHILOSOPHY 543, 544 (2002), *accessible at* http://www.jstor.org/stable/3505059.

17 Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AMERICAN SOCIOLOGICAL REVIEW 777, 794 (2002), *accessible at* http://www.jstor.org/stable/3088970.

18 Cholbi, *supra* note 16, at 545.

19 *Id.* at 545.

20 *Id.* at 548.

from disenfranchisement.[21]

The concept of forfeiture is supported by arguments that contend that the moral status of criminals is altered by their criminal behavior such that they forfeit their standing as right holders.[22] As a consequence of this forfeiture, society may permissibly treat criminals in a way that would otherwise be unjust.[23] To counter this claim, many appeal to the need for appropriate punishment, insisting that criminal behavior does not eradicate all rights and not all crimes specifically deserve the repeal of ballot rights.[24] Some scholars, considering the facts that criminals are obviously not deprived of the right to due process and that disenfranchisement is independent of the judge-imposed sentence, conclude that "it is very possible that the due process clause prevents a state from taking away the right to vote solely by legislative and administrative action, without an opportunity for a hearing."[25]

Emphasizing that permissibility does not equate with desirability, opponents of disenfranchisement insist that, according to Lockean social contract theory, of which criminal behavior constitutes a breach, to be justly implemented, disenfranchisement must serve some positive purpose in society, such as making crime "an ill bargain to the offender, [giving] him cause to repent, and [ter-

21 *Id.* at 546-48.
22 *Id.* at 550.
23 *Id.*
24 *Id.* at 553.
25 *The Need for Reform of Ex-Felon Disenfranchisement Laws,* 83 YALE L.J. 580, 596-97 (1974), *accessible at* http://www.jstor.org/stable/795357.

rifying] others from doing the like."[26] Proposed beneficial social consequences include "purity of the ballot box", deterrence, and rehabilitation.

The main point of advocates of "purity of the ballot box" or self-defense justifications is that "felons have demonstrated their lack of virtue and are likely to vote to weaken existing criminal laws."[27] The assumption that either felons or ex-felons are particularly likely to vote to weaken the criminal justice system or to otherwise abuse the ballot faces a marked lack of supporting evidence.[28] Squelching dissent by depriving a group of citizens the right to vote based on their likely voting preferences undermines the very purpose of elections in a free society.[29] Also worth noting, apart from silencing dissent, prohibiting felons from voting based on their likely voting patterns defies the principle that our "criminal justice system … does not have the right to punish the ex-criminal in advance on a basis of probability."[30]

Another proposed social good resulting from felon disenfranchisement is deterrence, the view that disenfranchisement "plays a role in preventing crime, serving to deter both actual and potential lawbreakers from future criminal activity."[31] Aware of the many studies that show lengthy prison sentences to have no

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26 Cholbi *supra* note 16, at 454.

27 *Id*. at 555.

28 *Id. and The Need for Reform*, *supra* note 25, at 590.

29 Cholbi. s*upra* note 16, at 556.

30 Alice E. Harvey, *Ex-Felon Disenfranchisement and Its Influence on the Black Vote: The Need for a Second Look*, 142 U. Pa. L. Rev. 1145, 1173 (1994), *accessible at* http://www.jstor.org/stable/3312504.

31 Cholbi, *supra* note 16, at 557.

significant deterrent effect on crime and skeptical that the threat of disenfranchisement would provide a stronger deterrent to potential criminals than harsh prison terms, many opponents of felon disenfranchisement deny deterrence as a reasonable justification for disenfranchisement.[32] Perhaps the most convincing evidence of the ineffectiveness of disenfranchisement as a deterrent is the fact that the general public, including most potential criminals, is unaware of disenfranchisement as a potential consequence of conviction.[33]

Proponents raising rehabilitation as a social good that justifies felon disenfranchisement may frame their argument as follows: "Perhaps by being disenfranchised, felons are reminded of their past criminal acts. Thus, they are more likely to commit themselves to being reformed and rehabilitated."[34] Opponents argue that the benefit of this potential good is outweighed by the potential, and more likely, negative effects of disenfranchisement on felon rehabilitation. To them, reintegration into the community is essential to rehabilitation since alienation, a sense of helplessness, and disregard for authority are at the root of criminal behavior. Disenfranchisement only serves to confirm these destructive attitudes.[35] Research on the process of transitioning criminals from prison back into society has demonstrated the importance of successful reintegration to avoiding recidivism, and politi-

32 Harvey, *supra* note 30, at 1172.
33 *Id.* at 1172, *and* Cholbi, *supra* note 16, at 557.
34 Cholbi, *supra* note 16, at 558.
35 *Id.*

cal activity has been identified as a milestone of reintegration.[36] Thus, it is argued, disenfranchisement may actually contribute to increased repeat offences.[37] As a punishment that encourages recidivism, fails to deter crime, and silences dissent while being only questionably permissible as a form of appropriate, proportional forfeiture or retribution, felon disenfranchisement rests on a precarious philosophical foundation.

Since the number of those disenfranchised is generally perceived as being too small to exert significant political influence, it is often assumed that felon disenfranchisement may safely be relegated to philosophical or legal discussions.[38] Accordingly, studies addressing the politics of disenfranchisement often take a historical, descriptive approach.[39] However, scholars are noting an upsurge, perhaps initiated by the drama of the 2000 presidential election, in work investigating the political impact of disenfranchisement.[40] This new scholarship indicates a growing recognition that the political impact of disenfranchisement is not merely a fascinating historical phenomenon but rather a serious matter with present- day import.

Several studies have been conducted that apply estimates of felons' likely voting behavior to past elections to determine what

36 Manza, *supra* note 8, at 502.
37 Harvey, *supra* note 30, at 1171.
38 Uggen, *supra* note 17, at 780.
39 Antoine Yoshinaka & Christian R. Grose, *Partisan Politics and Electoral Design: The Enfranchisement of Felons and Ex-Felons in the United States*, 37 State & Local Gov't Rev. 49, 50 (2005), *accessible at* http://www.jstor.org/stable/4355386.
40 *Id.* at 50.

the impact would have been. According to these models, enfranchised felon populations would have had determinative impact on both presidential and senatorial elections. Because felons are likely to be poor and racial minorities and individuals of this demographic profile are more likely to vote for the Democratic Party, most people expect that, overall, enfranchisement would be a political gain for Democratic candidates.[41] For instance, a survey published in 2002 found that in fourteen out of the previous fifteen senatorial elections, approximately seven out of ten ballots cast by felons would have been for a Democrat.[42] Several studies confirm that two presidential elections and seven senatorial elections may have been altered if felons had had the right to vote, and Democrats may even have maintained control of the Senate throughout the 1990s.[43]

The presidential election of 2000 is the most dramatic example of the potential impact of disenfranchisement, for scholars believe that approximately 60,000 members of Florida's ex-felon population would have voted Democratic. Thus, even if only ex-felons had been allowed to vote in Florida, the additional votes for Gore would easily have provided the necessary votes to reverse Bush's victory.[44] The importance of felon disenfranchisement is recognized by politicians, as evidenced by an Alabama Republican Party Chairman's reaction to a bill that would restore

41 Uggen, *supra* note 17, at 777.
42 *Id.* at 786.
43 *Id*. at 789-90, *and* Manza, *supra* note 8, at 497.
44 Uggen, *supra* note 17, at 792.

some ex-felons' voting rights: "…we're opposed to it because felons don't tend to vote Republican".[45]

The 2000 presidential election brought attention to the burdensome and potentially politically-driven restoration process that accompanies a system of permanent disenfranchisement. Permanent disenfranchisement denotes a "regime [where] convicted felons may not vote unless they obtain a pardon or other type of restoration order from the state's governor or from the state's parole or pardons board."[46] The Florida Department of Corrections drew criticism as word spread that it had granted approximately 50% fewer restorations in 2000 than it had a decade earlier.[47]

In addition to permanent disenfranchisement, state policies on the disenfranchisement of felons in the United States can be categorized as modified permanent disenfranchisement or restoring disenfranchisement and may shift from one category to another with a single legislative act.[48] Modified permanent disenfranchisement states have limits on their disenfranchisement, such as Arizona and Maryland, which only disenfranchise felons after their second offence, and restoring states, such as New Mexico and Texas, have ceased to disenfranchise ex-felons.[49] Whether motivated by political self-interest or pressure from the continued

45 Yoshinaka, *supra* note 39, at 50.

46 *Developments in the Law: The Law of Prisons*, 115 Harv. L. Rev. 1838, 1943 (2002), *accessible at* http://www.jstor.org/stable/1342597.

47 *Id.* at 1944.

48 *Id.* at 1943.

49 *Id.* at 1948.

civil rights movement, several state legislatures operating within each of these systems have recently expanded felon ballot rights.[50] Kentucky and Nevada, for instance, which, like Florida, practice permanent disenfranchisement, have significantly simplified their restoration processes in recent years.[51] Not all recent state legislation has been liberalizing, however. Between 1975 and 2004, 11 states have adopted more restrictive disenfranchisement laws, while 13 have eased up on their limitations, and three have passed both kinds of legislation.[52]

Reacting to state-imposed voting procedures and prerequisites that, in effect, undermined the intent of the 15th Amendment, the Voting Rights Act of 1965 officially ensured genuine equal suffrage to all United States citizens. Yet, many scholars who take a racial approach to the discussion of felon disenfranchisement are concerned that the largely ignored racial disparities in the prison system jeopardize the democratic rights of racial minorities.[53] Of particular concern are the possibilities of discriminatory intent in disenfranchisement legislation and unfair convictions. Where discrimination is found, the matter is often addressed through litigation in state courts.

Evidence of the discriminatory nature of current felon disenfranchisement laws includes the finding that changes to disenfran-

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50 Manza, *supra* note 8, at 499.
51 *Developments*, *supra* note 46, at 1946.
52 Manza, *supra* note 8, at 499.
53 Uggen, *supra* note 17 at 780, *and* Marie Gottschalk, *The World's Warden: Crime, Punishment, and Politics in the United States*, DISSENT (Fall 2008).

chisement laws that increase restrictions on felon voting are correlated to the percentage of non-white prisoners within a state, or "racial threat."[54] Racial threat's influence on disenfranchisement law is not new in American practice and is still observable today. Recognition of the large Mexican and Asian populations in the Western territories during the nineteenth century, when considering the passage of felon disenfranchisement legislation by every Western state besides Utah and Montana within a decade of statehood, has lead contemporary scholars to propose that the actions of these states amount to "attempts to limit suffrage of the non-white population."[55] Such racially motivated efforts were more blatant in the Reconstruction era, for many of the state laws adopted during this time appeared to target crimes for which African Americans were especially likely to be convicted."[56] Under these laws, Alabama's non-white prison population swelled from 2% in 1850, to 74% in 1870, rendering the impact of disenfranchisement laws disproportionately heavy on the black population.[57]

Racial disparity is prevalent in the disenfranchised felon population to this day, with blacks being disproportionally represented.[58] Approximately one out of every six African- American men is presently disenfranchised because of a felony conviction.[59] Though no racial injustice is incurred by disenfranchisement if

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54 Behrens, *supra* note 2, at 583.
55 *Id.* at 598.
56 Manza, *supra* note 8, at 492.
57 Behrens, *supra* note 2, at 598.
58 Harvey, *supra* note 30, at 1151.
59 Manza, *supra* note 8, at 499.

criminal justice is administered fairly across races, many scholars contend that the law, especially drug law, has been applied disproportionately and thus the disenfranchisement of felons constitutes an unlawful dilution of the black vote.[60] The huge disparity between the percentage of drug users that are black and the percentage of people arrested on drug charges that are black indicates that the drug law has been unfairly applied at the expense of blacks.[61] The greater likelihood of drug sweeps to be conducted in urban neighborhoods and harsher sentences associated with crack rather than powder cocaine do little to waylay concerns about injustice.[62]

While racist intent must be drawn through inference in the above examples, the history of many felon disenfranchisement laws is much more explicit. In 1901, for instance, Alabama's Constitutional Convention added crimes of "moral turpitude" to felonies meriting disenfranchisement, the convention's president arguing for the "manipulation of the ballot" to ward off "the menace of negro domination."[63] The Supreme Court struck down this measure in Hunter v. Underwood, 471 U.S. 222 (1985) as a violation of the Equal Protection Clause.[64]

Although the Court defended citizens from this flagrant attack on their voting rights, it has not opposed felon disenfranchisement

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60 Harvey, *supra* note 30, at 1155.
61 *Id.* at 1156.
62 *Id.* at 1157, *and* Marie Gottschalk, *The World's Warden: Crime, Punishment, and Politics in the United States*, DISSENT (Fall 2008).
63 Behrens, *supra* note 2, at 569.
64 Harvey, *supra* note 30, at 1166.

universally. While the Court has upheld the legal permissibility of disenfranchisement, lawmakers, questioning the social good of such laws, are liberalizing voting rights. The Supreme Court's ruling in Richardson v. Ramirez, 418 U.S. 24 (1974) is considered to be the controlling case in felon disenfranchisement cases because of its strong ruling that Section 2 of the Fourteenth Amendment allows states to disenfranchise ex-felons.[65] Because of this definitive legal precedent, state legislation has been more successful than litigation in reforming felon disenfranchisement policy.[66] Legislative changes may be sweeping, extending voting rights to large categories of criminals (as was the case in Connecticut, where felons on probation regained voting privileges due to the influence a coalition of community groups had on the Department of Corrections) or more narrow in scope.[67] Strategic litigation that focuses on specific aspects of policy and implementation, such as choice of disqualifying crimes and restoration conditions, has been modestly implemented in several states.[68]

The disenfranchisement of felons threatens to impinge the very foundation of democracy, the right of citizens to voice their views through the ballot box. Contemporary academics challenge the widely accepted philosophical arguments of justice and social benefits that underpin disenfranchisement, skeptical that these arguments can rationally justify the practice in light of political

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65 Harvey, *supra* note 30, at 1160.
66 Shaw, *supra* note 1, at 1444, *and Developments*, *supra* note 46, at 1955.
67 *Developments*, *supra* note 46, at 1958.
68 *Id.* at 1959.

and racial abuses. Spurred by the potential political impact of felon disenfranchisement policy evident in competitive elections and charged with the burden of ensuring the equal protection of the rights of citizens of all races, lawyers and policymakers must continue to wrestle through the difficult questions and implications of disenfranchisement. Laws that protect each citizen's right to vote, restricting it only, if at all, when honest philosophical analysis renders the restriction appropriate and proportional, must be developed and defended in state and federal legislatures and courts. For the good of society and the preservation of justice, disenfranchisement laws must be liberalized across America.